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The European Court and National Courts  
Doctrine and Jurisprudence:  
Legal Change in its Social Context

Report on France

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Doctrine and Jurisprudence: Legal Change in its Social Context*  
Directed by Anne-Marie Slaughter, Martin Shapiro, Alec Stone, and Joseph H.H. Weiler

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France<sup>1</sup> is one of the member states in which Community law has had the greatest difficulties to be fully integrated and recognised as supreme to national law. This observation fits into a line of events in which France has proven to be an essential, but sometimes difficult member of the Community. The student of European integration has, however, learned that often the essential impetus for further integrative steps finds its origin in Paris; one must only think of the Schumann-Plan or the decisive French role in the draft-comity for the legal aspects of the Treaty of Rome. Especially this last example shows the thoroughly ambiguous, often contradictory character of France's involvement: A leading role in the theoretic, intellectual construction of Europe finds its counterpart in an often 'national' interpretation of Community rules. A recent example of this puzzling attitude is to be found in the French position concerning the GATT - negotiations. The same applies to the discussion now starting to take place concerning the Maastricht review conference in 1996<sup>2</sup>. Although President Chirac has been keen to disperse tenacious voices blaming him of a lesser euro-enthusiasm than his socialist predecessor, his campaign and his first weeks in office seem to confirm a more intergovernmental - gaullist - approach towards the Union.

As I hope to demonstrate in the following, the pure doctrinal approach doesn't allow us to fully understand French resistance towards legal integration. Here, the use of extra-legal tools has proven to be of great help. As I will argue, one of the main reasons for the non-endorsement of the Direct Effect and Supremacy doctrine lies in the static's of the French legal and administrative system.

### **I. The reception of the Direct Effect and Supremacy doctrine by the French supreme courts**

The student of French and European law has, for the past twenty-five years, especially focused on the question of how Community law could be given full effectiveness within the French legal order.

In order to understand the particularities of the French case, few general remarks concerning the three supreme courts might be of use : the existence of a threefold judicial system finds are rooted in history; being the successor of the ancient Kings Council, the Conseil d'Etat traditionally stood independent from the ordinary courts. The Conseil Constitutionnel is the youngest of the three, it was established by de Gaulle as an innovation included in the Constitution of 1958. It is important to note that each of the three institutions stands for itself and that there is no formal interaction between them, the only exception being

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<sup>1</sup> The ideas expressed in this article represent the strictly private opinion of the author.

<sup>2</sup> *Le Monde*, 30.11.'94 : E. Baladur " Pour un nouveau Traité d'Elysée".

the Tribunal de Conflits, in which the CE and the CCass sit together in order to co-ordinate their respective spheres of competence.

Before retracing the history of the French reception of the Direct Effect and Supremacy doctrine, it would seem useful to describe the stage the development of this problem has reached today : All of the three French supreme courts (Conseil d'Etat, Cour de Cassation and, somewhat separated, the Conseil Constitutionnel<sup>3</sup>) have de facto accepted the supremacy of Union law over national law as well as the integration of the former into the latter. The fact that the result achieved by each of the three courts seems comparable should not however conceal large differences regarding methods and pace. In this first section I, will retrace the doctrinal development followed by each of the three courts by spotlighting the major events which led to the enforcement of the two founding doctrines of Union law (A).

In a second section, I will turn our attention to a second doctrinal question which, as I see it, merits just as much attention, the *Kompetenz - Kompetenz* problem (B).

#### A.

In contrast to Italy or Germany, France has a monist judicial tradition which finds its confirmation in art. 55 of the fifth republic' constitution which states : " Treaties or agreements duly ratified or approved possess, from the moment of their publication, a superior authority to those of laws under the condition, for each treaty and agreement, of its application by the other party." Although one might feel that such an approach to the relationship between national and international law would provide for a swift reception of EC law, there are a few hints in French legal history for the problems to come. First of all, there is the tradition of separation of powers inherent to France since the revolution which makes it quite unthinkable that a judge could censor the work of parliament<sup>4</sup>. And even if parliament could be controlled, there remains the strong position of the executive with the President at the top. Taking into consideration that de Gaulle had more or less tailor- made the Constitution of 1958 for his proper ideas of how a state should be lead, it seems quite unlikely that "La France" would accept any uncontrolled influence from whoever it may be. Bearing this in mind, we will now turn to the analysis of the three courts jurisprudence.

The **Conseil Constitutionnel** (CC), guardian of the French "bloc constitutionnel" (which includes the constitution of 1958, the preamble of the constitution of

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<sup>3</sup> Supreme courts for Administrative law, Civil law and finally Constitutional law.

<sup>4</sup> B. de Witte, "Retour à 'Costa'. La primauté du droit communautaire à la lumière du droit international", *R.T.D.E.* (1984), p. 425, 444.

1946, the Declaration of Human Rights of 1789 and some general legal principles) took the first opportunity to delegate the difficult task of enforcing the Direct Effect and supremacy of Union law. For the effectiveness of its move it matters little that the specific case had nothing to do with the European Community directly .

The question was to know whether Art. 55<sup>5</sup> of the French Constitution from 1958<sup>6</sup> had been violated by an abortion - liberating law because latter was presumed to be in violation of the *European Convention of Human Rights*. For two reasons, the CC refused to control the conformity of the pending bill with the Treaty : According to the Constitution, the decisions the CC handed down were of absolute and definitive character whereas the superiority of a Treaty to a law could merely be of relative and contingent nature. Relative, because the supremacy would be limited to the sphere of the Treaty (a law contrary to the Treaty could remain applicable if its sphere was larger than that of the Treaty) and contingent, because Art. 55 of the Constitution submits supremacy to the condition of reciprocity (and therefore a law contrary to the Treaty could nevertheless be applicable at certain moments towards certain nationals). In a syllabic diction, the CC considered that "a law incompatible with a treaty is not, by the same means, incompatible with the constitution"; and since Art. 61 of the Constitution charged the CC with the task of controlling the constitutionality of laws, it did not intend to do more than that<sup>7</sup>. In two decisions handed down on July 20th and January 18th, 1977, the CC reiterated this jurisprudence.

The reception of these decision by the legal community was generally positive. The imminent commentators and convinced gaullists Favereau and Philip praised the 1975 decision as a solution which gives "an interpretation to art. 55 and 61 which is in accordance with the spirit and letter of the text"<sup>8</sup>. Underpinning this analysis was a distrust towards the integrative character of community law which was considered as being in contradiction to the very principles of gaullism : "It is clearly admitted that during the drafting of the constitution the framers thought to avoid European integration from advancing to quickly and

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<sup>5</sup> "Treaties and agreements regularly ratified or approved have, as from their publication, an authority superior to that of laws under the condition, for every treaty or agreement, that it is applied by the other party."

<sup>6</sup> If not specified otherwise, "Constitution" is always the French Constitution of 1958.

<sup>7</sup> CC 15.01.1975, IVG.

<sup>8</sup> L. Favereau, L. Philip : *Grandes décisions du Conseil Constitutionnel* (Paris : Sirey, 1979), p. 301, 309.

from endangering national sovereignty"<sup>9</sup>. For the gaullist school of thought any other decision "would have lead to the path proceeding towards a government of judges"<sup>10</sup>.

In the same time, this decision was partially understood as an open invitation to the other two supreme courts to take on this task themselves<sup>11</sup>. As we will see, the two of them did not accept the invitation with the same degree of eagerness.

Apart from its function as guardian of the Constitution, the CC also may be called upon as judge in electoral litigation. It was on such a matter that the CC then finally did have to at least state its attitude concerning the supremacy doctrine. Without even making a point of the potential problem, the Conseil examined the compatibility of a later national law with an additional protocol of the European Convention of Human Rights, thereby implicitly acknowledging its superiority<sup>12</sup>. This decision was, however, not yet existent when the other supreme French courts started to develop their positions.

The first of them to substantially respond to the ECJ' fundamental jurisprudence was the **Cour de Cassation**, which has proven to be the most pro-European supreme court of France, and this despite the fact that in the early seventies its starting position was identical with that of the Conseil d'Etat.

Having subscribed to the monist theory since her constitution of 1946, France should at first view not have had any problems concerning the Supremacy doctrine. However, the traditionally very parliament -centred philosophy of French law<sup>13</sup> led to a distinction between laws previous to an international treaty and those latter to it. Concerning the first case, the solution never caused any problems : by the simple force of the international treaty, mostly ratified by

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<sup>9</sup> Ibid.

<sup>10</sup> L. Favereau, *R.D.A.* (1977), p. 131.

<sup>11</sup> See : L. Faverau, L. Philip : *Chronique constitutionnelle et parlementaire française*, *R.D.A.* (1975), p. 193 : "On peut même dire (que) le juge constitutionnel a implicitement confirmé le rôle exclusif du juge ordinaire, quand à la mise-en-oeuvre du principe de superiorité du Traité sur la loi."

<sup>12</sup> C.C. 21.10.1988, Election du député de la 5ème circonscription du Val d'Oise.

<sup>13</sup> Two still valid laws dating from the French revolution (16 and 24.08.1790) state : "The jurisdictions can not take any part whatsoever in the exercise of the legislative power, neither can it render impossible or suspend the execution of laws regularly promulgated without committing abuse of it's power". At that time, judges still designated by the King were now simply ignoring his orders since they were given under the pressure of the revolutionary National Assembly.



parliament, the previous law was automatically abrogated. The case of laws subsequent to a treaty was more complicated : If a court enforced such a treaty against a later law, it would thereby abrogate an act of parliament, quite unthinkable since Montesquieu wrote that judges were supposed to be the simple mouth of the law.

To reach a solution in this case, both Courts followed the famous doctrine *Matter*, named after an attorney general of the Cour de Cassation in the thirties:

- In a first stage, the judge should try to solve the apparent conflict between the two dispositions by conform interpretation;
- if this should not be possible, he had to enact the national law since he "cannot know other will than that of the law"<sup>14</sup>.

The landmark decision for the Cour de Cassation's final compliance with the Supremacy doctrine, implying the abandon of the doctrine *Matter*, was the case *Jacques Vabre*, decided 24.05.1975<sup>15</sup>. The case which had been referred to the Court opposed Art. 95 of the Treaty of Rome to a more recent (1966) French fiscal law. The lower courts had already enforced the disposition of the Community treaty against the later law. This in itself was already remarkable, although, from a Union point of view, not quite flawless. The lower courts had indeed based their enforcement on Article 55 of the French Constitution of 1958 translating the monist theory, and not on the famous 'specific character' of community law as set forth by the European Court of Justice (E.C.J.) in its *Costa E.N.E.L.* decision<sup>16</sup>.

Confirming the abandon of the doctrine *Matter* in cases concerning the European Community, the attorney general Touffait invited his colleagues to modify the grounds for their decision; instead of choosing their own constitution he proposed to follow the E.C.J. in its *Costa-logic*<sup>17</sup>.

