

On the Relationship between EU Law and Member State Law: From the Principle of Primacy to the Doctrine of Counter-limits

--The Czech Republic as an Example

Yuxin Sun

School of European Languages and Cultures, Beijing Foreign Studies University, Beijing, China
1853039244@qq.com

Abstract. Within the EU there exist two bodies of law, EU Law and Member State law, and in the relationship between the two, the European Court of Justice has established in practice the primacy of EU Law through the principle of direct effect and the principle of priority. With the continuous development of EU Law, some EU countries have established the doctrine of counter-limits in order to protect the inalienable national sovereignty and the fundamental principles of their constitutions. In the Czech Republic, the principle of the primacy of EU Law was implemented in the European Arrest Warrant case by the "EU-friendly" method of constitutional interpretation; in the Czechoslovak Pensions case for the first time, a specific decision of the European Court of Justice was declared to be ultra vires, giving effect to the doctrine of counter-limits.

Keywords: EU Law, priority principle, doctrine of counter-limits, ultra vires, Czech Republic.

The EU is a very special international organization with a "supranational" character, and the specificity of EU Law is bound up only with the characterization of the EU as a regional entity itself. [2]. The legal system of the EU is so large and complete that it is unique in international law. The European Court of Justice has defined EU Law as "an emerging legal order in international law", and Professor Wang Tieya has called it "a class of its own". It is thus clear that EU Law is a new legal system independent of international law and domestic law, with autonomy [3]. Therefore, the issue of the relationship between EU Law and the law of the member states does not follow the traditional theories of international law, but the relationship between EU Law and the law of the member states is governed by the goals of the European integration movement. [4]

1. Priority status of EU Law

1.1 Principle of Direct Effect

The direct effect of EU Law means that EU Law is directly applicable in all Member States. [5]"Direct effect" means that certain provisions of the basic EC treaties and EC legislation, in so far as they confer rights and, in certain circumstances, create obligations on individuals, may have direct effect in the Member States, i.e. they are directly applicable by the domestic courts of the parties or may be directly invoked by the parties before the courts.[6] Van Gend en The principle of direct effect of EU Law was first established in Loos, but not all EU Law produces direct effect in member states, and the European Court of Justice has since progressively clarified in its judicial practice through relevant jurisprudence three conditions for direct effect: the provision in question clearly sets out the scope and content of the obligations incumbent on member states; the provision is unconditional; the provision in question must itself be sufficient and need not further acts of member States or EU institutions are required for the implementation or entry into force of the provision.

1.2 The Principle of the Primacy of EU Law

While the direct effect of EU Law allows the courts of the Member States to directly apply the provisions of EU Law or the parties to directly invoke certain provisions, the areas regulated by the underlying EU treaties and legislation inevitably overlap with the scope of domestic law, and there is a high risk of conflict between the two. In practice, the European Court of Justice and the courts of

the member States have progressively established the primacy of EU Law, which was first clearly established in the Costa case[7] , where the position of the European Court of Justice is that EU Law takes precedence over all forms of domestic law, including domestic constitutional law.[8]

1.3 Autonomy of EU Law

The autonomy of EU Law is reflected internally in the direct applicability and supremacy of EU Law in relation to EU Member States and externally in the fact that no international treaty norm can undermine the integrity of the EU legal order. [9]The internal autonomy of the EU legal order was established by the Van Gend en Loos case and the Costa case, and this article discusses the issue between EU Law and the law of the member states, so only the internal autonomy of EU Law will be discussed here. In the Van Gend en Loos judgment, the European Court of Justice clearly stated that Community law forms a new legal order of international law ", where the common law is independent of the law of the Member States and can not only create obligations but also confer rights on citizens. In the Costa case, the European Court of Justice had indicated in its conclusions that the EC Treaty could not be overridden by the provisions of domestic law because of its special and original nature.

1.4 Prevailing Effect of EU Law in Czech Practice in the Light of the European Arrest Warrant Case

The Czech Republic, which separated peacefully from Slovakia in 1993 and joined the EU in 2004, had a relatively well-developed EU legal system at the time of its accession, and the principles of direct effect and primacy were already recognized. Thus, in order to ensure the primacy and direct application of Community law, the Czech Republic amended its Constitution prior to its accession to the EU by Constitutional Act No. 395/2001 Coll. and the Czech Central Council established a constitutional obligation to interpret Czech constitutional law in a "friendly" manner towards the EU, in accordance with the general constitutional provision on respect for the international obligations of the Czech Republic. "This obligation was reflected in the European Arrest Warrant case.[11]

The European Arrest Warrant (EAW) was enacted in response to the new security situation after 9/11, and the mechanism removes or reduces many of the traditional obstacles to cooperation that existed in international or EU criminal law cooperation provisions, such as special treatment of political or financial crimes, prohibition of extradition of national citizens, double criminality requirements and lack of enforcement deadlines. The Czech Republic would have been obliged to fully apply the European arrest warrant immediately upon accession to the EU, but some Czech parliamentarians challenged the constitutionality of the transposition of the European arrest warrant into Czech legislation, claiming that the European arrest warrant violated the principle of legality in criminal law and the constitutional prohibition of "forcing Czech citizens to leave the country", both of which were granted by the Charter of Fundamental Rights and Freedoms, a Czech constitutional document. The case was then brought before the Czech Constitutional Court.

