Why(how) the European Court of Justice Considers the European Legal Order as a New Legal Order

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Introduction

From the beginning I shall throw a wrench into this discussion. While the title of this paper speaks in terms of "why" the "why" cannot be separated from the "how". Rather, the way in which the European Court of Justice (ECJ) considers the European Community/European Union (the Community) as a novel legal order is easier accomplished by describing how it came to be, and its purpose divined from within those actions. As such, this paper starts from an influential summary by Dr William Phelan of three early ECJ cases that set the bedrock for the evolution of the Community as a new legal order.[2] From a discussion of Dr Phelan's work I shall discuss in further detail two cases as featured in Dr Phelan's article. The two cases being *Van Gend en Loos v Nederlandse Administratie der Belastingen* (*Van Gend*),[3] and that of *Flaminio Costa v ENEL* (*Costa*).[4] Following the discussion of those two cases I shall focus on the specific impact that the decision in *Costa* had in shaping the Community's legal order on the concept of state sovereignty. Then in order to bring substance to this effect I shall look toward the comparative conflict of its effect on member state's sovereignty in the form of the unique common law member state of the United Kingdom.

PART I

Dividing the European Community from the International Community

1.1 The Three Horses of the Troika

Without reservation, I confess that I am indebted and directly influenced by Dr Phelan's article 'The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium, Van Gen den Loos and Costa v. ENEL* in the Creation of the European Legal Order' referred herein as 'Troika'.[5] Dr Phelan describes three elements, or a 'troika' of elements, that were laid down early in the Community's history which set the specific foundation for which the Community developed a discrete and novel legal order distinct in operation from traditional international legal arrangements and domestic law supremacy.[6] These three elements can be simplified to: first, a prohibition on member states from using traditional retaliatory trade methods, secondly in that local member state courts have the obligation to enforce treaty obligations, and thirdly—and most importantly for this paper—that EU treaty regulations have supremacy before both pre and post-ratification

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[2] *William Phelan*, 'The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium, Van Gen den Loos and Costa v. ENEL* in the Creation of the European Legal Order' (2015) 21(1) *European Law Journal* 116. ('*Troika*')
[3] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1. ('*Van Gend*')
[4] *Flaminio Costa v E.N.E.L.* (C-6/64) [1964] ECR 585. ('*Costa*')
[5] See above n 1.
[6] *Troika*, 130.

member state legislation that falls into conflict with either the treaty or the regulations of the Community.[7] Dr Phelan attributes each element to a separate case. *Van Gend* established the first element by finding that citizens of member states are able to ask their local courts to protect their individual interests if backed by Community law.[8] The second element was established shortly thereafter in the case of *Commission v Luxembourg and Belgium* [1964] ECR 625 (*L*&B) where the ECJ rejected the ability of member states to take traditional retaliatory trade actions against other member states for their failure to implement Community trade regulations.[9] Lastly, the third element came from the case of *Costa* wherein on application from an Italian individual contesting a power nationalisation plan, the ECR made clear that Community regulations and the purposes of the *Treaty of Rome* may not be frustrated nor overridden by either earlier or latter local member state legislation, the Community's projects and regulations were to be supreme.[10]

Dr Phelan's primary case focus in *Troika* happens to be the one case I have not felt compelled to cover in detail, *L&B*. This focus by Dr Whelan is mostly because he argues that in operation *L&B* deprives member states from a traditional international law tool of reciprocal self-help trade retaliatory measures.[11] *Troika* goes into detail with a comparison between WTO and NAFTA measures in explaining this reasoning but this is not the focus I have chosen for this paper. Instead I turn to the effect that the new legal order has had on the sovereignty of the member states in a form discrete from traditional international treaty law. In fact I agree and go so far as to call *L&B's* departure as 'the EU's essential distinction from previous forms of international law'.[12] Dr Phelan is not unique in his identification of the new legal order with these cases.[13] In order to accomplish this task I must discuss the cases of *Van Gend* and *Costa* in their own right before focusing on the impact the *Costa* decision has in cleaving the Community from regular international legal practice by its evolution of state sovereignty.