The Court finally chose to proceed by compromise concerning the reasons for its decision : It bases its enforcement of the Treaty of Rome on Art. 55 of the Constitution as well as on the specificity of the Community law. Although this combined argumentation has not found unanimous appreciation<sup>18</sup>, the Cour de Cassation has until today continued to use the same formula.

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<sup>14</sup> Conclusions of attorney general Matter, Cass. civ.22.12.1931, *Dalloz* (1932).1., p. 131.

<sup>15</sup> Chambre mixte, *Dalloz* (1975), p. 497; *A.J.D.J.* (1975), p. 567.

<sup>16</sup> E.C.J. Aff. 6/64, *Costa vs. E.N.E.L.*, 15.07.1964.

<sup>17</sup> Conclusions of attorney general Tuffait, *Dalloz* 1975, p. 504.

<sup>18</sup> F.C. Jeantet, "La Cour de Cassation et l'ordre juridique communautaire", *J.C.P.* 2743, (1975).

If we add to this development the fact that the Cour de Cassation has never had any problems with the doctrine of Direct Effect, its degree of compliance with the E.C.J. and Union law is almost perfect.

This can hardly be said about the **Conseil d'Etat** (C.E.), as mentioned above a very traditional French institution. Confronted with the doctrines of Supremacy and Direct Effect, the Conseil took a long time to develop a very differentiated position towards both.

After the Cour de Cassation's *Jacques Vabre* decision, it was quite obvious that the next step would be up to the Conseil. It had however as early as 1968 clearly pointed out that supremacy of Union law over later national laws was quite unacceptable : In the *Semoules* affair<sup>19</sup>, the government commissioner Mme Questiaux affirmed that " the administrative judge can not make the effort demanded from him without modifying, by his own will, his place within the institutions". Three main reasons were given for this refusal : First of all, the Conseil believed that overruling a law in favour of an earlier treaty would be no less than a violation of the principle of separation of powers and that secondly, such a control of laws would be the work of the Conseil Constitutionnel. The third and final reason was of a quite pragmatic nature, but allows us to better understand the way the Conseil feels about its role : By accepting to take over the control of laws, the Conseils would sooner or later enter into conflict with Parliament; this in turn would then endanger its efficiency in exercising a control on administrative action.

The roots of this attitude were thus too deep for a change to occur soon and swiftly and this couldn't be changed by the harsh reminder quite obviously addressed to the Conseil by the E.C.J. in its *Simmenthal* decision : "The national judge has the obligation to assure the entire effect of community norms by leaving, if necessary, inapplicated, by his own authority, any contrary national legislation, *even subsequenti*"<sup>20</sup>.

Some first signs of a prudent reversal of this conservative attitude can only be found as late as 1986 in the Conseil's decision *Smanor*<sup>21</sup>, which admitted that the administrative judge could examine the conformity of regulations (based on a later law) with an international treaty.

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<sup>19</sup> C.E., 1.03.1968, *Syndicat général des fabricants de semoule*, A.J.D.A. ( 1968), p. 235.

<sup>20</sup> E.C.J., Aff. 106/77, *Simmenthal*, 9.03.1978, European Court Reports (ECR) 1978, p. 609, our italics.

<sup>21</sup> C.E. 19.11.1986, *Rec.*, p. 260.

This first step was made possible by a working distinction between laws which content themselves with attributing competence to the administration and laws which fix detailed rules of execution. In the first case, the administrative judges were from now on free to examine the conformity of the (later) law with a Treaty, in the latter, this procedure remained impossible.

This first shift in jurisprudence was however still a long way from an effective enforcement of Community law by the administrative judge. The real breakthrough only came three years later with the famous *Nicolo*<sup>22</sup> decision, which the Conseil d'Etat - sign for an important case - took as an Assembly. In his conclusions<sup>23</sup>, the Government commissioner Frydman followed a double strategy : on the one hand it was important that the Conseil did not give the impression of yielding ground to the doctrine but, on the other hand, a path had to be found allowing the Assembly to adopt a decision which would end its no longer 'splendid' isolation. The starting point was to confirm that the *Semoules* jurisprudence was by no manner erroneous today but that there existed another solution, legally just as valid but more appropriate and practicable. The key to this solution was found in a reinterpretation of Art. 55 of the Constitution: In the new reading, this article contained an implicit authorisation for judges to make treaties prevail on national law in order to render their supremacy ensuing from Art. 55 entirely effective. At this point, we already become aware of one of the major doctrinal deficiencies of the *Nicolo* decision: In contrast to the Cour de Cassation, the Conseil did not only base its decision on the French Constitution but it exclusively used the national text. In his conclusions, Frydman even went further when he expressly pointed out that this new interpretation of Art. 55 should be applied to all international treaties and not only to the Treaty of Rome, since such a distinction would be without any legal basis. According to him, the E.C.J.'s *Costa E.N.E.L.* decision, solemnly declaring the specific character of Union law, led to a supranational logic which in turn was in contradiction with the French Constitution<sup>24</sup>.

Although the legal foundation of the Supremacy doctrine has so far proven to be of no practical consequence, it is worthwhile to keep in mind this quite anti-integrationist conclusion as well as the nuance between the Cour de Cassation's and the Conseil's position in this question. As one author put it, the Conseil

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<sup>22</sup> C.E. Ass. 20.10.1989, *Dalloz* (1990), p. 136. For a complete bibliography : D. Simon, " La C.E. , la directive, la loi, le droit, *ad agusta per angusta*" *Revue Europe*, 4, chron (1992).

<sup>23</sup> Conclusions of Government Commissioner Frydman, *La semaine juridique* 48, (1989), p. 21371.

<sup>24</sup> *Ibid.*

d'Etat neither capitulated nor reviewed but installed its own "French garden"<sup>25</sup>. Apart from these - very important - doctrinal aspects of the case, the *Nicolo* decision left two important practical questions open :

- The first one concerns the reciprocity-clause contained in Art. 55 of the French Constitution. Once again based on the specificity of Union law, the E.C.J. does not accept that national courts examine the faithful and loyal application of the Union treaties by the other contracting states; this is however exactly what Art. 55 asks French judges to do. In the *Nicolo* case, the Conseil did not say a single word concerning this problem<sup>26</sup>, but in a case involving the European Convention of Human Rights, the Conseil continued to practise the reciprocity exam<sup>27</sup>.

- The second most important question left open by the Conseil concerned the extension of the Supremacy doctrine to derived Union law. In *Nicolo*, the French administrative judges were asked to apply Art. 227-1 of the Treaty of Rome, would they also extend the new approach to Union regulations, directives and decisions? The case of the regulations was the least complicated since Art. 189 Treaty of Rome stipulates their obligatory character in all elements; the *Conseil* therefore endorsed this first extension of the *Nicolo* jurisprudence in its *Boisder*<sup>28</sup> decision. Remained the directives...

This final step to full de facto supremacy of Union law seemed almost as difficult as the step made by *Nicolo*. Not only does the directive suffer from a very complicated and to a certain point still evolutive legal nature even within the Union legal system itself, but also the French administrative law has, as we will soon see, considerable problems with their Direct Effect.

Although there had been some positive signs of movement in a pro-communitarian sense<sup>29</sup>, it remained a surprise when the Conseil implicitly closed this last gap as early as 1992 in two decisions *Rothmans* and *Phillipp*

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<sup>25</sup> P. Sabourin : "Le Conseil d'Etat face au droit communautaire" *Revue de Droit Public et de la Science Politique en France et à l'Etranger* 2 (1993), p. 397, 399.

<sup>26</sup> Kovar, "Le Conseil d'Etat et la Cour de Justice des Communautés Européennes : De l'état de guerre à la paix armée", *Dalloz*, (1990), p. 57.

<sup>27</sup> C.E. 21.12.1990, Conclusions of Government Commissioner Stim quoted by P. Sabourin in *Dalloz* (1991), p. 283.

<sup>28</sup> C.E. 24.9.1990.

<sup>29</sup> In C.E. 22.12.'89 : *Cercle militaire mixte de la caserne mortier*, the C.E. accepted to interpret provisions of a domestic statutory law in the light of objectives determined by a EC directive.

*Morris*<sup>30</sup>. Not only does the Conseil in these cases assimilate the directive to an international convention with the effect that it gains supremacy over all national law but it also accepts the interpretation of the litigious directive as given by the E.C.J. holdings condemning the French Republic in an Art. 171 Treaty of Rome procedure. In its decision *Arizona Tobacco* taken the same day as the two aforementioned, the CE even complies with the ECJ *Francovich* and *Bonifacius* jurisprudence<sup>31</sup>. Under these circumstances, the only remaining quack once again is the legal basis; as the Government Commissioner Mme Laroque put it: The Conseil intends to enforce Union law supremacy "without going as far as to conform itself to the conception of absolute supremacy of community law, maybe even supra-constitutionality as the E.C.J. understands it"<sup>32</sup>.

Nevertheless, the attitude the C.E. has since adopted when confronted with the Supremacy doctrine must be recognised as a full-blown success for European integration through law. The achieved progress would however in practice remain without effect in absence of any consequent enforcement of the Direct Effect doctrine.

Although here, too, the C.E. has de facto adapted its jurisdiction to the demands of the E.C.J., the overall situation from the Union point of view still remains largely unsatisfactory<sup>33</sup>.

Concerning the Supremacy doctrine, the line of events which essentially begins in 1978 with the famous *Cohn-Bendit* decision<sup>34</sup> actually runs parallel to the development just described. In this quite picturesque case, Mr. Cohn-Bendit claimed that an administrative measure taken against him was in violation with

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<sup>30</sup> C.E. Ass. 28.02.1992, , conclusions Mme Laroque, *A.J.D.J.*, (1992), p. 210. and *C.M.L.R.* 30 (1993) : *Société Anonyme Rothmans International France et Société Anonyme Phillipp Morris France*, p. 187 - 198.

<sup>31</sup> C.E 28.02.'92 : *Société Arizona Tobacco*.

<sup>32</sup> See *supra* note 29.

<sup>33</sup> For a general panorama of the situation cf. Bonichot, "Convergences et divergences entre le Conseil d'Etat et la C.J.C.E.", *R.F.D.A.* (1989), p. 579.

