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- The Developing Doctrine

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Parliamentary Sovereignty in the European Communities -
The Developing Doctrine

Abstract

The doctrine of Parliamentary Sovereignty is a unique feature of the British constitution. No other parliament within the European Community can claim legislative omnipotence. Put simply, the concept describes the relation of the UK Parliament to the judicature. The courts accept that every Act of the Westminster Parliament has the force of law and that there is no higher source of law. By its very nature (which can best be explained with *Kelsen's* theory of the *grundnorm*), the doctrine of Parliamentary Sovereignty enjoys a peculiar status: it forms the basis of the whole legal system and can therefore not be altered by statute. In other words, Parliament cannot impose limitations on its own sovereignty or on that of future Parliaments.

Historically, the doctrine developed to its present form in the 19th century, when the United Kingdom enjoyed external sovereignty on an unprecedented scale. Today, the situation of the United Kingdom is characterized by mutual economic and political interdependence with other states. The strongest challenge yet to the doctrine of Parliamentary Sovereignty has resulted from membership of the European Communities and the claim of Community law that it must prevail over norms of the national legal systems, whether prior or subsequent.

This cannot be reconciled with the idea of legal sovereignty of a national parliament. The practical solution offered by sec. 2 of the European Communities Act has helped to avoid actual conflicts, but the theoretical problem remained unsolved.

However, some recent cases suggest that a fundamental change to the *grundnorm* which underlies the concept of Parliamentary Sovereignty may be imminent.

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Abbreviations

AC	Law Reports (Appeal Cases)
All ER	All England Law Reports
Bell	Bell's Reports (Scotland)
Bull. EC	Bulletin of the EC
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CA	Court of Appeal
Ch.	Law Reports (Chancery Division)
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
Cmd.	Command Paper (1956 - 1986)
Co. Rep.	Coke's Reports
col.	column
Crim. L. Rev.	Criminal Law Review
EC	European Communities
ECA	European Communities Act
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
EMU	European Monetary Union
EP	European Parliament
Foro ital.	Foro Italiano
GATT	General Agreement of Tariffs and Trade
GG	Grundgesetz
HC	House of Commons
HC Deb.	House of Commons Debates
HL	House of Lords
Hob.	Hobart
ICJ Rep.	International Court of Justice Reports
ICR	Industrial Cases Reports

JP	Justice of the Peace Reports
KB	Law Reports (Kings Bench)
L.J.	Lord Justice
LR (no.) CP	Law Reports (Common Pleas)
M.R.	Master of the Rolls
OJ (C)	Official Journal of the EC (Communications)
OJ (L)	Official Journal of the EC (Lois)
QB	Law Reports (Queens Bench)
SC	Session Cases
SLT	Scots Law Times
St. Tr.	Cobbett's State Trials
TLR	The Times Law Reports
V.C.	Vice Chancellor
WLR	Weekly Law Reports

Declaration

The present thesis contains no material which previously has been submitted for a degree in this or any other university.

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A. Introduction

The United Kingdom Government has seated Parliament on two horses, one straining towards the preservation of Parliamentary Sovereignty, the other galloping in the general direction of Community law supremacy.¹

When British politicians discuss 'sovereignty' with their partners in the European Communities, they cannot always be certain that they are fully understood. At least this is so whenever they employ the word 'sovereign' to describe the powers of their Parliament.

The doctrine of Parliamentary Sovereignty is a unique characteristic of the British legal system. Put very simply, it denotes the unfettered competence of the United Kingdom Parliament to make laws. This power has been praised as "the very keystone of the law of the constitution"² or "the fundamental law"³ of the British Constitution.

Even the formidable efforts devoted to criticizing or refuting the concept of Parliamentary Sovereignty by its outright opponents⁴ underline its constitutional weight.

Historically, the sovereignty of Parliament developed to its modern form in the 18th and 19th century, when Great Britain enjoyed external sovereignty on an almost unprecedented scale.

Today's scenario is different. The only single-nation superpower on earth is the United States of America and even the US are much more economically and politically dependent on other (industrial) nations

¹ S. de Smith/ R. Brazier, Constitutional and Administrative Law, p. 82.

² A. V. Dicey, Introduction to the Study of the Law of the Constitution, p. 70.

