



## The European Court of Justice and National Courts' Approach to the *Kompetenz-Kompetenz* Question: The Cases of Germany and the UK

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### Introduction

The application of European Union law within member states raises the so-called *Kompetenz-Kompetenz* question: is it the European Court of Justice (ECJ) or the national courts that decide the boundaries of EU legislative acts? The German and British judiciaries have opposite responses. The German judiciary has resisted the authority of EU laws and the jurisprudence of the ECJ. The German Federal Constitutional Court (FCC) has asserted its own competence. In contrast, the British judiciary has readily acknowledged the ECJ's competence and relinquished its own. This paper explains this contrast by arguing that the EU laws have a lesser impact on countries with written constitutions, like Germany, than on countries without written constitutions, for instance the United Kingdom (UK). Written constitutions, by crystallizing core national sovereign rights and constitutional principles, provide a basis for national judiciaries to assert their competence and protect national legal sovereignty against the encroachment of the EU laws and the ECJ's jurisprudence.

### Theory and Hypotheses

This paper draws on a classical theory of judicial behavior that assumes that the internal content of legal rules and judicial decisions matter for outcomes. Judges and courts are not simply self-interested political actors (Lasser 2004; Hilbink 2012).

There are two major differences between the German and British judicial systems that could account for these different approaches. One is that Germany has a written constitution while the UK does not. The other is that Germany and the UK draw on different legal traditions. Germany is a civil law country while the UK is a common law country. Both of these differences fall into the category of differences in the content of legal rules. These differences form the basis for two hypotheses described below.

#### *Hypothesis 1: Written Constitutions*

The first hypothesis is that the impact of EU laws is lesser on countries with written constitutions than on countries without written constitutions because the former can use the written constitutions as a basis to assert their competence and shield national

legal order against the European legal integration.

For this hypothesis to be true, we should see, in countries with written constitutions, that judges refer to the constitutions as a basis for their decisions, assertions of competence, and resistance of the encroachment of EU laws and the ECJ's jurisprudence. In contrast, in countries without written constitutions, judges do not refer to unwritten constitutional norms to make judicial decisions, assert their competence, or resist EU authorities.

#### *Hypothesis 2: Civil Law v. Common Law*

The second hypothesis is that the impact of EU laws is lesser on civil law countries than on common law countries. Because of the differences in the modes of adjudication and legal traditions, judicial activism traditionally exists in common law countries more than in civil law countries (Shapiro 1981). Activist judges will be more likely to import EU law rather than assert the supremacy of their own national legal orders. Activist judges may see the ECJ as an ally against national governments.

For this hypothesis to be true, civil law countries should lack judicial activism while common law countries should have judicial activism.

#### **Testing Hypothesis 1: Written and Unwritten Constitutions**

The key question is whether the national courts treat the EU treaties as a European constitution or as traditional international law. The answer depends on the courts' interpretation of their own national constitutions, which in turn depends on

whether the constitution is written or unwritten.

#### *The German Basic Law as the basis for the FCC's competence*

Germany's constitutional doctrines are enshrined in Article 79(3) of the Basic Law, which outlines core constitutional principles that are immune from any further amendment. The FCC has used Article 79(3) to assert its competence

The FCC first asserted its competence in *In Re Maastricht Treaty* by drawing on the principle of democracy proposed by Article 79(3). It concluded that the European integration must be controlled by the representative of the people—the German Federal Parliament. The competences transferred to the EU must not permit an autonomous development towards an EU federal state. Hence, the FCC has the power to examine whether the EU legal instruments remain within the limits of the sovereign rights accorded to the EU. The supremacy of EU laws does not extend to *ultra vires* acts.<sup>1</sup>

Therefore, the FCC has adopted an international law approach to EU laws, dictated by Article 79(3) that has established core fundamental constitutional principles the FCC is obligated to safeguard, thereby limiting the extent of the EU's powers.

#### *Absence of a written constitution as the barrier to the UK judiciary's competence*

In contrast, the British unwritten "Constitution" exists as "a system of laws, customs, and principles which sets out the

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<sup>1</sup> BVerfG, *In Re Maastricht Treaty* - 2 BvR 2134/92, 2 BvR 2159/92.

nature, function and limits of the constitutive elements of the State” (Besson in Keller and Sweet 2008). The legal order depends on the doctrine of implied repeal—the latest will of the Parliament predominates. Any parliament can repeal any existing statute. No sitting parliament can bind a future parliament. Parliament cannot entrench legislation by, for example, requiring a two-thirds majority to overturn the statute. Thus, Parliament cannot draft a constitution or create legislation that could act like a written constitution.

This is problematic in the EU context because the ECJ requires that EU law always prevail, even over a later British statute. Because there is no written constitution, the British courts could not imitate the FCC’s argument that the national constitution (but not national legislation) is superior to EU law. They decided that only accepting the ECJ’s competence is compatible with the Parliament’s decision to join the EU.

In *Factortame*, the House of Lords readily acknowledged the ECJ’s competence to override national judicial authorities.<sup>2</sup> Unlike the FCC, the House of Lords argued that the British Parliament conceded limitations on its sovereignty by enacting the European Communities Act of 1972. The British courts were merely exercising their duty under the European Communities Act.

In *Thoburn*, the High Court established a hierarchy of parliamentary acts—“ordinary” and “constitutional” statutes,<sup>3</sup> which include the European Communities Act and cannot be repealed by implication. Hence, EU law is made a central part of the British Constitution. This argument is only possible because the lack

of a written constitution gave the High Court the opportunity to interpret EU law as part of the unwritten national constitution. The British courts did not cite any constitutional norms, and they limited the traditional doctrine of implied repeal.

## Testing Hypothesis 2: Civil Law and Common Law

The second major difference is that Germany is a civil law country while the UK is a common law country. Common law judges have traditionally tended towards activism because the common law has a pragmatic mode of adjudication that stresses adaptability to new situations (Shapiro 1981; Craig in Slaughter, Sweet and Weiler 1998; Stein 1992; Merryman 1969).

### *Judicial Activism in Germany*

The assumption that judicial activism is necessary for courts to accept EU law is correct. However, modern civil law countries, particularly in Europe, have broken with the tradition of judicial deference. One key illustration is the parallel cases decided by the U.S. Supreme Court in 1973 and the FCC in 1975 regarding the same issue. The U.S. judiciary, as its British counterpart, follows common law traditions. In *Roe v. Wade*, the U.S. Supreme Court invalidated state criminal anti-abortion laws and imposed on legislatures a boundary within which the legislatures could act to regulate abortions.<sup>4</sup> In contrast, in *Abortion I*, the FCC invalidated Section 218a of the Penal Code and rewrote the Penal Code.<sup>5</sup>

Therefore, because the German and the UK judiciaries equally demonstrate

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<sup>2</sup> [1990] UKHL 7.

<sup>3</sup> [2002] EWHC 195 (Admin).

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<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> BVerfGE 39,1/75.

judicial activism, the second hypothesis cannot explain the different responses to the *Kompetenz-Kompetenz* question.

## Conclusion

The constitutional doctrines implied by the written Basic Law of Germany and the unwritten British Constitution explain the two countries' different responses to the *Kompetenz-Kompetenz* question.

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