<sup>34</sup> C.E. Ass. 22.12.1978 : *Ministre de l'Intérieur c/ M. Cohn-Bendit*. Cohn-Bendit, of German nationality, was one of the student leaders in the May '68 revolts in Paris. For his active participation in these events he was expelled. On petition of Cohn-Bendit, the Paris administrative court suspended the expulsion order and addressed a preliminary reference to the E.C.J. concerning the conformity of above mentioned ordinance with Community law. The Minister of the Interior on his turn called upon the C.E. to invalidate the suspension in order to allow the immediate expulsion of Cohn-Bendit, which finally took place. Today, Cohn-Bendit is a member of the Frankfurt city government.

a community directive. The Conseil's answer was clear : As it results from Art. 189 Treaty of Rome, community directives are addressed to member states and bind these only regarding the results to achieve; directives cannot be referred to by a national of one of these states against an individual administrative act. This position was of course in complete contradiction with the E.C.J. *van Duyn* jurisprudence<sup>35</sup>. For this radical solution, the C.E. used two superposed lines of argumentation : The first was offered by a strictly textual interpretation of Art. 189-3 Treaty of Rome which specifies that directives bind the addressed states in the results to achieve. It would have required a certain amount of good will from the C.E. to follow the purely teleological interpretation of this article by the E.C.J., and this certain amount was missing for a matter of principle: In its motives, the C.E. sharply points out that "no stipulation (of Art. 56 Treaty of Rome concerning public order) empowers organs of the Community to take regulations concerning public order (...) directly applicable in the member states (...)"<sup>36</sup>. What the C.E. actually feared - and what it tried to prevent by this decision - was a significant shift in the balance of power between Community and national state<sup>37</sup>. If in a field as sensitive as that of public order, community directives could be directly referred to by an individual, a significant shift in competences would be the consequence. In the doctrinal reaction to the Cohn-Bendit case, very few became aware of an escape route left open by the C.E. which was to even the way to a more citizen-rights friendly interpretation six years later.

In a case brought before the C.E. in 1984<sup>38</sup>, an association attacked a French administrative decree transposing a community directive with the argumentation that the former was in violation with the objectives of the directive: Quashing the decree, the C.E. decided in favour of the litigant. The trick was quite simple: in its Cohn-Bendit decision, the C.E. had expressly pointed out that an individual could not validly attack an *individual* administrative act on the basis that it is in violation with a community directive. If, however, the individual takes the detour to attack the general national regulation (transposing the directive), the administrative court can examine whether this national regulation is conform with community law.

One year later, the C.E. took a further step by deciding that the French

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<sup>35</sup> E.C.J., Aff. 41/74, *Van Duyn*, 17.12.1974, E.C.R. 1974, p. 1224.

<sup>36</sup> C.E. Ass. 22.12.1978, *supra* note 33.

<sup>37</sup> See Paul Sabourin, *supra* note 24, p. 424.

<sup>38</sup> C.E. 28.09.1984, *Confédération nationale des Sociétés de protection des animaux de France et des pays d'expression francaises.*

administration could not invoke a national regulation which is in violation with a directive even if the directive has not yet been transposed<sup>39</sup>. Finally, the *Alitalia*<sup>40</sup> decision not only invalids a national regulation contrary to objectives contained in a directive - which now is quite usual - but recognises furthermore that individuals have a right to ask their administration to take the measures necessary for the transformation of a directive and to invalid former ones henceforth contrary to the community text.

After these three decisions, the Community directive gained some of the force of which it seemed deprived since the Cohn-Bendit case. Nevertheless, two lacunae remain : The first consists in the CE refusal to examine a breach of community law despite the appellants not invoking the breach of it. More important is however the possibility to directly invoke a directive before a French administrative court. This possibility becomes vital when no application measure whatsoever has been taken; the potential litigant then has no national text by the detour of which he can make use of the directive<sup>41</sup>. In this case, one can of course argue that the litigant has the possibility, as described by the CE in *Alitalia*, to ask the concerned administration to transpose national law. He must however be prepared to wait for three month after wich silence can be interpreted as a tacit refusal. These three month can be a to long time to wait, especially if the execution of the original administrative measure against which he wants to invoke community law is not suspended. Taken into consideration the quite theoretic nature of the described constellation, one must however admit that the problem of the Direct Effect of Union directives is more of doctrinal than factual relevance.

## B.

Apart from this first complex of problems which gained the centre of attention quite some time ago, the recent decision of the German Constitutional Court concerning the Treaty of Maastricht has shown a second theme which is likely to become an equally important issue: the problem of the *Kompetenz - Kompetenz*. The question is simple: Who decides who decides? In France, this interrogation has never been widely discussed under legal aspects, and the jurisprudence of the supreme courts, except maybe the Conseil Constitutionnel, has so far not addressed the problem. Before trying to develop some hypotheses

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<sup>39</sup> C.E. 07.12.1984 *Fédération française des sociétés de protection de la nature et autres*.

<sup>40</sup> C.E. 03.02.1989 *Companie Alitalia*.

<sup>41</sup> Note, however, that in C.E. 8.07.1991 *Palazzi* the C.E. admitted the direct invocation of a directive by way of putting forward an "exception d'illégalité".

on the reasons for the silence of the two regular supreme courts, our attention will first of all turn to the position of the CC and its development.

Endowed with the task of examining whether the international treaties and certain agreements signed by France are compatible with the French Constitution (s), the CC very early had the possibility to take position: Seized by the Prime Minister in 1970, it was asked to examine if the decision of the European Council from April 21st 1970 concerning the fusion of the EEC and the ECCS and whether the new budgetary rules were in contradiction with the French Constitution. The court answered in the negative; one of its arguments was that the above-mentioned decision only contained "dispositions concerning the inner functioning of the Community" and did "not affect the balance between the European Communities on the one hand and the member states on the other"<sup>42</sup>. The decodation of this a contrario argumentation could have meant that if the above mentioned balance had been affected, the international Treaty would have to be considered as contrary to the Constitution. Further hints were soon added by a second decision handed down in a case concerning the election of the European Parliament : Even if the preamble of the French Constitution of 1946, confirmed by the new Constitution<sup>43</sup>, allowed the "limitations" of sovereignty necessary to the organisation of the defence of peace, "no disposition of constitutional value whatsoever allows the *transfer* of all or part of national sovereignty to whatever international organisation it may be"<sup>44</sup>. This sophisticated textual approach obviously had the major inconvenience that the difference between "transfer" and "limitation" would not always be an easy one to make<sup>45</sup>.

In a 1985 decision, the CC added that an international agreement would have to "preserve the essential conditions of exercise of national sovereignty", those being the states duty to assure the respect of the republican institutions, the continuity of the life of the nation and the guarantee of civil rights and liberties<sup>46</sup>.

A first shift towards a new doctrine, more practical and pro-European, can be

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<sup>42</sup> C.C. 19.06.1970, *Rec.* p. 15.

<sup>43</sup> Alina 15 of the preamble of the Constitution of 1946 and implicetly art. 53 of the Constitution of 1958.

<sup>44</sup> C.C. 30.12.1976, *Rec.* p. 15.

<sup>45</sup> D. Rousseau, *Droit du contentieux constitutionnel*, Monchrestien 1990, p. 259 and following.

<sup>46</sup> CC 22.05.1985, *Rec.* p. 15



seen in the CC decision on the constitutionality of the Schengen-Agreements<sup>47</sup>, where the Council for the first time does not recall its precedent jurisprudence and quite openly defies the distinction between transfer and limitation put forward by the plaintiffs without, however, explicitly mentioning it<sup>48</sup>.

The new doctrine was then finally established in 1992 with the Maastricht I decision when the Council stated that according to the preamble of the 1949 Constitution, France "can enter - under the condition of reciprocity - international agreements in order to participate in the creation or development of permanent international organisations, possessing a judicial personality and power of decision and that in consequence France, as other states, accepts the transfer of competencies"<sup>49</sup>. According to this new doctrine, the CC considers the existence of two potential cases of unconstitutionality: an international agreement may contain clauses in contradiction to the constitution or violating the essential conditions of exercise of national sovereignty. The Council's Maastricht I decision has shown how it operates this distinction. Among the considerable number of arguments brought forward by the opponents to the Treaty on the European Union, the CC recognised three Treaty dispositions as being unconstitutional.

The right to vote and the eligibility in municipal elections for non-French EU-citizens was considered being in contradiction to art. 3, 24 and 72 of the Constitution, whereas the clauses concerning the monetary union and the common visa policy were regarded as violating the essential conditions of the exercise of national sovereignty. Following this decision, the government proposed a bill amending and changing the Constitution which was substantially amended especially in Senate before then passing the Congress in Versailles where both houses sit together. The ratification of the Treaty on the European Union as such was submitted to the people by referendum.

This jurisprudence gives us a first idea of how the CC intends to treat the *Kompetenz - Kompetenz* problem : It has clearly stated its intention to protect French sovereignty, as defined in the constitutional block, against silent enlargement of Community competence. If the government nevertheless wishes to transfer sovereignty, it has to go through the complicated and politically delicate task of modifying the Constitution; and even this possibility might not always be assured: In its Maastricht II decision, the CC points to Art. 89 of the French Constitution which stipulates "... the republican form of government may

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<sup>47</sup> CC 25.08. 1991.

<sup>48</sup> see D. Rousseau : Chronique de jurisprudence constitutionnelle, *R.D.A.* (1992), I, p. 92 - 94.

<sup>49</sup> CC 09.04.'92, *Maastricht I*.

not be issue to revision"<sup>50</sup>.

This very interpretable stipulation makes it difficult to say to what extent the CC will develop its doctrine of *Kompetenz-Kompetenz*. If in the future it should decide to make use of a historical interpretation of Art. 89 of the Constitution, every step toward supranational integration short of founding a European Kingdom seems possible. On the other hand, a more extensive interpretation would be capable of freezing the integration progress at its current stage. Whatever the direction chosen, an important input on the outgo will be given by the French political development since the members of the CC are nominated in equal numbers by the President of the Republic and by the Presidents of the two Houses.

Notwithstanding this aspect of the *Kompetenz - Kompetenz* problem, the CC has already taken its precautions for not being left out of the control mechanism : Article 54 of the Constitution declares the CC competent for the examination of "international engagements". As those who have closely studied the CC's jurisprudence have demonstrated<sup>51</sup>, its interpretation of this definition is very extensive; the CC has thus declared itself competent for examining the legal commitments taken in application of the constituent international treaties.

It may be added that since the constitutional reforms of 1980 and 1992, any group of 60 members of Parliament and Senators are entitled to refer an international engagement to the court. Given the fact that as mentioned above in the Assemblée Nationale amended the constitutional law enacting the Maastricht treaty in order to oblige government to consult the Parliament before consenting to a European legal text<sup>52</sup>, one can presume that MPs will use their power to defer these texts to the CC as a political weapon.

The above said suggests that the CC has not only pointed out the outer limits of European integration contained in the French constitution, but also has opened the way for a potentially very extensive control of all European legal

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<sup>50</sup> C.C. 02.09.1992, n°19, *Rec.* p. 791.

<sup>51</sup> E. Zoller, *Droit des relations extérieures* (Paris : PUF, 1992) p. 270.

<sup>52</sup> The new art. 88 - 3 of the Constitution reads : " The government submits to the National Assembly and to the Senate , by way of their transmission to the Counsel of the Communities, proposals of Community acts incorporating provisions of legislative nature. During session or outside of them, resolutions can be voted in the framework of the present article, according to the terms determined by the rules of each assembly". For the extension of the assemblies and the CC's competencies subsequent to the modification of the Constitution see : F. Luchaire "L'Union Européenne et la Constitution" : R.D.A. (1992) II, p. 933, 965 - 971.

measures; and, as its first Community - related decision has shown,<sup>53</sup> this control will include the question of competence. It therefore seems, that as far as the CC is concerned, the *Kompetenz - Kompetenz* problem is solved : This competence finally remains with each member state.

As I mentioned further above, the Conseil d'Etat as well as the Cour de Cassation have neither directly nor indirectly addressed the problem of who was to decide over how far Union competence extends. Any hypotheses I propose in the following have even more the character of speculation than hypotheses always tend to have since no thorough analysis of this aspect of European integration has been undertaken in the French legal literature.

A first approach leads us to believe that the absence of discussion might be the result of a certain legal tradition. This proposition becomes especially clear when we compare the French legal culture with the German: Being of federal structure, Germany is well acquainted with the problem of attribution of competence between different levels of power and the problems which can arise from the borderline-conflicts. In France, the situation is and always has been totally different. United for centuries, Paris always represented the central power and had the last word in all matters. A first, quite simple explanation must therefore be that the *Kompetenz - Kompetenz* problem has historically never been a subject to be solved or even discussed.

Moreover, the French legal system today still carries the imprint of the Revolution, which clearly subordinated the legal branch to political power<sup>54</sup>; this also became clear in the difficult enforcement of the Supremacy and Direct Effect doctrine. In is therefore in the purest French legal tradition to turn to the political power for arbitration and not to count on the courts.

These reasons might, to a different extent, be true for each of the two courts. More intimately related to the political power in what concerns its history and scope of activity, the silence of the Conseil d'Etat as an institution and of its members as individuals<sup>55</sup> should quite accurately be explained with the above. As a Conseiller d'Etat and former judge at the ECJ told us, he had only made acquaintance with the *Kompetenz - Kompetenz* problem while serving in Luxembourg, it was quite simply not a matter he had been taught at the ENA.

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<sup>53</sup> See *supra* note 41.

<sup>54</sup> See *supra* note 12.

<sup>55</sup> The members of the *Conseil d'Etat* are almost entirely recruited from the best E.N.A. (*Ecole Nationale d'Administration*) graduates, one of the *Grandes Ecoles* which prepares for the senior civil service as well as for political careers.

The members of the judicial legal branch might not count on the political branch as much as their administrative law colleagues, but ignorance about typical federal problems was wide-spread there too.

As to what concerns the probable reaction of the two courts when confronted with the issue, our hypotheses can only be based on their past attitude towards the Communities' legal order. As a basic rule, one can presume that the Cour de Cassation's approach will be more pragmatic and therefore pro-integrationist than that of the CE. As we will see later, the members of the C.Cass have in the past proven to be quite frankly pro-European which may also result from the less doctrinal character civil jurisprudence tends to have.

Even though this is so, it would be pure speculation to say that the supreme civil court would accept to finally subordinate itself to the ECJ, for the *Kompetenz - Kompetenz* problem finally turns around the question to know who is the supreme umpire. As we will see below, one of our explanations why the C.Cass enforced the two founding doctrines of Union law much more swiftly than the CE is that the CCass therein saw a chance to strengthen its position within the French legal system as a whole. Such an advantage can however not be expected from an enactment of the ECJ *Foto-Forst* jurisprudence.

The acceptance of the CE should even be weaker. Given the sophisticated doctrinal construction which finally allowed the CE to accept Supremacy and Direct Effect, one can only imagine the difficulties connected to the *Kompetenz-Kompetenz*.

## **II. The Social Context of Legal Change concerning Union Law in France**

For the analysis of the deeper, extra-doctrinal reasons for the legal evolution, or revolution (depending on the court) which took place in France during the last twenty five years, I propose to reconsider the chronology of events which led to today's situation. By using this method, I hope to show to what extend of the three supreme courts of France influenced each other. A second emphasis will be placed on the importance of the position each of the Courts take within the French legal system as a whole. I will try to explain that this position and the way the legal actors felt about it was a determining factor for their instinctive opinion on Supremacy and Direct Effect (A).

In a second section, our analysis will turn to a more specific issue which, however, also tries to explain the developments which led to a de facto enforcement of the two Union law doctrines: the relationship between *Doctrine* and *Judicial decisions*. I will try to explain to what extent the influence of doctrine varied from one supreme court to another and how doctrine itself developed (B).

## A.

Before entering into a chronological analysis of the social context leading to legal change or inertia, a few general remarks concerning social differences between the three courts might be of use.

As I already explained above, the first problem encountered on the way to full enactment of the two founding doctrines of the Community law in France was the existence of the doctrine *Matter*<sup>56</sup>. More than a simple operational doctrine, this obstacle represented the very core of the French approach to statehood and the separation of powers. Different than in the United States or Germany, France today still feels very strongly about this separation, which it has not attenuated by the system of checks and balances. By the end of the sixties, it however became more and more clear that this doctrine, dating back to 1931, was difficult to maintain. In the more than thirty years which had past, the number of international treaties had significantly increased and parallel to this the number of plaintiffs founding their action in court on such international texts. This development was of course of different concern for the judicial and administrative branch of justice. For the former, the steady growth of transnational economic exchanges brought along an internationalisation of civil and especially commercial law. This was only later the case for their administrative colleagues.

Subsequently, the differing litigation patterns with which the respective courts were confronted lead to differences in their adaptation to growing interdependence.

Therefore, it must be said that the 1968 *Semoules*<sup>57</sup> decision of the Conseil d'Etat was not a total surprise.

A second distinction with high social relevance is, the total difference of a career in the judicial and in the administrative branch, especially the CE. Magistrates of the judicial have generally studied law at university and then taken quite a difficult exam to enter the *Ecole de la Magistrature* in Bordeaux. Once they pass their final exams, they are posted all over France and work their way up through the courts of appeal to, eventually, the Cour de Cassation. Those judges who compose the CCass can therefore look back to a long career which often started in the *province*. The normal career of a member of the *Conseil d'Etat* follows a totally different logic. The CE almost exclusively recruits its members from the very first ranks of each ENA graduation class. This very reputed Grande Ecole was founded with the aim of providing national administration with the most qualified recruits. The rank obtained in the final

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<sup>56</sup> See note 13.

<sup>57</sup> See note 18.

exams is the essential criterium for a future career; the first five to ten graduates enter the Conseil d'Etat, the next five the Cour des Comptes, then comes the *Quai d'Orsay*, etc. It is important to understand that the new *Maître de requêtes*, the lowest rank within the CE, are aware of being the most excellent servants of French Grandeur. In their future career, they will spend many years in leading positions of the administration, the ministries or in nationalised companies. In this, their work will often bring them very close to political power. This tendency is confirmed by the French political tradition of establishing a restricted circle of personal advisers around every minister, these then are frequently composed of members of the CE. Furthermore, the normal CE - member will spend the most of his working life in Paris; a recent project to transfer the ENA to Strasbourg had to be partially cancelled.

The contrast between these two groups of civil servants therefore already finds its roots in their education : While the members of the Conseil d'Etat have had the benefit of the finest studying conditions France can offer, their judicial colleagues had to take the long way through the not so reputed universities. This discrepancy will then continue in the working conditions which, for the magistrates, are subject to growing complaint. All of this adds up to create a public opinion which has less and less esteem for magistrates and, in spite of some criticism concerning the C.E. corps members detachment from the people, still rates a career in the CE very highly.

These fundamental differences provide a first explanation for the divergent jurisprudence of the CE and the CCass and must be kept in mind when analysing the reasons for the path each of the two supreme courts chose.

On the basis of what we just learned about the existing divergences in general, it seems worthwhile to have a closer look at how Community law has been integrated into the training of future judges. Here too, we can note a difference in the approach :

Even if the role Community law plays within the curriculum of both branches of justice could be improved, the basic attitude of the two formations towards the EEC have differed in the past. Less centralised, the future magistrates simply didn't learn anything about Community law whereas the ENA -students were taught in an atmosphere of distrust towards European integration for a long time. A further important reason for the resistance the CE developed against the full implementation of Union law in France, resides in its somewhat delicate position within France's legal and institutional framework<sup>58</sup>. Concerning the problem of the control of laws, the CE finds itself in a quite different position to that of the CCass. The main task of the latter is to arbitrate between individuals and

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<sup>58</sup> For an in depth analysis of this problem by a member of the CE see : B. Genevois, note on CE 22.10.1979 in *Actualité Juridique* (1980), p. 43.

only quite seldom the action of the public administration is at stake. Even when this is the case, the decision the CCass hands down only concerns the individual affair in point. The CE however, usually issues daily judgements on the legality of public administration actions which, in quite a few cases, can have great political importance. The collective memory of the CE has still not forgotten the strong governmental reaction caused by its decision *Canal* in 1962<sup>59</sup>. In this decision, the CE had invalidated an order given by General de Gaulle which was to establish a special military court for crimes committed during the 'events' in Algeria. Very upset about this decision, President de Gaulle is said to have considered the pure and simple dissolution of the Conseil d'Etat. In this affair, the CE learned two lessons: It should never forget that its existence had no constitutional guarantee whatsoever. Although - or because - it is the oldest French court, it is not mentioned with a single word in any of the constitutions. The direct consequence of this deficiency is that, if he had decided so, the General could have dissolved the CE entirely legitimately.

The second lesson concerned its place within the institutional framework. Given the fact that the CE could not avoid to hand down decisions now and then which did not please the government, it was important to be on good terms with parliament. In the eyes of the CE however, declaring himself competent to control an act of parliament although it was later to the Treaty in question would have meant leading the administrative jurisdiction into a conflict on two fronts. As a Conseiller d'Etat later put it, the CE already often had against it a "heterogeneous troop uniting the upholders of public power, annoyed by the very strict control of their measures, the supporters of deregulated liberalism 'à l'américaine', contesting the distinction between private and public law and, of a more mediocre type, those practitioners of law who wished to be dispensed of studying a supplementary discipline"<sup>60</sup>.

These considerations were, as the *Canal* affair had shown, in no way purely hypothetical and it must be presumed that they played an important role in determining the Conseil's position in the early sixties and the seventies<sup>61</sup>.

A last and very important cluster of reasons for the conservative approach the CE adopted towards Community law might reside in its powerful position within

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<sup>59</sup> CE 19.10.1962, *Rec. Lebon*, p. 552.

<sup>60</sup> Yves Galmot, "Le Conseil d'Etat et le contrôle de la conformité des lois aux Traités", *Revista de Instituciones Europeas*, (January/February 1990).