1.2 Discussing *Van Gend*

The case of *Van Gend* is chronologically the first of the three, and likely most important, of the cases that make up Dr Phelan's troika. *Van Gend* was decided in 1963, only five years following the enactment of the *Treaty of Rome* that established the EEC.[14] *Van Gend* concerned a reference from the Dutch Tariefcommissie over whether the shipping company Van Gen den Loos could apply to a local Netherlands tribunal to recover tariff costs for an importation fee.[15] What was at issue was whether Van Gen den Loos as a private individual (a corporation) could seek to enforce Community obligations by itself through the local tribunals/courts.[16] What was particular about this was whether the EEC imposed not merely obligations that only the member states' governments could hold each other to account in the ECJ over, but whether the entrance by the member states also empowered member states' citizens to hold their own (and other member state governments and member state citizens) government accountable for failures of Community obligations.[17]

In *Van Gend* the ECJ found that Article 12 of the *Treaty of Rome* did in fact confer not only a right upon member state's citizens to seek enforcement of EEC obligations and rights, but also that local courts had an obligation to adjudicate such disputes.[18] The ECJ decided that article 12 produced 'direct effects and create[ed] individual rights which national courts must protect'.[19] In coming to this conclusion the ECJ felt that the very objectives of the *Treaty of Rome*—which created the EEC—established a common market to a degree that those who participated in it (such as private individuals like the corporate body of Van Gen den

[7] Ibid.
[8] Ibid 116.
[9] Ibid 120.
[10] *Costa*, 594–597.
[11] *Troika*, 134.
[12] Ibid, 116–117, 121.
[13] *Matej Avbelj*, 'Theory of European Union' (2011) 36(6) *European Law Journal* 818, 825. ('*Theory EU*')
[14] *Van Gernd*, 2.
[15] Ibid 3–4.
[16] Ibid.
[17] Ibid; *Troika*, 117.
[18] *Van Gend*, 13.
[19] Ibid.

Loos) gained a legal interest in the performance of the obligations that regulated the market.[20] And, that the very preambles of the *Treaty of Rome* indicated not just the states but also the peoples of states were included in the Community project.[21]

Why *Van Gend* is important to the evolution of the Community as kickstarting a nascent novel legal framework is two-fold in nature. On the one hand, as Dr Phelan adroitly points out, by empowering member states' citizen's ability to hold their own and other member states (and their citizens) to account for obligations found in an international treaty (the *Treaty of Rome*), *Van Gend* has altered the traditional idea that only state actors could hold each other to account when international treaties were the subject matter of dispute. With *Van Gend*, the Community's regulations now had a 'direct [legal] effect at each member state's national level automatically.'.[22]

Dr Phelan, and other academics such as Trevor Hartley,[23] accurately point out the novel nature of bringing member states' citizens into international treaty obligations is a novel evolution in its own right. Although, some argue that *Costa* did not create a new overarching court in power over the national courts and this militates against a new order revolution.[24] However, for our purposes the allowing of member citizens to enforce obligations is what makes our next case, *Costa*, possible.

1.3 Discussing *Costa*

Without *Van Gend*, we would not have had the case I turn to now, *Costa*. *Flaminio Costa v E.N.E.L.* or '*Costa*'. In the case of *Costa* a private individual by the name of Flaminio Costa sought to frustrate an attempt by the Italian government to nationalise certain electrical power generation.[25] Mr Costa had a financial interest in the nationalisation and, because of the ruling in *Van Gend* which allowed private members to take their own state to task for violating Community obligations, Mr Costa challenged that the new privatisation law that the Italian government relied upon were void via the obligations of the EEC as found in the *Treaty of Rome*.[26] Given that the EEC was an international trade group coalition, without *Van Gend* the traditional position that only member states deal with member states would have prevented Mr Costa from his standing.