In this regard, the Czech Constitutional Court concluded that since article 14, paragraph 4, of the Charter of Fundamental Rights and Freedoms did not explicitly prohibit the extradition of Czech citizens, but only prevented them from being forced to leave their country, the criminal court could interpret this constitutional provision narrowly, i.e. the constitutional order only prevented the involuntary removal of Czech citizens from the national territory, which was not possible with the cooperation of the European arrest warrant is not possible, and therefore there is no question of the European arrest warrant violating the Czech domestic constitution, thus defusing the argument that the European arrest warrant impinges on the Czech constitution. Thus, the Czech Constitutional Court did not interpret the relevant provisions from the perspective of the Charter of Fundamental Rights and Freedoms, but rather narrowly interpreted them in an "EU-friendly" manner, bringing the Czech Constitution into line with the European arrest warrant through constitutional interpretation.

Although the principles of direct applicability and primacy have long been recognized in the EU, judicial practice in reality is far more complex than theory. In the Czech Republic, a conservative and pragmatic approach of "EU-friendly interpretation"[11] has had the de facto effect of giving EU Law

precedence over domestic constitutional law when faced with conflicts between the European arrest warrant and constitutional documents, thus preserving the primacy of EU Law.

2. The Doctrine of Counter-limits - An Exception to the Primacy of EU Law

2.1 The Emergence of the Doctrine of Counter-limits

The doctrine of counter-limits was established by member States, represented by Italy and Germany, to protect the foundational principles of their constitutions and inalienable national sovereignty from being restricted by EU Law. According to the principle of the primacy of EU Law, in case of conflict between EU Law and domestic law, EU Law should be applied first. The essence of the doctrine of counter-limits is an exception to the principle of the primacy of EU Law, and the core of the principle is to characterize the foundational principles in the constitution as unchangeable and unbreakable by EU Law. EU Law does not take precedence over domestic law in areas where the foundational principles of the constitutions of the member states are concerned, because the sovereignty ceded by the member states to the EU is limited and the powers ceded by the member states to the EU cannot exceed the foundational principles of the domestic constitution.[12]

The doctrine of counter-limits, which arose out of a concern to protect the core interests of member States while preserving the EU legal system, does not in reality undermine the EU legal order, but rather facilitates the development of European integration, as it allows for a degree of balance between the interests of member States and the interests of the EU as a whole in the event of irreconcilable conflicts. The doctrine of counter-limits was gradually established in the dialogue between the European Court of Justice and the constitutional courts of the member States, which were thus given the discretion to decide whether EU Law conflicted with the core fundamentals of their constitutions.

2.2 The Practice of the Doctrine of Counter-limits in the Czech Republic

The term "counter-limits" in the doctrine of counter-limits means to oppose the restriction of core provisions of domestic constitutions by EU Law. The principle was first reflected in the jurisprudence of the constitutional courts of Italy and Germany, and was later followed by the Czech Republic, among others.

The term "counter-limits" was coined by the Italian scholar Paolo Barelli. In his work, he pointed out that certain fundamental rules of constitutional law are immutable and unbreakable by international law. Later, as a result of Italian practice, it became known as the "doctrine of counter-limits". Although Germany and other countries do not use the same terminology, but refer to it as the principle of "ultra vires" or "constitutional identity", this is only a difference in wording, which essentially expresses that the core interests of the national constitution cannot be derogated from by the supremacy of EU Law. It should be noted that the Czech Constitutional Court has expressed the doctrine of counter-limits as "ultra vires".[13]

The Czech Constitutional Court's "Czechoslovak Pensions" case[14] was the first time that a constitutional court of an EU member state stated that a specific decision of the European Court of Justice was ultra vires.

3. The "Czechoslovak Pensions Case"

While most of the issues arising from the separation of Czechoslovakia in January 1993, when it became two independent States, were settled by specific bilateral treaties between the successor States, issues concerning citizens' pensions were dealt with by the Czech-Slovak Agreement on Social Security, signed in October 1992. The Agreement provided that, after the separation of Czechoslovakia, the pensions of citizens employed by employers registered in the Czech Republic would be governed by Czech law, while employees of companies registered in Slovakia would be governed by the law of the Slovak Republic, i.e. which country's law was applied to calculate the

pensions would depend only on the place of registration of the employed company, independent of the employee's nationality and actual place of work. However, due to differences in social welfare legislation between the Czech Republic and Slovakia and the exchange rate between the Czech and Slovak currencies, pensions calculated according to the relevant Czech rules are usually higher than pensions calculated according to Slovak law.