<sup>61</sup> That this kind of reasoning was still current at the end of the eighties can be read in a note under a CE decision confirming the Semoules jurisdiction. The note was written by Bruno Genevois, a younger member of the CE : B. Genevois, "Note sur l'arrêt du Conseil d'Etat du 22.10.1979, Union démocratique du travail", *Actualité Juridique* (1980), p. 43.

the French establishment in its broadest sense. Up to 1958 the CE had the monopoly of interpreting public and constitutional law in France. Furthermore it participated in the elaboration of all legal norms. This had placed the CE in the very core of the French political system. From 1958 onwards, this predominance was under attack : The first assault consisted in the creation of the Conseil Constitutionnel, who's judges - political nominates - were considered as 'parvenus' in the public law establishment. Belonging to an institution which had been there for more than two hundred years, the members of the CE could not help asking "who are they to tell us what public law is?". The CE's position was further threatened when it finally became obvious in Paris that there was a court in Luxembourg which actually had the competence to intervene in what seemed to be French domestic affairs. If one adds to this France's accession to the amendment granting citizens direct access to the European Court of Human Rights in 1973, the predominance of the Conseil d'Etat's role had been seriously restricted within as little as twenty years. Notwithstanding the 'Canal-syndrome', the CE as a corps had and still has a very strong hold on administrative power in the national bureaucracy.

This might have led its members to consider Supremacy and Direct Effect as another threat to the status quo which for them was still, after all, quite favourable. Even if full enforcement of Community law was unlikely to substantially endanger their position, the awareness of a certain precariousness of their situation led the corps as such to defend their '*acquis*' in a static manner.

A first occasion for an elegant shift in its jurisprudence was offered to the CE in 1975, when the Conseil Constitutionnel decided not to examine the conformity of international treaties with national laws<sup>62</sup>. Before we try to understand why the CE did not make use of this occasion, let us have a look at the motives which drove the CC to its step.

As explained above, the doctrinal explication turned around the fact that character and form of the control operated by the CC were inappropriate to the distinct characteristics of international treaties. To us, this reasoning seems quite convincing, although it might not be the only reason for a decision of such strategic character.

Among the three supreme courts, the Conseil Constitutionnel is the youngest, it was founded in 1958 by General de Gaulle. It therefore seems possible that such a relatively recent institution felt the explosive power contained in the issue and thought it wiser to leave such a difficult task to the century-old regular supreme courts.

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<sup>62</sup> See *supra* note 6.



A second hypothesis would be that the CC felt that the Supremacy and Direct Effect problem demanded a different answer depending on the judicial or administrative character of the case. In this case, it would not have wanted to 'force' a single solution on both of the two other courts.

The last aspect I would like to spotlight in our non-exhaustive list of possible motives is the twofold political character of the CC which potentially weakens the court. This first of all stems from the nomination procedure of its members who are nominated by the President of the Republic and the Presidents of the two Houses representing three equal voices. Comparable to Germany, the selection of the nominees is of course subject to political tractations, but unlike Germany and the United States, their nomination is not submitted to a vote in the houses. As a result of this, the presidents, and especially the President of the Republic, can, *in extremis*, finally decide alone. Although this procedure could be seen as a guarantee for the independence of the members of the CC, these are very well aware that the French public is not used to this kind of nomination in the legal branch. Any political fraction can therefore quite easily discredit one or another decision of the CC by simply recalling its nomination procedure. In this context, the members of this court surely remembered the harsh public and political criticism which followed the ECJ *AETR* decision in 1971<sup>63</sup>. Although without any direct link with the Supremacy and Direct Effect doctrine, the vivid polemic which was triggered off by the insight into the extent of integration through law must have been impressive. All this might have led the members of the Conseil to consider that their position was not strong enough to take over a leading role in the full enforcement of Community law in France.

In any case, the CC had cleared the way for the two other courts. Let us, in examining their reaction, begin with the inertness of the Conseil d'Etat.

Our first attempt to explain it can simply recall that none of the factors which had determined the *Semoules* jurisdiction had become obsolete. Neither had the CE's position within the institutional framework changed, nor had it any reason now to consider that it could gain influence by subordinating itself to Luxembourg. At this moment, it became quite obvious that the Conseil d'Etat's position was hardly based on genuinely doctrinal foundations, for otherwise, a pondering of the different doctrinal aspects would undoubtedly have led to a change of its jurisprudence. On the one hand, French legal tradition protected laws as representing "*la volonté générale*", but on the other, the Constitution of 1958, adopted by the people in a referendum, clearly stated that international treaties had supremacy, without making any difference whatsoever between their former or latter character in relation to the treaty. The CE therefore had to

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<sup>63</sup> E.C.J., Aff. 22/70, *Commission vs Council (AETR)*, 31.03.1971.

ponder between a purely praetorian rule and a clear constitutional stipulation which had been confirmed by the people. The fact that the Conseil decided to favour the creation of a court, namely the doctrine *Matter*, shows that its true reasons, at least since the CC decision in 1975, were not of doctrinal dominance. Under these circumstances, its inertia cannot be surprising.

Quite the opposite of the CE, the Cour de Cassation merely let four months pass before it accepted the invitation of the French Constitutional Court. Its *Jacques Vabre* decision<sup>64</sup> seems even more courageous if we remember that it had quite heavy financial consequences for the French treasury which had to pay back an important sum to the coffee merchant who had filed the suit. In our attempt to explain this 'revolutionary' decision with extra-doctrinal tools, I propose to focus on three different dimensions of explanation : institutions, people and finally perspective.

The institutional context within which the CCass is situated is quite the opposite of that described further above concerning the CE. I have already pointed out that the differences in origin, formation and recruitment of the judges respectively serving in the CE and the CCass are very different. Just as much as these factors were of decisive importance to explain the CE's position, I believe that this dimension is one of the main reasons for the progressive character of the CCass' jurisprudence. Understanding themselves as practitioners, the members of the magistracy always claimed to be led by two main preoccupations: to facilitate commerce and to protect the individual in his rights. This self-understanding must be completed by an observation concerning the magistrates' relationship with the state in general and political power in particular. In contrast to the CE, the magistrates, beginning with their training, do not have the feeling that their task receives the same recognition as that of the CE. This must not especially be based on ill will but simply on higher numbers and the consequently poorer cohesion of the magistracy as a corps: the CE is an elite corps concentrated in Paris, the magistracy a heterogeneous 'melting pot' spread all over France. This - certainly unconscious - feeling of being less privileged than their administrative colleagues must then be combined with a certain distance towards government and politics. The notion of 'national interest', an invisible pillar of the ENA curriculum, is absent from that of the Ecole de la Magistrature and can hardly be found in any defence speech before a civil court. I therefore believe that the institutional position of the Cour de Cassation greatly favoured a swift endorsement of Community law.

Given its feeling of being second to the CE, the Community level offered itself as an instrument enabling the judicial branch not only to accomplish its task

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<sup>64</sup> See *supra* note 14.

even better but also to gain an advantage on the Conseil.

A second important dimension concerns people involved in the process of change. Although a single individual of course only seldomly makes a difference in a matter of such importance, an especially convincing individual in the right moment can be of great importance. In spite the fact that the secret of deliberation unables us to present indubitable proof, it seems very likely that the role played by the public prosecutor Touffait was decisive. Of fervent European conviction, the late Adolph Touffait had been a close friend of Pierre-Henri Teittgen, who himself was one of the pioneers of Community law in France. Together they had done a lot for the promotion of the European idea in the field of law during a period which was not particularly favourable to such activity<sup>65</sup>. It was therefore extremely fortunate (if not deliberate) that the conclusions of the first case presenting the *lex posteriori* problem which the CCass had to decide after the Conseil Constitutionnel decision of January 1975 were presented by Touffait. Hearing his exposition with eyes closed, one could for a moment have imagined oneself to be in the European Court of Justice : "... the reasoning the Court of Justice of Luxembourg (develops) such a coherent argumentation that its conclusions impose themselves"<sup>66</sup>. Not only does Touffait completely endorse the reasoning of the ECJ concerning the necessity of Direct Effect and Supremacy of Community law but he also bases his argumentation on an teleological interpretation of the Treaty of Rome by paraphrasing its Articles 2 and 3. It may be reminded that his suggestion was to found the decision exclusively on the specific character of Community law. The fact that the court did not follow him on this point should not diminish his merits. It probably is no coincidence that, only one year later, Touffait took the first opportunity to go to Luxembourg as a judge at the ECJ. Despite the fact that he surely considered this change to be a promotion, there were some very political reasons for his departure. Not only for the financial reasons mentioned above the reaction of the government mitigated : on the one hand, the newly elected President Giscard d'Estaing was a declared supporter of the European idea, but on the other hand, the governmental bureaucracy (partly dominated by the Conseil d'Etat) was opposed to any abandon of sovereignty. Also to the ears of a political public, Touffait's conclusion that "the operated transfer (...) in favour of the Community legal order (...) leads to a definitive limitation of (our) sovereign rights..."<sup>67</sup>

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<sup>65</sup> Must we bring into remembrance de Gaulle's remark : " Of course one can jump on a chair like a kid crying 'Europe! Europe! Europe! but that doesn't lead to anything and that doesn't mean anything': radio-Television interview on December 14th 1965.

<sup>66</sup> Conclusions Touffait, *supra* note 16.

<sup>67</sup> *Ibid.*

seemed tantamount to the end of France's sovereignty.

The reaction of the political class actually turned out to be a time bomb : it almost took four years before the full extent of its anger became public. Led by some Gaullist politicians and lawyers, the ECJ was compared with Stalin's revolutionary courts and the CCass considered as its complice<sup>68</sup> : "The Cour de Cassation has been contaminated by the virus of supranationality !"<sup>69</sup> I will return to the consequences of this uproar further below.

The fact that the CCass did not let this harsh criticism influence its jurisprudence leads us to the third element of our analysis : perspective. I believed that the courts far-sightedness materialised in two considerations. First and foremost, the CCass had in mind the interest of French economic agents and citizens. In the case of the former, the impossibility of referring to certain community regulation was bound to represent a serious economic disadvantage in comparison to their European competition. In the long run, this could have led to a movement of forum shopping, combined with some delocalizations of head offices. Concerning the individuals, the problem was basically the same only that in this case the stake was not economic competitiveness, but the protection of civil rights. Would it be conceivable that in France, cradle of human and civil rights, individuals would benefit from a poorer standard of protection than in the other countries of the Community? In the eyes of the CCass, traditionally a rampart against arbitrary state action, this perspective must have seemed quite unacceptable.

The second consideration could have been of a more down to earth nature. By fully enacting Direct Effect and Supremacy, the scope of action open to the judicial magistrate would undergo considerable widening : From now on, any simple court could not only control all acts of parliament but also became what the Treaty of Rome had foreseen, the common judge of Community law. This extension of competence was indeed very tempting and offered exciting new perspectives on the work of France's judicial branch.