The ECJ in *Costa* would make the landmark finding that together with the purposes and objectives of the *Treaty of Rome* at articles 5(2) and (7), in conjunction with article 189, a member state's sovereignty was severely limited in this regard.[27] It was found that domestic laws enacted both prior to and after the ratification of the *Treaty of Rome* which conflicted with the EEC would be automatically null and void. In making its decision the ECJ noted that the treaty's objective would be pointless and constantly frustrated if it could be overridden by newer local legislation, and that the treaty provided where states could act unilaterally implying that no conflicting unilateral action was valid outside those parameters.[28]

Given the influence of this paper by the work of Dr Phelan it is important to point out his thoughts on the matter of *Costa*. Dr Phelan regards Costa as being alongside *Van Gend* as the most discussed cases that elucidate the novel legal order of the Community.[29] For Dr Phelan, as for this paper, the importance was the limitation on the sovereignty of the signatories. Where in traditional international legal agreements countries may abrogate their treaty obligations locally (facing reciprocal actions from their partners) this is not possible

[20] Ibid 12.
[21] Ibid.
[22] *Troika*, 130–131.
[23] *Troika*, 118; Trevor Hartley, *The Foundations of European Community Law*: *An Introduction to the Constitutional and Administrative Law of the European Community* (Oxford University Press, 2007) 198.
[24] *Theodore Schilling*, 'The Court of Justice's revolution: its effects and the conditions for its consummation. What Europe can learn from Fiji' (2002) 27(4) *European Lawn Journal* 445, 458.
[25] *Costa*, 589.
[26] Ibid.
[27] Ibid 594.
[28] *Costa*, 594–595.
[29] *Troika*, 118.

for Community member states.[30] However, Dr Phelan goes on to suggest *L&B* as being the main case of concern and this is where we part ways. At this point I turn to the more in-depth comparative and consequential effects that *Costa* has on sovereignty and how this marks a truly unique and novel legal order.

PART II

The Effects of the New Legal Order

2.1 The impact of *Costa* on the concept of Sovereignty

Costa applied the direct effect elucidated in *Van Gend* and in doing so created another element to compose the Troika, supremacy.[31] As noted above, the effect of supremacy is such that any member state legislation that is in conflict with the relevant EEC/EU regulations/treaty will be considered directly null and void *ab initio*. Yet what *Costa* did in a more international jurisprudential and legal political sense, was to strip large swathes of sovereignty from the member states.[32] This surrender of sovereignty was not a mere incidental conclusion of the outcome of *Costa* but was expressly acknowledged by the ECJ.[33] The impact of this very direct surrender of sovereignty is so significant as to upend the very international legal tradition for which the continent itself was responsible for creating, the *Peace of Westphalia*.

The *Peace of Westphalia* brought an end to the European Wars of Religion, and importantly created the concept of 'Westphalian Sovereignty'.[34] The *Peace of Westphalia* is widely considered the beginning of the modern model of the international political system, including the framework within which international law is expected to operate.[35] Fundamental to Westphalian Sovereignty is the idea that every state, no matter its size, population, or power, ought to and does have, complete sovereignty on all matters domestic.[36] So traditional is the idea of state sovereignty that the United Nations Charter reflects the essence of Westphalian Sovereignty by stating at Article 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.[37]

Given the strong proclamations of state sovereignty from the *Peace of Westphalia*, and the same concept's primary placement in article 2 of the UN Charter there is a projected image of discrete and supreme international states, states with unopposable domestic authority. Yet, as we have discussed, this model appears to not only be upended by the *Treaty of Rome*/EEC/EU but decisively fractured and discarded by the judgment in *Costa*. *Costa* is remarkable in this sense in that a member state's citizen (Mr Costa) is invoking an international treaty obligation (*Treaty of Rome*) to an international court (the ECJ) in order to invalidate a domestic law (the legislation nationalising the interest Mr Costa was opposed to). An international treaty obligation, as pointed out by Dr Phelan among a large group of other political and legal academics, was traditionally only the domain of state versus state.[38] With the advent of *Van Gend*, however, within the

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[30] Ibid 134.
[31] *Troika*, 118; *Michel Struys, Henry Abbot*, 'The Role of National Courts in State Aid Litigation' (2003) 28(2) *European Law Journal* 172, 173. ('*Role of National Courts*')
[32] *Troika*, 118; *Joseph Weiler*, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, 2403, 2413.
[33] *Costa*, 594.
[34] 'Sovereignty' *Stanford Encyclopedia of Philosophy* (Web Page, 25 March 2016) < https://plato.stanford.edu/entries/sovereignty/>.
[35] *Andreas Osiander*, 'Sovereignty, International Relations, and the Westphalian Myth' (Spring 2001) 55(2), 251, 251.
[36] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) 69.
[37] *Charter of the United Nations* art 2(7). *Note* – the reference to measures under Chapter VII have to do generally with military matters and are therefore unimportant for this discussion on domestic sovereignty issues
[38] *Troika*, 117.

Community this specific international treaty could be enforced between a member states and a member state citizen. *Costa* followed closely on the heels of the *Van Gend* evolution wherein this same international treaty soon became a tool to overturn and intervene in the domestic decisions of states. Mr Costa's legal action resulted in the empowering of an international body (the ECJ) to intervene in affairs of a Westphalian and traditionally domestic nature. Whether the *Treaty of Rome* really supports such a supremacy doctrine, or whether the ECJ was overzealous in *Costa* I need not discuss, as the outcome and not the correctness is what is important for this essay. Regardless of the correctness of the decision in *Costa* the outcome is particularly clear in that member states have traded (or lost) their Westphalian and UN endorsed style of domestic sovereignty by their entrance into the Community. This 'shared-sovereignty' is directly contrary to the *Peace of Westphalia* and runs contrary to those principles found in article 2 of the UN Charter. If the *Treaty of Rome* has indeed absorbed a large swath of traditional state sovereignty is it really a treaty of international states, or really the formation of a supra-state. If one accepts that the treaty is merely just that, a treaty of international states, then it is clear that the decision in *Costa* (and in *L&B* and *Van Gend*) has altered international legal obligations of member states in a way that is a break from the old and definitely is therefore a new type of international legal order. However, if one takes domestic sovereignty as the lynchpin of state-ship itself, then the conclusion is not that of a new legal order, but of a new legal sovereign and supranational state.

I am unsure what the answer is. On the one hand, direct and local control over all things domestic appears to be the primary definer of what it is to be a sovereign state, any degradation to that power could entail the demise of a state as being truly sovereign. On the other hand, the preceding EEC treaty of the *Treaty of Rome* does not clearly nor exhaustively usurp the domestic sovereignty of its member states in all things,[39] and not everyone is convinced that total domestic control is a necessary condition for a sovereign state.[40] From this confusion of novel legal order or supranational state I turn to the place of the United Kingdom. At the time of writing this essay the United Kingdom is (allegedly) in the final process of leaving the European Union. However, the British Parliament appears to be deadlocked in a prisoner's dilemma and the actual departure is somewhat uncertain in both time and execution. That notwithstanding, I turn to how the concept of sovereignty as first brought out in *Costa* plays with the only member state to follow the common law tradition.

2.2 The British Common Law and State Sovereignty

Indisputably the United Kingdom is the only member state in the EU whose legislative and legal framework is solely that of the common law rather than that of the civil law.[41] The most notable feature of the British Common Law (BCL) system for the purposes of this discussion is that of parliamentary sovereignty. The BCL system takes as paramount and central to the legal and legislative framework the idea that parliament is omnicompetent to pass a law regulating, overturning, or establishing any manner it sees fit.[42] Three features of the BCL system are important for this critical comparative analysis. The first is the fundamental idea that parliament is omnicompetent, as mentioned above, to pass law on any matter whatsoever.[43] The second, is that the sitting parliament in its omnicompetent nature, while it may pass a law on any manner it feels fit, may not pass a law that binds its successor parliaments, there is no legal permanence.[44] The third feature is the presumption that where two statutes are in conflict the temporally more recently adopted statute will triumph.[45] I'll designate these three features—in the philosophical tradition in which I'm trained—in the order I just listed them as: Omnicompetence, Statutory Impermanence, and Temporal Preference. Astutely, one might already see how the rulings in cases such as *Van Gend*, and *Costa*, would pose specific challenges to these BCL features. It is at this point I turn to the unique challenge these three cases pose to the UK in this 'novel international legal order'.

[39] *Treaty of Rome*,
[40] Javier Solana, 'Securing Peace in Europe' (Speech, North Atlantic Treaty Organization, 12 November 1998).
[41] Note, since joining the EU, Cyprus is considered a mixed civil and common law system
[42] *Mark Elliott*, 'The demise of parliamentary sovereignty? The implications for justifying judicial review' (1995) 115(Jan) *Law Quarterly Review* 119, 119.
[43] Ibid.
[44] *Richard Ekins*, 'Legislative freedom in the UK' (2017) 133(Oct) *Law Quarterly Review* 582, 582.
[45] *Amanda Perreau-Saussine*, 'A tale of two supremacies, four greengrocers, a fishmonger, and the seeds of the constitutional court' (2002) 61(3) *Cambridge Law Journal* 527, 527.

2.3 *Van Gend* and the challenge to BCL Omnicompetence

As just mentioned, Omnicompetence is the perspective that parliament may legislate in any way it sees fit on any manner, including creating new rights, abolishing old rights, altering existing rights, or adding/derogating away from judicial precedent.[46] However, what is also implicit in this Omnicompetence is the idea that statutes that have been passed by parliament and signed into law become immune from any attempt by any court, institution, or person to set such statute aside, valid or not.[47] It is in this immunity from challenge that the BCL feature of Omnicompetence comes into conflict with the decision in *Van Gend*. Recall that *Van Gend* found that the *Treaty of Rome* (and by extension the EU that followed the EEC) created obligations of a nature that empowered member states' citizens to legally challenge member states' domestic laws in member states' courts.[48] This finding in *Van Gend* in effect denies the Omnicompetence of parliament. *Van Gend* denies this Omnicompetence not by denying the power of parliament to legislate on the issue, but by replacing the traditional BCL immunity of the statute with a route for citizens and other institutions to challenge and overturn a parliamentary statute. This idea of parliamentary sovereignty is not typically found in the civil law member states of the EU. Jack Connah in his article *Legislative Sovereignty or Constitutional Supremacy? The Dutch Constitutional Review Conundrum*, points out in a comparative analysis between the UK and the Netherlands that parliamentary sovereignty is typically bound by constitutional supremacy in Community civil law jurisdictions.[49] It likely helps that the UK has no written constitution of any primacy. In the short of it, *Van Gend* upsets the BCL feature of Omnicompetence in a way that is unusual for common law systems as opposed to constitutionally civil bound systems. From *Van Gend* then sprouted the case of *Costa*.

2.4 *Costa* and the challenge to BCL Statutory Impermanence and Temporal Preference

Where *Van Gend* conflicts with the Omnicompetence of parliament, *Costa* conflicts with a negative liberty of parliament, that of Statutory Impermanence. Statutory Impermanence is a negative liberty in that it safeguards a future parliament from the actions of a past parliament. Statutory Impermanence protects from the fettering of future governance by not allowing a parliament at T^1 from passing a statute of which it forbids parliament at T^2 from amending or repealing. Yet, the ECJ in *Costa* diminished this BCL feature of statutory impermanence. Building from *Van Gend*, the case of *Costa* established that EEC/EU regulations and other treaty articles were permanently supreme.[50] Recall that in *Costa* a private citizen (thanks to *Van Gend* allowing such standing) challenged a statute of Italy that had been passed well after that of the *Treaty of Rome*.[51] The ECJ in *Costa* then decided that the nature and principle of the obligations of the Community was such as to be immune from '[being] overridden by domestic legal provisions, however framed…'.[52] So not only was parliament not Omnicompetent to legislate on many matters relating to the EEC/EU but it was also found that due to the supremacy and '***permanent*** (emphasis added) limitation of their sovereign rights' a state's domestic law could not prevail 'regardless of any domestic law, whenever questions relating to the interpretation of the treaty arise'.[53]

