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The ECJ as the European “Supreme Court”: Setting Aside Citizens’ Rights for EU Law Supremacy

VB verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/



Leonard F.M. Besselink

18 August 2014

We recently celebrated the 50th anniversary of one of the landmarks of the jurisdiction of the European Court of Justice, the decision *Costa v ENEL*. In strong contrast to last year’s celebration of another founding stone of European law, the *Van Gend & Loos* decision, the Court of Justice seemed not to pay any attention. In reality, however, various members of the Court of Justice and others attached to the Court are engaged in a renewed effort to turn primacy into full supremacy of EU law over national constitutional law and constitutional courts well beyond *Costa/ENEL*.

In the final plenary session of the FIDE conference in May 2014 in Copenhagen Vice-president Koen Lenaerts pointed out that in essence the recent *Melloni* judgment ‘made clear that the Member State constitutional courts can use their national constitutional rights to provide more protection than the Charter does’. President Vassilios Skouris repeated this, significantly opening his remarks by stating:

‘The Court of Justice is not a human rights court; it is the Supreme Court of the European Union’.

Lenaerts’ statement is at first sight deeply confusing, but on reflection the context provided by Skouris’ clarification makes clear that the message they want to convey is that it is entirely up to the Court of Justice to decide on the place of national constitutional rights, even when it concerns autonomous Member State action. This message is corroborated by others, such as former Judge Cristiaan Timmermans (The Magic World of Constitutional Pluralism. *European Constitutional Law Review*, Volume 10 September 2014 , pp 349-358, referring to *Åkerberg Fransson*) and CJEU legal secretary Daniel Sarmiento, who referred in his presentation at the Amsterdam Colloquium ‘Settling the supremacy of European law? Interdisciplinary perspectives on 50 years *Costa v ENEL* (26 June 2014) to both *Melloni* and *Åkerberg Fransson* in order to make the same point as Lenaerts and Skouris. Thus, the Court, which had already disengaged primacy from direct effect in *Melloni*, is intent to go much further beyond *Costa/ENEL*.

In order to understand this, let us first explain the cause of confusion caused by Lenaerts on the meaning of *Melloni*, and next consider Skouris’ statement as a further explanation.

In *Melloni*, the Court of Justice judged that the Spanish Constitutional Court could not provide a higher level of protection for persons convicted *in absentia* for serious crimes. This, it held, would be in conflict with EU law, *in casu* the non-directly effective European Arrest Warrant Framework Decision: EU law – also non-directly effective EU law adopted by the Council without parliamentary co-decision – has primacy and trumps more protective national constitutional rights, even if these are rights that aim to protect individuals against an infringement at their core affecting human dignity, as the Spanish Constitutional Court had determined to be the relevant national constitutional standard under the Spanish Constitution. As we know, more or less obediently, the Spanish Constitutional Court subsequently lowered the Spanish constitutional standard for surrender and extradition of persons convicted *in absentia*. (However, it did so without giving up the supremacy of the Spanish Constitution over EU law, thus committing an act of judicial disobedience towards the ECJ.)

Were vice-president Lenaerts and President Skouris retracting on the essence of *Melloni* by suggesting that higher national standards can apply? The very doctrinal tone of *Melloni* on primacy makes this unlikely. Instead, they must have been referring to an *obiter dictum* that was irrelevant to the case decided in *Melloni*: it implies that when EU law leaves discretion to Member States in the implementation and application of EU law, the Member States can apply national constitutional rights provisions. Why would the presidency of the Court of Justice turn this into the most important message of *Melloni*, although this was irrelevant to the case and already for that reason trivial? Let us try to understand this *ex contrario* by hypothetically taking the opposed view: the view that Member States are *prohibited* to apply national standards protecting citizens' rights when they have discretion. The revolutionary nature of this counterfactual hypothesis becomes clear when we realize that 'discretion' means that there is scope for autonomous action: Member State authorities are free to act in one way or another, and whether they do or not is entirely up to them. Under the counterfactual hypothesis Member States would thus be prohibited to apply their constitutional standards to their own autonomous action. This would signal the end of constitutional autonomy of Member States.

The happy message that the Court of Justice's spokesmen bring us, then, is that this counterfactual hypothesis does not apply: the Member States may indeed apply their constitutional rules when they act autonomously in applying and implementing EU law. That the presidency of the Court of Justice considers this the most important message of *Melloni* (and *Åkerberg Fransson*) also reveals something different: it is by the grace of the Court of Justice that Member States can apply their constitutions to their discretionary action. The Court of Justice evidently considers itself to be the ultimate arbiter of the scope of national constitutions, thus extending its power well beyond the interpretation of EU law in the strict sense: even if EU law does not prescribe a certain course of action to Member State authorities, the power to decide on the applicability of national constitutions lies with the

Court of Justice, not with a national constitutional authority. In other words, the constitutive power has shifted from the Member State to the European Union impersonated by the Court of Justice.

This is confirmed by President Skouris' statement that 'the Court of Justice is the Supreme Court of the European Union'. Literally, this is saying that the Court of Justice enjoys *supremacy*, thus leaving behind the subtlety of the case law which has so far only spoken in terms of 'primacy', not of 'supremacy'. Evidently, this supremacy is extended over the national courts in the EU, including national constitutional courts. This supremacy explains why it is the European Court of Justice, not the national constitution itself or a national constitutional authority, to grant the applicability of national constitutions to discretionary Member State action.

Finally, President Skouris emphasized that the Court of Justice in being a supreme court is 'not a human rights court'. A clear example of this was the Court extra-judicial interventions to create a cumbersome and costly extra 'prior involvement' procedure at accession to the ECHR (Article 3(6) Draft Accession Agreement, Council of Europe) – a move that was in no way inspired by the protection of fundamental rights or any other citizens interest; it exclusively aimed to safeguard what the Court called its 'prerogatives' within the EU legal order. *Melloni* of course is the other evidence that the Court of Justice is not a fundamental rights court: it took the position that the application of this secondary legislation cannot be conditional on compliance with EU or national fundamental rights in the concrete case: the Council's Framework Decision was exhaustive, so it suffices that it was considered to be in conformity with the ECHR and Charter in the abstract only. Moreover, it made clear that higher national levels of protection of fundamental rights in such cases of EU primacy always have to give way to lower EU standards.

Costa v ENEL has often been understood to be inspired to promote the rights of citizens and thus to be constitutionalist in nature: it gave primacy to the rights that citizens could directly derive from European law. Fifty years later, *Melloni* makes clear that primacy also applies to non-directly effective EU law that is to the detriment of their fundamental constitutional rights. The extra-judicial statements by the presidency of the Court of Justice on *Melloni* suggest that national constitutional rights no longer apply due to the autonomous nature of national authority's action, but they apply only by the *fiat* of the Court of Justice. Once upon a time *Costa v ENEL* may have been about citizens' rights, but taken to its extreme 50 years later, it turns out to be about mere supremacy of EU law for which citizens' rights have to be set aside.

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