As a result, we can consequently credit the Cour de Cassation for having made the first, in the context of time, courageous step. Its position within the institutional context of the French legal system led it to regard the full integration of Community law as a chance for increasing its own powers and improving its position within the system. Furthermore, its practical, non-doctrinal approach proved to be open-minded towards the strong European convictions of certain of its members. In this situation, the full endorsement of the two Community doctrines was the only possible solution for granting French

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<sup>68</sup> *Le Monde*, 20.09.1980, p. 9.

<sup>69</sup> *Le Monde*, 23.09.1980, p. 14.

citizens and economic agents the same rights as their European neighbours.

While the quite critical reception of the *Jacques Vabre* decision by the political opinion did not influence the CCass, it did, however, led to quite a threatening development<sup>70</sup>. During a public meeting organised by Michel Debré<sup>71</sup> (Gaullist, one of the main responsables for the *Assemblées* decision against the European Defense Community, ex-Prime Minister and presidential candidate in 1974), the idea of a bill protecting laws against international treaties had been born. Taking advantage of parliamentary negotiations concerning a 'code of judicial organisation', the Gaullist MP M. Aurillac tabled the following amendment: "Jurisdictions can neither directly nor indirectly take part in the exercise of the legislative power, nor prevent or suspend the execution of regularly promulgated laws for any reason what so ever."<sup>72</sup> To the great surprise of everybody, the amendment was accepted<sup>73</sup>. Fortunately, it was to be blocked by the Senate a few weeks later.

I have mentioned this episode because it gives an insight on the 'public' acceptance of Direct Effect and Supremacy in the early eighties. Although these events only occurred four years after the *Jacques Vabre* decision, there can be no doubt concerning the direct link between the two affaires. One can furthermore presume that the criticism did not suddenly erupt but had been steadily building up within the political and administrative establishment. This provides us with a first answer to the question why the Conseil d'Etat did not follow the CCass on the path of full compliance with the ECJ's *Costa* jurisprudence. The first reason for the continuing inertia of the CE indeed lies in its hope that Parliament would decide and thereby settle the difference between CE and CCass. This expectation first of all resulted of the Conseil's traditional belief in state and strong central power as described above. Furthermore, it also confirms our presumptions concerning the motivations of its *Semoules* jurisprudence; the fear of entering into conflict with the legislator. In this perspective, the CE would have been able to more or less enthusiastically accept any solution adopted by the *Assemblée*: If it had decided to allow courts to examine and, given incompatibility with a treaty, not apply national laws, the

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<sup>70</sup> See *Revue du Marché Commun*, (n° 247), May 1981, p. 245-47.

<sup>71</sup> See *Le Monde*, October 21th 1980, p. 9.

<sup>72</sup> *Journal Officiel* Assemblée Nationale, débats, session on October 10th 1980, p. 2634 - 2644.

<sup>73</sup> It should be added that the only socialist to take part in the vote announced that he would use the time during which the amendment was under consideration by the Senate to study it 'more carefully'. See *Le Monde*, supra note 67.

CE would at least have avoided a potential conflict with Parliament. If, on the contrary, the National Assembly had taken the legal dispositions to prevent the above, the CE could have continued its jurisprudence concerning the *lex posteriori*. In any case, its hesitant attitude would have had the merit of leaving the final decision to those who represented "la volonté générale".

Consequently, growing Parliamentary resistance to the CCass' judicial politics of which the CE certainly had knowledge is liable to have made it persist in its refusal to follow the judicial branch. This explanation, however, only remains valid until the end of 1980, the date on which the Senate refuses to accept the amendment of Mr. Aurillac.

From then on, it should have been quite clear that a decision could not be expected from that side.

The only hope which then remained was that the Conseil Constitutionnel would change its jurisprudence and thereby accept to control the conformity of laws with the existing treaties<sup>74</sup>. Although some authors continued to criticise the CC's refusal to 'stand up to its responsibilities', there was little chance that it would change a jurisprudence now five years old, frequently confirmed and in concordance with that of the CCass. Objectively, everything pointed in the direction that the only solution for the CE would be to modify its own point of view. Until this finally took place in 1989 with the Nicolo decision, a line of events led the Conseil to understand that change was imperative.

I would like to present this chain of events in a, as far as possible, chronological order. It may be added at this stage that I am far from proposing any deterministic approach to explain changes. It is certainly true that the motivation for the eventual shift in jurisprudence was pluricausal. I do however feel that all of the following aspects were of importance when the CE finally 'broke the spell'.

A first series of events finds its origin outside of France. In 1983, France was condemned for breach of Community Law<sup>75</sup>: In application of a community directive voted in 1972, a French law had amended the national tobacco monopoly, authorising the responsible minister to fix the retail price of every product. This, the ECJ esteemed, was in contradiction to the goals of the above-mentioned directive. Seized by a tobacco-importing company, the CE was asked to annul a ministerial decision refusing the company the right to raise its prices for certain tobaccos. Based on the French law (incorrectly) transposing the Community directive into national law, the CE confirmed the legality of the

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<sup>74</sup> See Y. Galmot, *supra*, note 59.

<sup>75</sup> E.C.J., 21.06.1983, Commission vs France, *Rec.*, p. 2011.

government's decision, and this in spite of the ECJ's decision of breach of EC-law<sup>76</sup>. The law not having been modified by Parliament, France was a second time condemned in 1988<sup>77</sup>. This kind of chain verdicts was of course a direct consequence of the CE refusal to remind the French government that it was not respecting its international commitments. It was only a matter of time until the next comparable case would come before the ECJ.

I presume that at least the particular case I have just described was not a pure product of coincidence. The company which ask the CE to annul the minister's refusal, the Société International Sales, was one of the biggest importers of tobacco. If we then remember that the CE decision which confirmed the Direct Effect of Community directives in France was initiated by Philipp Morris and Rothmans, the existence of a concerted action seems possible. It could indeed be that certain very export or import-oriented companies systematically attacked government decisions they felt would be possibly contrary to Community law. The aim of this action would then have been to provoke such chain of verdicts, thereby steadily increasing the pressure on the French government and on the CE.

At this point, I would like to point out some reminiscences which we can find in this context with the neofunctionalist theory on regional integration<sup>78</sup>. According to its premises, the above mentioned tobacco industry would be part of an important number of pressure groups selfishly seeking economic advantages. A side product of their pressure would however be the incremental expansion of integration by functional spill-over : Acting within an economic context already characterised by a high degree of integration in some sectors (e.g. lack of protected national markets in the EEC), fair competition henceforth depends on the existence of comparable legal constraints in every member state. As the CE refuses to assure the correct application of Community directives, the legal context economic agents find in France is bound to be different from that of the rest of the Community. As soon as this difference is felt as being harmful to economic agents established in France, they will develop pressure in order to integrate the legal sector on the Community level. In our case, this means to assure the full supremacy and direct effect of Community law. In any case and despite the lack of any concrete legal consequence of the above

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<sup>76</sup> C.E. 13.12.1985, *Rec. Lebon*, p. 377.

<sup>77</sup> E.C.J., Aff. 169/87, 13.07.1988, *Commission vs France*, Rec., p. 2603.

<sup>78</sup> See Haas, *The uniting of Europe* (Stanford: Stanford University Press, 1958). For a recent study applying this theory to legal integration see Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organisation* 47 (Winter 1993), pp. 41 - 76, esp. pp. 52 - 56.

mentioned verdicts, the CE must have increasingly become nervous. Under this angle, the two decisions opening certain possibilities for the direct effect of directives which the CE took at the end of 1984<sup>79</sup> could have been addressed to the ECJ as an armistice offer. The message could have been : Give us some time to find our own way to assure full effect of community because the result is what really counts.

Taking into consideration the growing reception which the Direct Effect and Supremacy doctrines received in the other member states, this offer had no chance. Until the beginning of 1980, the Conseil had quite a valid argument for its refusal to endorse: Not only in France were the judicial politics of the ECJ seen with a certain distrust. Two of its major partners, Germany and Italy, both had supreme courts which refused to fully comply with the ECJ's jurisprudence. This resistance, however, diminished more and more during the eighties. In 1984, the Italian Constitutional Court in its decision *Granital* authorised lower judges to themselves declare a national law incompatible with a former treaty without beforehand referring the case to the Constitutional Court.

In Germany, the *Bundesverfassungsgericht* 1986 pronounced its famous *Solange II* decision, announcing that henceforth it would no longer control the constitutionality of Community legal acts, since the level of protection of the fundamental rights on Community level was comparable to that on a national level<sup>80</sup>. From this moment on, not only the Conseil d'Etat but also France were totally isolated.

Apart from the psychological effect of this isolation, it also led to a growth of the discrepancy in treatment of the French nationals in comparison to other member state citizens. This development became even more alarming when in 1985, the European Council decided to create a fully integrated Common Market. Even if the full dimension of change programmed by the Single European Act only became evident at the end of 1987 and the beginning of 1988, its impact on the CE's perception of the European integration must have been considerable. From this moment on, the project of European unification was, for the first time since decades, once again on the top of the public agenda.

Reacting to the announcement of Jacques Delors that in ten years 80 % of economic law would be of Community origin, lawyers and students of law or economics started to study Community law. This of course had consequences on the activity of the courts. Not only did judges more often decide preliminary references to the ECJ but also the lawyers more frequently made use of

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<sup>79</sup> *Supra* notes 37 and 38.

<sup>80</sup> BVerfG, 22.10.1986, *Solange II*.



Community law in the defence of their clients' interest. From 1987 onwards, the number of demands for preliminary rulings referred to the ECJ by French lower courts stabilised to more than thirty a year whereas until 1986 the average lay by eighteen<sup>81</sup>.

All this adds up to create supplementary pressure on the Conseil which must have begun to feel overrun by the events leading to the key date 1992. A part from this - important - psychological effect, there also were solid economic reasons which, in advance of the Common Market made a full integration of Community law into French law paramount. How could the project of 1992 become effective if the almost three hundred directives intended to transform it into legal reality were not to be directly enforced by the Conseil d'Etat? The fact that this problem is not of mere academic interest is proved by the fact that the *Assemblée Nationale* apparently shared the same preoccupation.

Obviously worried about the CE's intransigent and hostile position towards international and more specifically Community law, Parliament did not hesitate to let the Conseil know about its discontent : In 1987, it accepted to transfer the competence for suits directed against the action of the newly created *Conseil de Concurrence* from the Conseil d'Etat to the Court of Appeal of Paris<sup>82</sup>.