³ I. Jennings, The Law and the Constitution, p. 65; also O. Hood Phillips/P. Jackson, Constitutional and Administrative Law, p. 25.

⁴ See e.g. J.D.B. Mitchell, Constitutional Law, pp. 63 - 91; or, to give some more recent examples, M. Upton, Marriage Vows of the Elephant: The Constitution of 1707, C. Dike, The Case Against Parliamentary Sovereignty; P.A. Joseph, Beyond Parliamentary Sovereignty.



than was Britain in the last centuries.

The European Communities were built not least on the insight of the founding member states that national interests could be better pursued on the world stage if sovereignty was shared, pooled and transferred to a unified central authority. When the United Kingdom entered the Common Market in 1973, many were concerned about the implications membership would entail for the legal sovereignty of the Westminster Parliament. The discussions have never really stopped since.

Recently, the problem has become very topical again due to the ongoing negotiations on Economic, Monetary and (especially) Political Union. Whatever the precise final outcome of the two Intergovernmental Conferences will be, it seems almost certain that even more powers will be given to the Communities and that the already existing federal structures will be strengthened.

The present thesis will attempt to answer the question what impact membership of the European Communities has had so far on the doctrine of Parliamentary Sovereignty. A clearer understanding might help to assess the possible consequences of proposals that are currently put forward in connection with the negotiations on the future of the Communities.

The paper is divided into three main chapters.

The first chapter (B.) will closely examine the doctrine itself from different angles.

Part I discusses the nature of Parliamentary Sovereignty. It will explain the specific meaning of the sovereignty of Parliament as opposed to political or state sovereignty. Particular attention will be paid to the problem whether Parliament itself can limit and/or transfer its own power, a question of obvious importance in relation to membership of the EC.

A proper understanding of present developments requires that they are seen in their historical context (part II). Just as the doctrine of Parliamentary Sovereignty evolved under certain historical conditions, it is conceivable that it might change or even disappear if the conditions change substantially.

Part III tries to determine the legal foundations of the doctrine. Any statement or prediction about changes must take into consideration not only the historical background but also the roots in legal theory. It will be argued that due to the peculiar nature of the

concept the courts must play a key role in its further development.

In chapter C. discussion turns towards the Community's legal system. It will show in what respects the EC is different from other international organisations (part I) and why it is so difficult to reconcile membership with the doctrine of Parliamentary Sovereignty. This is followed by a detailed analysis of the case-law of the European Court of Justice on the principles of direct effect and supremacy of Community law and its consequences for the member states (part II and III). This reveals that many incompatibilities with the national legal systems are caused by the (monist) approach employed by the Community to bind national courts into its own structure and to assign to them the task of ensuring that Community law always prevails over conflicting national law.

Part IV looks at the constitutional positions in other member states and their reactions to the specific problems caused by membership.

Having established in the first two chapters the nature of Parliamentary Sovereignty and the challenge posed by Community law, the final chapter deals with the constitutional developments in the United Kingdom. It starts by pointing out the interrelations between the way Community law is given force by a British statute, the views of Parliament itself on its legal sovereignty and the (ultimately decisive) attitudes of the British courts (part I).

Thus, part II examines the provisions of the European Communities Act 1972 which deal with the problems of direct effect and supremacy of Community law. Part III scrutinizes political views and statements on the question of sovereignty.

Finally, in the light of the previous findings, an analysis of relevant cases before British courts shows how far constitutional theory has undoubtedly be adapted to accommodate the facts and also suggests that there are indications that even more fundamental changes are imminent (part IV).

B. The Doctrine of Parliamentary Sovereignty

Opinion as to the existence and the importance of the doctrine of Parliamentary Sovereignty is almost unanimous. The picture changes, however, when it comes to its precise nature and origin.¹

There is an 'orthodox view' of Parliamentary Sovereignty and also a fair number of varieties of a 'new view'. There are different notions as to the relationship of Parliamentary Sovereignty to the rule of law or to the sovereignty of the people. Some people say that Parliamentary Sovereignty is 'continuous', other writers are of the opinion that it is 'self-embracing'.

Considering these distinctions it is vital to bring out the precise sense in which the term 'