The Danger of Judicial Nationalism

Maastricht Journal of European and
Comparative Law
2021, Vol. 28(6) 741–743
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DOI: 10.1177/1023263X211063761
maastrichtjournal.sagepub.com

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Courts are not always right. But we rely on them to resolve disputes in the belief that, even when they get it wrong, they at least act without any systematic bias. This presumption is fundamental for the functioning of the European Union, given the diverse interests of its Members. EU courts are supposed to interpret EU law impartially and ensure that it is applied uniformly, regardless of national interests or preferences. Yet this presumption is increasingly challenged by national courts claiming to protect their national constitutional values from being undermined by EU law.

In 2014, when the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) submitted to the Court of Justice of the EU its first ever request for a preliminary ruling, it did not ask for guidance on how to interpret EU law. Instead, it asked the Court of Justice to confirm the conclusion that it had already reached.¹ The BVerfG considered that the European Central Bank violated Article 123 TFEU by purchasing government bonds through the so-called ‘outright monetary transactions’.

Advocate General Cruz Villalon in his opinion, noted that ‘the BVerfG has developed a body of case-law pursuant to which it carries out a review of the constitutionality of acts of the institutions and bodies of the European Union when the acts concerned are obviously ultra vires or affect “constitutional identity”, as it results from the “eternity clause” in Article 79(3) of the German Basic Law.’²

In that particular case, the BVerfG ‘start[ed] from a finding of principle that there ha[d] been an ultra vires act on the part of an EU body. More specifically, under national law, it is a question of “an obvious and structurally significant ultra vires act”’.³

1. Case C-61/14 *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400.

2. Opinion of Advocate General of Cruz Villalon in case C-61/14 *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:7. See also P. Craig, ‘The ECJ and ultra vires action: A conceptual analysis’, 48 *Common Market Law Review* (2011), p. 395-497; M. Payandeh, ‘Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice’, 48 *Common Market Law Review* (2011), p. 9–38.

3. *Supra* note 2, para. 46.

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The Advocate General pointed out that ‘if a national court or tribunal were to reserve for itself the last word on the validity of an EU act, the preliminary ruling procedure would then be merely advisory in nature, and its function in the scheme of actions provided for by the Treaties would thus be severely undermined.’⁴

Then he observed that ‘it is the case that a number of national constitutional and supreme courts, in quite different ways but with an essentially precautionary aim, have found it appropriate to discuss or allude to the possibility, normally conceived of as a last resort, of – stated in the most general possible terms – a breakdown in the European “constitutional compact” underlying the integration process, specifically because of the conduct of one of the EU institutions.’⁵

He then warned that ‘it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity”.’⁶

Nonetheless, instead of advising the Court of Justice to reject the request of the the BVerfG as inadmissible, as several intervening Member States had argued, he proposed that the Court gave an answer in the spirit of sincere cooperation,⁷ because any other possibilities or scenarios ‘can only be regarded as extreme cases, scarcely conceivable, and, ultimately, an insufficient basis for refusing to give an answer’.⁸

With the benefit of hindsight, those other possibilities were not extreme or inconceivable. The second request for a preliminary ruling by the BVerfG⁹ resulted in a shock decision by the BVerfG on 5 May 2020 that the ruling it had received from the Court of Justice was ‘incomprehensible’ and that the ECB had acted *ultra vires*.¹⁰

More recently, on 7 October 2021, Poland’s Supreme Court declared that certain provisions of the Treaty on the European Union were incompatible with the Polish Constitution.¹¹ Poland has also been unwilling to comply with orders of the Court of Justice. As a result, on 27 October 2021, the Court of Justice ordered Poland to pay a daily penalty of EUR 1 million for failing to comply with the order of 14 July 2021 to suspend the proceedings of the Disciplinary Chamber of the Polish Supreme Court.^{12,13}

4. *Supra* note 2, para. 35.

5. *Supra* note 2, para. 38. The BVerfG did carry out a review of the compatibility of the Treaties of Maastricht and Lisbon with the German Basic Law. The Advocate-General also noted the judgments of several other constitutional courts such as those of the French Constitutional Council of 27 July 2006 and 9 June 2011, the Spanish Constitutional Court of 13 December 2004, the Italian Constitutional Court of 1973 and 1991, the Danish Supreme Court of 6 April 1998; the Polish Constitutional Court of 2004, and the UK Supreme Court of 22 January 2014.

6. *Supra* note 2, para. 59 (emphasis added).

7. *Supra* note 2, para. 62–66.

8. *Supra* note 2, para. 68.

9. Case C-493/17 *Weiss and Others*, EU:C:2018:1000.

10. Case 2 *BvR 859/15* of 5 May 2020.

11. Case K 3/21 of 7 October 2021, available online at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>. See also M. Lasek-Markey, ‘Poland’s Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls’, *European Law Blog* (2021), <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/>.

12. Case C-204/21 R *European Commission v Poland*, EU:C:2021:878.

13. Case C-204/21 R *European Commission v Poland*, EU:C:2021:593.

The European Union is a necessity. It tackles the common European problems in an interdependent world. Uniform interpretation and application of its rules is the glue that keeps it together. Denial of that uniformity by one or another Member State should be prevented from spreading.