The CE clearly considered this transfer as an unfriendly act which led it to reconsider one of its motives for its *Semoules* jurisprudence. As mentioned above, one of the reasons for this jurisprudence had been that keeping Community law out of the way seemed to be in the well understood interest of the CE as a corps; it was, in other words, a question of power. To which extent, however, could one under these circumstances still believe that the present jurisprudence was liable to add or even to preserve the CE status within the French judicial and political establishment? The pertinence and topicality of these interrogations were confirmed by additional governmental pressure. In November 1988, the French Prime Minister asked the Conseil to undertake a "synthetic reflection on the possibilities to increase the effort of adaptation of the French domestic law to the Community exigencies" and that in the "perspective of the imminent fulfilment of the large domestic market"<sup>83</sup>.

Even if as a result of the above the CE was totally aware that it could no longer count on governmental or parliamentary support for its jurisprudence, it may have hesitated to act in accordance with the current political will. What would

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<sup>81</sup> European Court of Justice, *Annual Report 1991*, (Luxembourg : Office des Publications Officielles des Communautés Européennes, 1993), p. 136.

<sup>82</sup> *Journal Officiel*, 07. 03. 1987, p. 7.391.

<sup>83</sup> Letter from the Prime Minister dated November 21st 1988, quoted by Y. Galmot, *supra* note 59.

happen if it changed its position and the next Gaullist President and his parliamentary majority would then be less enthusiastic for the European cause? Here again, we find the 'Canal -syndrome' mentioned above. This fear was taken from the Conseil by a decision of the Conseil Constitutionnel in 1987, confirmed in 1989<sup>84</sup>. In its findings, the CC acknowledged that the existence of an administrative jurisdiction represented a "fundamental principle confirmed by the laws of the Republic", thus its existence was a rule of Constitutionnel value<sup>85</sup>. From this moment on, Parliament had lost the power and competence to simply abolish the administrative branch of justice. Therefore, a repetition of the Canal decision would not newly endanger the Conseil d'Etat in its very existence.

At the end of 1988, the main reasons of the CE's *Semoules* jurisprudence had consequently become obsolete :

- With government and even Parliament urging it to change its jurisprudence, should the Conseil have been "more royalist than the king"? Did it make sense to protect the Assemblée against a development the High House was now energetically furthering?
- Things being as they were, the members of the CE could also no longer hope to maintain and even less to add to their power within the French establishment. On the contrary, it was slowly gliding into isolation.
- All of these elements were amplified by the new European élan which had taken hold of the entire Community. Standing aside in this situation was no longer appreciated as a particularly patriotic French attitude but rather as that of a 'spoil-sport'.

Under these circumstances, an objective mind would have considered change as the only way out, therefore imminent. The question then is to what degree the members of the *Conseil* were to be described as 'objective minds'. It is not our intention to underestimate the CE, there can be no doubt about the brilliance and intelligence united in this superb corps. What I do however want to point out is that especially a study on the extra-doctrinal reasons for legal change must strongly focus on the individuality of the actors concerned and the social constraints under which they act. In the case of the CE, this aspect is of great importance because we are dealing with quite a homogenous corps, this equals strong social pressure on its members to act in accordance with the corps tradition, which consists in serving national interests. The last element of our explanation of change concerning the CE must therefore deal with the question

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<sup>84</sup> C.C. 23.01.1987, *J.O.* 25.01.1987, p. 924 ; C.C. 28.07.1989, *J.O.* 01.08.1989, p. 9679.

<sup>85</sup> *Ibid.*

of how the majority of the corps members came to believe that an enactment of the Direct Effect and Supremacy doctrine would in the end serve the interests of France as a nation.

I believe that one of the keys to the understanding of this development lies in the evolution of the *ENA*'s curriculum. Until the beginning of the eighties, it was characterised by - to put it cautiously - a certain distance towards Community law. As a Sorbonne professor told us, the simple fact that European law courses existed must not be taken as a guarantor of Community friendliness. He himself had made this experience while giving some lessons on EC-law at the *ENA*: Having asked the administration to xerox and distribute some documents drafted by the European Commission for the preparation of his next class, he was told by the Vice Director : " Monsieur, ici, nous défendons les intérêts de la France!" and the distribution was refused. As one can imagine, we have come a long way since.

A first reason for a development to a more Community friendly attitude within the *ENA* simply lies in the fact that the members of the CE could not possibly have remained completely immune to the in some aspects euphoric 1992 campaign. Becoming aware of the crucial lack of information on the Community as a whole and of the considerable influence of EC - law in particular, seminars and meetings were organised all over France. Public organisations and private companies established posts for advisers in Community matters. Being a major pillar of the French establishment, the CE could not avoid coming more and more frequently into contact with Community law and with people who felt that this law was, after all, a good thing for France.

The most direct contact the CE had with European law stemmed from the delegation of an - experienced - Conseiller d'Etat to the ECJ. As one of the "big" member states, France had the right to nominate two candidates for the ECJ, one judge and one Avocat General.

Since 1952, the French government had thought it wise to nominate a member of the CE for the post of Avocat General. The organisation of the ECJ having been developed according to the blueprints of the CE, the belief was that a member of the administrative law branch would more easily fulfil this role specific to the French law system. According to this logic, the judicial branch provided for the candidate to the post of judge. This division of tasks lasted until 1982, a year in which the government took advantage of a third seat it had received for two years in order to swap the roles<sup>86</sup>: From now on, the CE nominated the judge, and the magistrates occupied the function of Avocat General. This "rochade" was the result of pressure on the part of the CE which

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<sup>86</sup> This third seat was accorded to compensate the effects of the Community expansion to include Greece and was occupied by Mrs. Simone Rozès.

had turned out to be increasingly unhappy with the status quo. Unexpectedly, the role of the public prosecutor in the ECJ had developed to be much less influential than that of the French original. In contrast to French courts, the European Court quite frequently did not follow the conclusions of the prosecutor who, again unlike the French model, never assisted in the final deliberation. Under these circumstances, the role played by nominated Conseillers d'Etat had proven to be tiring and of lesser influence than expected. As I have learned from magistrates, another reason for the CE's determination to occupy the position of judge was linked with its growing isolation in France concerning the endorsement of Community law. If it was not possible to convince the other French supreme courts not to follow the *Costa*-jurisprudence, one could at least try to shift the jurisprudence of the ECJ. The first member of the CE to be nominated for the post of judge at the ECJ was Yves Galmot, according to his curriculum vitae a typical product of the French elite educational system<sup>87</sup>. During the six years Mr. Galmot was in office in Luxembourg, no remarkable shift in the *Costa* jurisprudence had occurred; it is however not sure that this can be said about Mr. Galmot's attitude towards the Conseil d'Etat's jurisprudence. As he said in his farewell speech in 1988: "I can assure you that after six years in Luxembourg I, as a Conseiller d'Etat will never again see the French Public Law as before"<sup>88</sup>. This is actually only one example for the fantastic socialisation device the ECJ represents. In interviews I have conducted with all former French ECJ members, this was a feature they all agreed upon. The general opinion was that an institution, which today can already look back on a - measured by its importance and degree of innovation - tremendous jurisprudence, imposes itself on all new members. Even if the attitude of a newcomer towards Community law should be a critical one, he would in a short span of time be assimilated by the institution as such and by the older members.

Consequently, the members of the ECJ tend to eventually become the best ambassadors of EC law in their countries of origin.

If we look at the chronology of events, this remark seems to be singularly true in the case of Y. Galmot: Having left the Luxembourg court in October 1988,

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<sup>87</sup> Born in 1931, Galmot attended the most famous French High School, the Lycée Louis le Grand, before taking a degree in law and then acquiring his diploma at the Institut d'Etudes Politiques de Paris which directly lead him to the ENA, which he left in 1956. At the age of 32, he was member of the CE.

<sup>88</sup> European Court of Justice, *Apperçu des travaux de la Cour de justice et du Tribunal de première instance des Communautés Européennes en 1988 et 1989 et audiences solennelles 1988 et 1989* (Luxembourg: Office des Publications Officielles des Communautés Européennes 1990), p. 191.

he was immediately reintegrated into the CE; one year later, the Conseil took its *Nicolo* decision. As members of the CE have told us, this is far from being a coincidence. As we have learned, Galmot had already been in frequent contact with the CE during his stay in Luxembourg in order to insist on the growing necessity to end the isolation into which the Supreme court had manoeuvred itself.

It would be blunt determinism to pretend that a single individual finally decided a fifteen year old struggle. One should however consider that the case of Galmot was only the tip of an iceberg. Together with younger colleagues such as Patrick Frydman and Bruno Genevois, Galmot was the most exposed indicator of change within the corps.

In this perspective one must also mention the significant influence of Marceau Long, vice-president of the CE since February 1987. Long had served as Secretary General to the French government in the early eighties and had been President of the French national carrier Air France. Also because of his professional background, he was widely regarded as a pro-European.

Here, our three sub-strands of explication merge : A changed environment, henceforth favourable to European integration, a more pro-European training and finally the influence of the ECJ via its French judges. At this point, all was set for the two landmark decisions *Nicolo* and *Alitalia*. Given the development I described, it is no coincidence that the two decisions were taken with an only eight month interval as well as the fact that *Alitalia* led the way. As we have seen, the problems the CE had and still has with the doctrine of Direct Effect are certainly of doctrinal character. The circumstances in which the problem presents itself do however leave some latitude for compromise; the *Alitalia* decision is situated within it. With Supremacy, such a compromise seemed impossible: either the CE accepted it or it didn't! Therefore, the order in which the two decisions were handed down correspond to the amount of conviction needed to persuade the more sceptic members of the court that the time was ripe for change. Once this step was made, the extension of supremacy to Community regulation and directives was the next problem on the agenda. The Conseil probably felt that it would, now that full supremacy had been granted, have to deal with an important number of cases. It would undoubtedly have created an extremely complicated doctrinal and practical situation if the CE would have excluded the derived Community law from the benefit of supremacy.

Under these circumstances, it must have seemed a wiser solution to now draw back to an operational jurisprudence instead of deliberately opening the next field of conflict.

What still today remains to be done today is the full enforcement of Direct Effect. As described above, the method employed by the CE which consists in always founding an action in court on the national regulation translating the

Community directive is not only complicated but more important, it does not cover all possible constellations. Here one can see the disadvantages of compromise: Believing that it could apply Direct Effect to directives on the basis of national law only, the CE has built up a complicated and *in extremis* ineffective jurisprudence. It will now take a great deal of courage to abandon the initial path in favour of a clear alignment on the *Van Gend en Loos* jurisprudence.

Whatever the future development of this question will be, the analysis of the extra-doctrinal reasons for legal change has shown that the combination of a great number of very different pressure-creating factors were necessary, before the Conseil d'Etat realised that it could only gain by change. In our attempt to understand why the CCass shifted its jurisprudence into a Community conform direction almost fifteen years earlier than the CE, two reasons seemed to be of central importance :

- The importance of the diverging education of the magistracy on the one hand and the CE-corps were decisive. Placing the latter in the front row of the French establishment, their elite training led them to feel particularly attached to the French central state. For the former, things were quite the other way around. Lesser public esteem, lesser cohesion as a corps and a more heterogeneous educational background led them to recognise the chance of adding to their influence via Community law earlier .
- The consequence of this first element was that our two actors originally saw themselves on different steps of the ladder of a (judicial and political) French establishment. While for the CE any change in the status quo could only mean loss of influence, things were the other way around for the CCass. Their reaction to Direct Effect and Supremacy was a flawless application of this insight.

