Supremacy of EU Law: A Comparative Analysis

I BACKGROUND

Supremacy of European Union law is one of four constitutional doctrines in EU law, which has no formal basis in the original Treaty of European Community. Nevertheless, it was developed by the European Court of Justice on the basis of its conception of a “new legal order”. In its landmark case, Flaminio Costa v. ENEL, there was a conflict between Italian laws on the national electricity monopoly and EC provisions allowing for the free movement of goods. The ECJ established a clear hierarchy between EC and national law, stating that: “by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply”.1 Furthermore, the ECJ argued that “The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.”2

II DUALITY OF SUPREMACY OF EU LAW

The doctrine of supremacy of Community law was developed by the ECJ at the beginning of the 1960s, were more or less accepted by the judiciaries of member states and by national governments. This doctrine holds that “in case, and to the extent,

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2 Id.
of irreconcilable results in the application of both legal systems to the same situation, the conflicting national law of member states becomes inapplicable.”\(^3\) In other words, in cases of conflict, EU law prevails over national law. Crucially, this is true of Community law of any level: “Treaty Articles as well as secondary European law, vis-à-vis national law of any level, constitutional law as well as parliamentary statutes, by-laws, individual administrative acts, and so on.”\(^4\)

Interestingly, the supremacy doctrine has a characteristic of dualism between the ECJ and member states. On the one hand, the ECJ persists in complete supremacy of EU law over national law “since the aim of creating a uniform common market between different states would be undermined if Community law could be made subordinate to the national law of various states.”\(^5\) On the other hand, most member states do not truly accept the supremacy doctrine completely. First of all, in most member states, the conceptual foundation for the acceptance is not the special nature of EU law developed by the ECJ – a “new legal order”, but their respective constitutions. In addition, most member states do not regard the supremacy doctrine as unconditional. Generally speaking, EU law has primacy over national statutes, but cannot conflict with constitution in each of member states. Lastly, national courts claim that it is themselves, not the ECJ, retain an ultimate power to rule on the competence between EU law and national law.


\(^4\) *Id.*

1. ECJ’S PERSPECTIVE

Although the EC Treaty contained no provision about the supremacy doctrine, the ECJ made unremitting efforts to develop such a doctrine. In the first place, the Costa decision is the cornerstone of the supremacy doctrine. By insisting on the conception of a “new legal order”, the ECJ argued that “by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”6 One thing deserves to be mentioned is that the ECJ defined EU law as a “new legal order” different from ordinary international treaties. According to Vienna Convention on the Law of Treaties, a state cannot be bound by a treaty without its consent.7 However, from the ECJ’s perspective, member states are bound by EU law automatically as a result of establishment of EU.

Additionally, in Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle fur Getreide und Futtermittelthe, the ECJ stated that EU law must take precedence over any conflicting domestic law regardless of the nature of that law. It has been decided that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either

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fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.” 8 Therefore, even national constitutional law cannot be invoked to challenge the supremacy of EU law. In 1978, the ECJ in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* further developed the supremacy doctrine by stating that “every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule”. 9 Consequently, retroactivity of EU law was also recognized by the ECJ.

Furthermore, the *Simmenthal* decision also addressed the issue regarding conflict between national law and EU law. Unlike the United States, models of judicial review in most European countries are concentrated rather than diffuse. That is to say, it is usually only the Constitutional Court or the Constitutional Council which is empowered to pronounce on the constitutionality of a national law. On the contrary, the ECJ decided that “any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with

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requirements that are the very essence of Community law”. Thus, based on the ECJ’s decision, where a conflict between a national law and EU law arises, any national court must give immediate effect to EU law and rule the national law invalid without awaiting the prior ruling of the Constitutional Court or the Constitutional Council.

2. MEMBER STATES’ PERSPECTIVE

Supremacy of EU law is a doctrine developed by the ECJ, however, it is common knowledge that fiction persists around the EU. Generally, most member states do not truly accept the supremacy doctrine with only one exception, which is the Netherlands. By way of an amendment to the Constitution of the Kingdom of the Netherlands, made in 1963, “self-executing provisions of treaties and of resolutions of international organizations are binding upon natural and legal persons and have supremacy over national law, including the Constitution itself, Acts of Parliament and subordinate legislation.” Additionally, Article 66 said that “Legal regulations in force within the Kingdom shall not apply if this application should be incompatible with provisions – binding on everyone – of agreements entered into either before or after the enactment of regulations.” Apparently, for the acceptance of the supremacy doctrine by the Netherlands, it is not derived from its own constitution, but from recognition of the special nature of EU law.