The effect of the ECJ's finding in *Costa* is such that parliament is not Omnicompetent to even legislate on manners relating to the treaties founding the EEC/EU but also that the treaties themselves deserve a special exception to the BCL feature of Statutory Impermanence. Simplified, *Costa* says that parliament is not competent to legislate on Community treaty affairs not now, and not ever. This strikes at all

[46] *Mark Walters*, 'St. German on reason and parliamentary sovereignty' (2003) 62(2) *Cambridge Law Journal* 335, 367–368.
[47] Ibid 335.
[48] *Van Gend*, 2, 10–13.
[49] *Jack Connah*, 'Legislative sovereignty or constitutional supremacy? The Dutch constitutional review conundrum' 2008 4(2) *Cambridge Student Law Review* 167, 167, 169–173.
[50] *Costa*, 594.
[51] Ibid.
[52] Ibid.
[53] Ibid.

three BCL features but has a particular effect on Statutory Impermanence and Temporal Preference features of the BCL system. *Costa* not only established a legal regime (that of the treaty and regulations of the Community) that was excepted from the negative liberty feature of Statutory Impermanence, but it also effectively wiped out the Temporal Preference presumption. At least with regard to matters coming within treaty interpretation and Community regulations, *Costa* ensures that parliament may not presume that statutes it enacts post treaty/regulation are to be supreme when conflict arises.

It is important to note in an aside that not only the UK has dealt with the conceptual issues that the *Troika* have raised. In a comprehensive article by Dimitrios Doukas, Dr Doukas goes through the history of Germany/West Germany and its push-and-pull struggle trying to make sense of domestic law and EEC/EU obligations and supremacy.[54] Dr Doukas notes how the German constitutional courts, while still less supreme than the BCL system due to their supremacy of the constitution, have struggled with the power of the domestic law in relation to the EEC/EU legal order.[55] I make this aside so as to note it is not a conceptual problem merely for the UK but rather only that I have chosen to go with the UK for comparative simplicity as its tradition is the most distinct and the cleanest to elucidate the challenges to international tradition state sovereignty.

Conclusion

In Part I of this essay I have laid out the mechanical way in which the ECJ has come to define the Community as operating in a distinct and novel legal order. Influenced by, and appreciative of, Dr Phelan's article on the *Troika*, we have seen the evolution of Community law. The case of *Van Gend* brought about a revolution in allowing member states' citizens to litigate on international obligations traditionally only the domain of state governments. Then, we saw how the case of *Costa* established the supremacy of Community law to the point where it lay supreme to local domestic legislation in the past, present, and future. Also mentioned briefly was the case of *L&B* which denies to member states the ability to take traditionally reciprocal self-help trade actions in international disputes. From these three cases there emerged a picture wherein member states appear to have ceded traditional Westphalian Sovereignty to the Community especially including to such as body as the ECJ. Upending traditional international law and politics these three cases bring doubt to the traditional view of the nation state as sovereign (at least within the Community) and the effects this doubt on traditional sovereignty has had. Part II then saw a comparative application on the effect the *Troika* may have in relation to primacy of parliament in the UK. In particular how the case of *Van Gend* questioned the Omnicompetence of parliament to have its will and statutes remain unchallengeable. Then turning to *Costa* we addressed how the ECJ's finding in *Costa* created a supremacy of the Community's regime which doubly questioned the basis of Statutory Impermanence and Temporal Preference. In two short pages the ECJ would doubt these BCL features by setting the Community as a permanent fetter on domestic parliaments both past and present while also abrogating the principle that laws last in time are superior to those conflicting statutes of prior years.

I have not set about to cast a normative judgment on whether the judgments or developments that sprung from the *Troika* are correct. What is important is their effect and not their moral character. By using the UK and its common law system I hoped to paint the clearest picture of how the ECJ has helped to create a novel legal system by breaking away from traditional Westphalian perspectives of state sovereignty.

[54] *Dimitrios Doukas*, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!' (2009) 34(6) *European Law Review*, 866.
[55] Ibid 869–873.