As to the situation today, apart from the problem of the legal basis for the two doctrines, the only quack comes from the Conseil d'Etat. As one author entitled a study on the courts' relation with Community law : " .. des progrès mais peut mieux faire"<sup>89</sup>.

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<sup>89</sup> Kovar, "Le Conseil d'Etat et le droit communautaire: des progrès mais peut mieux faire", *Dalloz chr.* (1992), p. 207.

## B.

The last issue to be discussed is intimately linked to the foregoing in as far as it also aims at explaining how change in jurisprudence takes place. While the previous section was open to a wide range of socio-cultural influences on judges and courts, this one will focus on a single potential source of influence on jurisprudence : doctrine.

This questioning calls for a certain number of methodological remarks beginning with the definition of 'doctrine'. Even if it should be easy to admit the working definition that what we are talking about is the sum of scientific, published opinion concerning a field of Science, the problem of knowing what publications to consider remains. Considering the great number of appearances which deal with International, European and French constitutional law, a representative selection had to be made.

I first of all ruled out the pure teaching manuals. Although of doubtless importance, I realised that their approach was purely descriptive and - except for the fact-creating power of regulation - therefore unlikely to have had any determining influence. In a second step, I decided to focus on periodical publications. This choice had the advantage of giving us an impression of the dynamics of doctrine : How had the reaction to the ECJ' jurisprudence developed and was there a growing or maybe declining pressure on national courts to behave in a certain manner? The risk that this choice would lead us to ignore certain non-periodical publications which however directly concerned our subject were comparatively minor. If a book turned out to be of such importance, it would necessarily be discussed in the periodicals. The last methodological question concerned the choice of the periodicals, which was guided by two main criteria: The duration of its publication (as far as possible having begun before 1963 because of *Van Gend en Loos*) and the importance accorded to Community matters. This led us to a selection of eight titles<sup>90</sup>.

Our analysis will proceed in two steps: First of all, I propose to take a look at the way the French doctrine reacted to some major decisions of the ECJ. Since I presume that the influence doctrine has had on the different supreme courts varies, I then propose to examine them one by one. Before doing so, I however would like to make a few general remarks concerning doctrines' relation with Community law. As we know, the development of a distinct scientific domain of Community law is a recent phenomenon; as far as France is concerned, we

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<sup>90</sup> *Revue du Marché Commun* (RMC), *Revue Trimestrielle de Droit Européen* (RTDE), *Gazette du Palais* (GP), *Actualité juridique* (AJ), *Revue Française de Droit International Public* (RFDIP), *Revue critique de Droit International Privé* (RDIP), *Annuaire Français de Droit International* (AFDI) and *Revue Générale de Droit International* (RGDI); subsequently referred to in their respective abbreviation or as 'analysed (French) literature/publications/periodics.

find first signs for this as late as the end of the sixties. This has two consequences : Until today, the majority of the confirmed scientific specialists in Community law are people who originally either came from the field of domestic public law or from classic International law. Having abandoned their traditional field of studies, their professional existence henceforth strongly depends on a positive, expansive development of Community law. This can of course not remain without consequence on their work as scientists. Concerning this phenomenon, Anne-Marie Slaughter Burley speaks of an 'identity of interest' between scholars and practitioners of Community Law<sup>91</sup>. In the worst case, this could be an elegant description of a voluntary blindness for the deficiencies of Community law, otherwise it could simply mean that public criticism on decisions of the ECJ is considered as cutting the ground from under one's own feet. As we will see below, one of these possibilities could very well apply to France.

The second consequence of the only recent advent of EC-law is, that apart from those directly specialised in it, ignorance dominantes. This lack of even quite basic knowledge lasted right up to the early eighties.

This is one of the reasons why in 1963 and '64, the two decisions founding the doctrines of Direct Effect and Supremacy were almost ignored in the analysed French literature. Solely two of the eight chosen publications- those specialised in International law - seemed to have realised the fundamental innovation represented by the courts *Van Gend en Loos* decision. In the AFDI, one of France's leading specialists in EC-law quite simply notes that one will have to expect a difficult phase of transition<sup>92</sup>. A note in the RGDI seems more enthusiastic when it declares that the *Van Gend en Loos* decision "opens perspectives of which one cannot underestimate the importance"<sup>93</sup>. All in all it must however be underlined that the reaction to this first fundamental decision was of benign neglect, specialised publications like the RMC - admittedly more turned towards the purely economic aspects of the EEC - did not even mention the case.

The reaction to the 1964 *Costa* case was quite identical. While neutral analysis dominated in all publications, Boulouis added that one could begin to recognise " the essential lines of a doctrine for a Community based on law"<sup>94</sup>.

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<sup>91</sup> Slaughter Burley, "Legal Research and the EC," *Journal of Common Market Studies* 31, n°3 (September 1993), p. 391 - 400, 395.

<sup>92</sup> Boulouis, "Le juge interne et le droit communautaire", *AFDI*, (1963), pp. 736 - 778.

<sup>93</sup> Ampoux, " A propos de Van Gend en Loos", *RGDI*, (1964), pp. 110 - 157.

<sup>94</sup> Boulouis, "Note sous Van Gend en Loos", *AFDI*, (1964), pp. 398 - 403.



The third and last decision concerning which I would like to examine the reaction of the French doctrine is the *AETR* case in 1971. Unlike the two former cases, I feel that our choice of this decision requires some explanations. I would like to spotlight two aspects: First of all I believe that *AETR* marked the end of the founding period of Community law. As Robert Lecourt, member and later President of the ECJ from 1963 - '76 confirmed to us, the judges had clearly felt that this decision touched the point to which they could go without endangering the whole legal edifice. The second reason for our choice is the political reaction set off by this decision in France.

It consequently represents the moment in which the broad French public became aware that things were happening in Luxembourg.

For the first time in history, a decision of the ECJ found its way into newspaper articles of considerable size. If in a first reaction, the puzzled journalist merely spoke of a "at first sight disconcerting decision"<sup>95</sup>. Two weeks later, a "high-ranking international government agent" was to be heard on the subject in an article entitled: "Has the Court of Justice of Luxembourg exceeded its competence?"<sup>96</sup>

Under these circumstances, one could have expected a more extensive reaction in the specialised publications; this was however not to be found. In his traditional review of the ECJ jurisprudence, Boulouis simply ended a neutral description of the facts by noting that this decision would enter into the annals of Community jurisprudence<sup>97</sup>. Reacting to public discontent, Kovar remarked that the basically positive contribution of the *AETR* decision could be endangered by political resistance<sup>98</sup>. And yet the impact of this decision had been more important than printed opinion leads us to believe. It is for instance a public secret that Mr. Boulouis, pioneer of Community law in France and Professor of Community Law at the University Paris II Assas, started to discreetly distance himself from the ECJ' jurisprudence he felt was no longer in accord with the treaties. There is, however, no trace of this alienation in his comments, which remain sober.

The overall lesson we can keep in mind after this brief examination of the French doctrines' reaction to three decisive ECJ decisions is consequently first of all ignorance and secondly neutral, cautiously positive description. It almost seems as if those more closely concerned with the Community law did not wish

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<sup>95</sup> *Le Monde*, 3.04.1971, p. 37.

<sup>96</sup> *Le Monde*, 27.04.1971, p. 19- 20.

<sup>97</sup> Boulouis, "Note sous l'arrêt *AETR*", *AFDI*, (1971), p. 366 - 370.

<sup>98</sup> Kovar, "Note sous l'arrêt *AETR*", *RGDI*, (1971), p. 387 - 418.

to break the silence for fear of the public reaction when confronted with the extent of legal integration.

The second step of this section will now consist of an analysis of the influence doctrine had on the Supreme Courts. As I already mentioned, the potential influence of doctrine strongly varies from court to court. I propose that this difference is essentially due to the distinct legal culture of each institution; for this, we can therefore refer to the previous section in which legal change was also explained by institutional culture.

Especially in the case of the Cour de Cassation, the doctrinal discussion of Direct Effect and Supremacy, or of Community law in general, was of little importance when it took its *Jacques Vabre* decision. In compensation of the relative lack of doctrine, it must however be pointed out that the CCass is traditionally very sensitive to doctrinal discussions. Consequently, the fact that published opinion since *Van Gend en Loos* can be characterised as neutral to friendly could have confirmed the court in its intention to endorse community doctrines. For two reasons, I do however not believe that its influence has been decisive: First of all, the sparse place accorded to Community law in the analysed publications reflects the rank which Community law had within the doctrinal discussion. It can quite clearly be said that it was not a major topic. Its simple extent can therefore not have been enough to bring a supreme court to change jurisprudence. This appears to be even more true when recalling the reaction to *AETR*. The *Vabre* decision having been taken only four years later, the members of the CCass must still have remembered the public and political distrust towards Community jurisprudence expressed by the reaction in 1971. The court must therefore have known that an identical, maybe even stronger reaction could be expected if it decided to enact the two doctrines. Under these circumstances, I feel that the positive input caused by the doctrine was neither strong nor wide enough to counterbalance the negative one based on the establishment's political distrust towards integration by law.

If there has been an influence, I would presume that it rather went the other way: The CCass led doctrine to better understand the reasons for which the full enforcement of Community law was so important.

In the case of the Conseil d'Etat, I will also defend the thesis that doctrine had little influence on the jurisprudence concerning Community law, the argumentation however is opposite to that concerning the judicial court. Once again because of its specific tradition, the CE is reputed to pay very little attention to the doctrine in general. This can already be deduced from the fact that in the Advocate General's conclusion, references other than those to the court jurisprudence are taboo. As a Conseiller d'Etat explained, not only do the members of his corps simply not have the habit of looking at the doctrine, they also have a slight feeling of disdain for those who try to 'understand' what they,

the supreme court, intend to say. Had this been otherwise, the CE would probably not have maintained its conservative jurisprudence over so many years during which doctrine steadily increased its demands for alignment in direction of the CE. Compared with the multitude of pressures the CE was subject to at the end of the eighties, that caused by doctrine must have worried it the least.

Summing up, no direct, causal link between the supreme courts jurisprudence in Community matters and doctrinal pressure can be made according to our analysis of French doctrine. Although doctrinal pressure, when it existed, generally went in the direction subsequently taken by the courts, there are no indications that this pressure was strong enough to have made the difference. If, as in the case of the CE, doctrine strongly argued in favour of a shift in jurisprudence, it merely represented one instrument within a whole orchestra.





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