10 “Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (INASTII)”, EUR-Lex-62000J0118-EN.
(1) The United Kingdom

In the UK, the main problem is that it follows dualist theory on the relationship between internal and international law strictly. According to this theory, internal and international laws are two separate legal systems, and accordingly, internal provisions are applied exclusively between the state’s borders, and cannot intervene in the international legal system. Similarly, a perfect international treaty would only be effective at an international level. For it to be applied in a contracting state, it’s necessary for that state to either adopt legal measures from the treaty into a national provision or to introduce it through a legal plan that facilitates admission. Thus, in the UK, acceptance of the supremacy doctrine must be based on express constitutional amendment or other acts of Parliament. In fact, it is the European Communities Act 1972 to give internal legal effect to EU law in the UK. Section 2(1) seems to provide that all directly effective EU law will automatically be enforceable in UK courts: “All such rights, powers, liabilities, obligations and restrictions…and all such remedies and procedures…as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly…”

Another problem posed for the UK by acceptance of Community Law is the apparent irreconcilability – the traditional doctrine of parliamentary sovereignty versus the supremacy of EU law. The constitutional doctrine of parliamentary

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sovereignty essentially holds that “Parliament is the supreme legal authority in the UK which can create or end any law.”

In general, UK courts cannot overrule legislation of the Parliament, and no Parliament can pass laws that future Parliaments cannot change. Although the 1972 Act created an obligation to construe all national legislations in a manner consistent with the directly effective provisions of EU law, the logical difficulty still remains since the 1972 Act is itself only an act of Parliament like any other. Consequently, provisions of 1972 Act could theoretically be repealed by any subsequent act of Parliament.

In the long-running Factortame series of cases, the House of Lords accepted the ECJ’s ruling that “under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.”

Nevertheless, the significance of Factortame cases is that the supremacy of EU law over national law of the UK is only recognized where EU law has competence over the British legal system. Therefore, if the British Parliament passes a new law which conflicts with EU law, the national courts have power in some circumstances to grant a temporary injunction to prevent the UK authorities from enforcing that law. The “in some circumstances” phrase must be emphasized.

Actually, the Factortame decision just served as a compromise solution, and in the

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UK, supremacy of EU law derives not from the special nature of EU law developed by the ECJ, but from the exercise of parliamentary sovereignty doctrine.

(2) Germany

Article 25 of the Basic Law for the Federal Republic of Germany provides that “The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory”. 18 Obviously, the conceptual foundation for acceptance of the supremacy doctrine is Article 25 of the German Constitution, not the special nature of EU law developed by the ECJ. Most importantly, “the German courts accept the primacy of Community law in circumstances where there is no conflict with the German Constitution and no issue about whether the Community has competence to act.” 19

At first, the highest German court refused to recognize supremacy of EU law without preconditions. In the 1974 Solange I judgment, the Federal Constitutional Court of Germany ruled that “Article 25 of the Constitution…does not open the way to amending the basic structure of the Constitution…without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution”. 20 Also, the Court maintained that “the part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution and one which forms part of the constitutional structure of the

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Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications.” 21 As a result, the Court concluded that “in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution… the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism”. 22

In 1986, in a case in which an EC import licensing system was challenged despite an ECJ ruling on its validity, the Solange II decision rendered a clash between EC law and national law over fundamental rights less likely. 23 It should nonetheless be recognized that “the court did not surrender jurisdiction over fundamental rights, but only stated that it would not exercise that jurisdiction as long as the present conditions as to the protection of fundamental rights by the ECJ prevailed.” 24 Therefore, the Federal Constitutional Court preserves its final authority to intervene if real problems concerning the protection of fundamental rights in Community Law arise.

Furthermore, based on the Maastricht judgment, the Federal Constitutional Court made clear that “it would not relinquish its power to decide on the compatibility of Community law with the fundamentals of the German Constitution.” 25 More importantly, the Court ruled that the power of review over the scope of Community

21 Id.
22 Id.
competence should be excised by itself. Consequently, “the German courts regard themselves as possessing the ultimate Kompetenz-Kompetenz to decide whether action taken by the Community falls within the scope of Community competence.”

Nonetheless, the ECJ holds an opposite opinion that persists in its last word on the issue of Kompetenz-Kompetenz.

(3) France

In France, the main initial obstacle to the recognition of supremacy of EU law has been the jurisdictional limitation of the French courts. Under the French Constitution of 1958, the Constitutional Council is the sole body which has the power to decide on the constitutionality of legislations. Apparently, France adopts concentrated model of judicial review. For instance, in *Semoules*, the Supreme Administrative Court rejected the supremacy doctrine by ruling that it could not find the legislation to be incompatible with EU law since it has no power to review the validity of French legislation.

However, in *Café Jacques Vabres* case, the Cour de Cassation, the highest of ordinary judicial courts, took a different view and decided that when a conflict exists between an internal law and a duly ratified “international treaty”, the Constitution itself accords priority to the latter since Article 55 of the Constitution provides that “treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by

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26 *Id.*
the other party”. Therefore, in France, it is clear that the conceptual basis on which supremacy is accorded to EU law is the Constitution itself, and not the *communautaire* reasoning of the ECJ in *Costa*.30

Later the *Nicole* decision reconfirmed the supremacy of EU law on the ground that Article 55 of itself necessarily enables the courts, by implication, to review the compatibility of statutes with treaties.31 However, the Supreme Administrative Court did not recognize the primacy of EU law over the Constitution itself. Actually, in France, Community law is held to rank above statute, but below the Constitution. It is therefore reasonably clear that the French courts do not accept the supremacy doctrine over all national law, as stipulated in the ECJ’s jurisprudence. Also, Article 54 of the Constitution provides the relationship between EU law and the Constitution. It says that “if the Constitutional Council…has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.” Obviously, in a case of conflict between EU law and the French Constitution, EU law cannot be applied unless the conflict has been removed by a constitutional amendment.

(4) Italy

As in the case of Germany and France, the acceptance of the supremacy of EU law in Italy is also based on its own constitution, not the *communautaire* reasoning of

the ECJ. Article 11 of the Italian Constitution provides that “…it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends.”

This acceptance, of course, has not been unconditional. In *Frontini* case, the Italian Constitutional Court decided that Article 11 cannot give the organs of the EEC an unacceptable power to violate the fundamental principles of the constitutional order or the inalienable rights of man. Hence, the Italian courts do not accept that EU law has primacy over its own constitution, and they retain ultimate authority over the issue of whether EU law infringes fundamental rights. For instance, the *Fragd* decision considered that “a Community measure would not be applied in Italy if it contravened a fundamental principle of the Italian Constitution concerning human rights protection.” Moreover, *Frontini* was followed in 1984 by *Granital*, in which the Italian Constitutional Court ruled that it had the power to adjudicate upon the basic issue of competence between Community law and national law.

(5) Ireland

According to the Third Amendment of the Constitution Act, Article 29 (4) provides that “no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or prevents laws enacted, acts done or measures adopted by
the European Union or by the Communities, or institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State”.36 This constitutional amendment gives complete supremacy to EU law over national law of Ireland, even including the Constitution itself.

Nevertheless, in practice, the supremacy doctrine is not always be upheld by Irish courts. In 1989, the Irish Supreme Court enjoined several student groups from distributing literature regarding the availability of abortion in England since the distribution of such information violated the Irish constitutional proscription against abortion. Actually, the injunction conflicted with the free movement of services under EU law due to recognition of abortion as a service by the ECJ. However, the Court declined to address this issue – the compatibility of the ban with EU law.37 Therefore, it seems that in Ireland, EU law does not have primacy over some fundamental principles in the Constitution.

(6) Poland

Article 90 (1) of the Polish Constitution provides that “the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters”. Also, Article 91 (3) provides that “if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a

36 The Third Amendment of the Constitution Act, 1972.
conflict of laws”. Thus, it clearly shows that in Poland, the supremacy doctrine has been accepted on account of the Constitution itself.

However, neither Article 90 (1) nor Article 91 (3) authorizes delegation to an international organization of the competence to issue legal acts or take decisions contrary to the Constitution. Consequently, the Polish courts do not accept the supremacy of EU law over its own constitution, and also regard national constitutional rights as a minimum which cannot be questioned as the result of a provision of Community law.\textsuperscript{38} In fact, Polish Constitutional Tribunal expressly declared that the Polish Constitution has an absolute primacy over Community law, and it might lead to a situation that all Polish courts, not only Constitutional Tribunal, will have to disregard some of Community measures as long as they conflict with the Polish Constitution.\textsuperscript{39}

III THE SUPREMACY CLAUSE IN THE UNITED STATES

The Constitution of the United States created a governmental structure known as federalism. Federalism refers to a sharing of powers between the federal government and the state governments. Although the U.S. is not the only nation to embrace federalism, American Federalism has been described as “the great political experiment” in representative democracy.\textsuperscript{40} The Constitution gives certain powers to the federal government and reserves the rest for the states. Therefore, “while the Constitution states that the federal government is supreme with regard to those powers


\textsuperscript{39} Krystyna Kowalik-Banczyk, “Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law”, \textit{German Law Journal, Vol. 06, No. 10}.

\textsuperscript{40} Gerston, Larry N., “American Federalism: A Concise Introduction”, \textit{2007, M.E. Sharp, Inc.}
expressly or implicitly delegated to it, the states remain supreme in matters reserved to them. This supremacy of each government in its own sphere is known as separate sovereignty, meaning each government is sovereign in its own right.”

Like the EU, there is also a supremacy doctrine in the U.S. legal system. Based on Article VI, Paragraph 2 of the Constitution, “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding”.

This Supremacy Clause recognizes only three sources of law as “the supreme Law of the Land”, and accordingly, its effect is twofold. “The direct effect is that these three sources of law override contrary state law. The negative implication is that state law continues to govern in the absence of these sources.” For example, the *Erie* case ruled that federal courts have no independent lawmaking authority to displace state law. Rather, they may do so only when acting pursuant to applicable provisions of the Federal Constitution, Acts of Congress, and presumably, Treaties.

Though the Supremacy Clause authorizes courts to review and invalidate state laws that conflict with federal statutes, at the same time, courts must seriously review the constitutionality of federal statutes alleged to exceed the scope of Congress’

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42 U.S. CONST. art. VI, §2.
enumerated powers since there is an express textual basis.\textsuperscript{45} The Supremacy Clause designates as “the supreme Law of the Land” only those “Laws of the United States…made in Pursuance” of the Constitution. Therefore, “if a federal statute satisfies this condition, courts must apply the statute notwithstanding contrary state law. If the federal statute fails this condition, however, it does not qualify as ‘the supreme Law of the Land’ and courts remain free to apply state law.”\textsuperscript{46}

In order to apply the Supremacy Clause, courts must necessarily consider and resolve challenges to the constitutionality of federal statutes. According to Article I of the Constitution, “the Congress shall have power…to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”\textsuperscript{47} In fact, federal statutes purporting to displace state law without a clear direction from Congress, which authorizes the preemption, simply cannot be regarded as “the supreme Law of the Land” overriding state law.\textsuperscript{48} “By expressly conditioning the supremacy of federal statues on their constitutionality, the Supremacy Clause reassures the states that courts, both federal and state, would keep the federal government within the bounds of its assigned powers.”\textsuperscript{49}

IV COMPARISON BETWEEN EU AND U.S.

The last part of this paper will focus on the following question: why is the

\textsuperscript{46} Id.
\textsuperscript{47} U.S. CONST. art. I, sec. 8.
\textsuperscript{48} Pace, Christopher R. J. “Supremacy Clause Limitations on Federal Regulatory Preemption”, Texas Review of Law & Politics; Fall 2006, Vol. 11, Issue 1, p157-173.
\textsuperscript{49} Id at 45.
supremacy doctrine really a big problem in the EU, but not in the U.S? As I discussed before, supremacy of EU law is a fundamental constitutional doctrine developed by the ECJ, but its implementation in member states is problematic to a certain degree. On the contrary, in the U.S., relationship between federal law and state law has been expressly defined by the Constitution, and accordingly, no such dispute exists among different states. The main reason for the difference concerning acceptance of the supremacy doctrine is that the U.S. is a federal nation with its own constitution. Nevertheless, what about the EU? None of official documents is able to describe the EU in a straightforward and commonly agreed manner.