A number of Czech citizens receiving Slovak pensions therefore sued the Czech Constitutional Court, which ruled that the Czech-Slovak Social Security Agreement was unconstitutional on the basis of the principle of non-discrimination in the Czech Constitution. In compliance with the Constitutional Court's decision, the Czech Government introduced the pension supplement system, which provides for the payment of compensation by the Czech Government to Czech citizens receiving Slovak pensions in order to fill the gap between Slovak and Czech pensions and to preserve equality between Czech citizens. However, the pension supplement system applies only to Czech citizens residing in the Czech Republic and not to Slovak retirees residing there.

Subsequently, in the context of a judicial review of a specific and disputed pension between a Czech citizen, Ms. Landtová, and the Czech Welfare Administration, the Czech Supreme Administrative Court referred the case to the European Court of Justice (ECJ), asking whether the Czech supplementary pension scheme complied with the principle of non-discrimination between EU citizens under EU Law and requesting a prior interpretation by the ECJ. Based on the principle of non-discrimination between EU citizens, the European Court of Justice declared that EU Law excluded "the national rule that supplementary pensions should be paid only to Czech citizens residing in the Czech Republic". As a result, the Czech Government abolished the supplementary pension system in accordance with the interpretation of the European Court of Justice in *Landtová*.^[15]

Another Czech citizen, Mr. Holubec, then appealed to the Czech Constitutional Court for a constitutional re-examination of the abolition of the pension supplement scheme. The Czech Constitutional Court finally concluded that the case was a special case arising after the secession of Czechoslovakia and that the enactment of the pension supplement was a purely domestic matter, which did not fall within the scope of EU Law, and therefore declared that the CJEU had ruled *ultra vires* in the *Landtová* case.

4. Grounds for an *ultra vires* decision

The Czech pension supplement system was introduced with the aim of upholding the principle of equality established in the Czech Constitution, and Czech citizens should not be treated unjustifiably differently on the basis of the place of incorporation of a company. In modern society, equality is the most fundamental right of citizens and one of the most basic core principles enshrined in the Czech Constitution. The European Court of Justice, however, excluded the application of the Czech pension supplement system on the grounds that the Czech Act had created inequality between Czech citizens and Slovak citizens living in the Czech Republic, which in the Czech view had violated the basic provisions and core interests of the Czech Constitution. Equality between Czech citizens is enshrined in the founding principles of the Czech Constitution and therefore cannot be restricted by the principle of non-discrimination of EU citizens in EU Law.

In its judgement, the Czech Constitutional Court stated that the purpose of the Czech supplementary pension scheme was to respect the principle of equality under the Czech Constitution and to exclude unjustified injustice, and that "equality", a fundamental requirement of a democratic State governed by the rule of law, was inviolable. Legal acts of the EU are not binding in the Czech Republic if they would undermine the basis of the substantive constitutionality of the Czech Republic. The Czech Republic's loyal cooperation with the Community is limited by constitutional principles and the fundamental interests of the member States, and the Czech Republic remains a sovereign State despite the partial cession of sovereignty to the EU.

5. Czech approach to the principle of counter-limitation

In its judgment on 8 March 2006, the Czech Republic had asserted that "the Czech Constitutional Court refused to recognize the doctrine of the European Court of Justice, which provides for the absolute primacy of the law of the Council of Europe". And it stated that "the cession of some powers from state institutions to EU institutions can only be sustained if the manner in which these powers are exercised by EU institutions is consistent with the basis for the preservation of the Czech Republic's national sovereignty and does not threaten the essence of the Czech Republic as a modern state governed by the rule of law." While rejecting the absolute primacy of EU Law, the Czech Republic also noted that the situation where an EU Law conflicts with a foundational principle of the domestic constitution is extremely exceptional and highly unlikely, with the Czech Constitutional Court writing in the same decision that "unless such an extremely exceptional and highly unlikely situation arises, the Constitutional Court should still be guided by the doctrine of the European Court of Justice guidance, will not examine the conformity of individual norms of EU Law with the Czech constitutional order." [16] Thus it is not to be assumed that the Czech Republic is opposed to the principle of EU primacy because it does not recognize the absolute primacy of Council of Europe law, but rather it should be understood as a specific Czech interpretation of the doctrine of counter-limits.

6. Conclusion

Due to the supranational nature of the EU, the relationship between EU Law and the law of EU member States cannot be dealt with in accordance with the general doctrine of international law. The European Court of Justice has developed in practice the principle of direct effect and the principle of EU primacy, thus establishing the primacy of EU Law among the member states, which is even higher than the constitutions of the member states. The Czech Republic joined the EU in 2004 and in order to comply with this principle, the Czech Constitutional Court not only made certain changes to the Constitution, but also introduced the principle of "EU-friendliness" in its interpretation. At the same time, in order to preserve the fundamental principles of the constitutions of the member states and the inalienable sovereignty of the member states, the doctrine of counter-limits was gradually developed, which is essentially an exception to the primacy of EU Law. In order to uphold the principle of equality of citizens established in the domestic constitution, the Czech Republic put into practice the doctrine of counter-limits by ruling that specific decisions of the European Court of Justice were ultra vires.

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