Despite of long-term debates in international academia, no final conclusion has yet been reached on the significant issue-the legal nature of the EU. Firstly, federalism is a powerful normative idea which motivates many of the founding fathers of the European movement and much of the early scholarship on the EU. In addition, some scholars adhere to the specialty of the EU as an international organization and a sovereign complex state simultaneously. Moreover, some scholars see the EU as an emerging system of multi-level governance in which national governments are losing influence in favor of supranational and subnational actors. Finally, someone even argues that the enlarged EU increasingly resembles a neo-medieval empire rather than a classical type of federal state. Certainly, as a matter of political taxonomy, the

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50 Felix Knüpling, “Federalism and Multi-level Governance: Comparing the EU with Other Federal States”, Director Europe, Forum of Federations.
European Union is still a novelty in want of a convincing label.\textsuperscript{54}

For the time being, we can only describe the EU by distinguishing it from traditional forms. On the one hand, the EU is not a state because it has too little sovereign power, and its inability to determine autonomously the form and substance of its own political existence distinguishes it from a state. That’s the reason why the supremacy doctrine developed by the ECJ is not completely implemented by member states. On the other hand, the EU is not an international organization because it possesses too much sovereign power. The sovereign authority it exercises with direct effect in member states distinguishes it from ordinary international organizations.\textsuperscript{55}

Consequently, member states cannot directly deny the effect of the supremacy of EU law in their respective legal systems.

Similar to the ECJ, the U.S. Supreme Court has made decisions on the relationship between federal case law and state case law. However, these decisions are binding precedents on state courts, in contrast with awkward position which the supremacy doctrine experiences in member states of the EU. It can thus be concluded that it’s insufficient to develop the supremacy doctrine, which should be implemented in all of member states, only by means of the ECJ’s decisions. Since the legal nature of the EU is uncertain, how could decisions of the ECJ become binding on national courts of member states? Another reason maybe that most member states of the EU belong to civil law country, so case law does not have the same force of law as


\textsuperscript{55} Id. at 53.
statutes. In my opinion, it’s extremely significant to enact a fundamental law of the EU – European Constitution, in which specifies the legal nature of the EU.

In February 2002, in Brussels, the Convention on the Future of Europe started and it declared very soon that it would aim at making a comprehensive European constitution, or at least a constitutional treaty. Unfortunately, after more than three years’ work, the prevailing opinion is that the “constitution is dead”. One of the principal errors of the European constitution-making is evident in the ambiguity of the document regarding its constitutional or treaty character. There are a number of characteristics of the document indicating that it is partly a treaty, and partly a constitution.\(^{56}\) Apparently, without clarifying the legal nature of the EU, neither a constitution nor any constitutional doctrine can be truly developed in the EU.

The last issue I want to discuss is about the future development of the EU. During its history of more than half a century, the European integration process has achieved things that had been unconceivable before. Nevertheless, political integration has not developed as rapidly as the founding fathers imagined it,\(^{57}\) and I would argue that uncertainty about the legal nature of the EU is the “chief offender” since relation between the EU and members states is not definite, which severely impedes the Union to act efficiently.

To dodge the issue about what the EU is may be looked upon as the most stupid mistake that EU has made. One can image how could the EU work and even develop


without understanding its nature? It must be admitted that at present, operation of the EU is more or less a disaster. Let’s take the supremacy doctrine as an example. The ECJ claims that EU law is supreme over national law including constitutions, however, member states argue that EU law is supreme as long as it does not conflict with the constitutions. It’s an absurd situation although one can argue that it’s just a compromise solution. Nonetheless, compromise means nothing, and the supremacy doctrine is only law in book, but hardly law in action. In order to have a glorious future, the first and most important task for the EU is to make clear about its own legal nature, no matter what it is, an international organization, a state, or whatever.

V CONCLUSION

Although supremacy of EU law is a constitutional doctrine developed by the ECJ, which is the highest judicial branch of the Union, implementation of this doctrine in most member states is not satisfactory since they continue to locate the authority of EU law in the national legal order centrally within the national constitution, and not in the jurisprudence of the ECJ or in the sovereignty of the EU. In comparison with the U.S., relationship between federal law and state law is clearly defined by the Constitution and precedents of the U.S. Supreme Court. The principal reason which leads to this distinction is uncertainty about the legal nature of the EU, and thus, decisions of the ECJ are not legally binding on national courts of member states among the EU.
References


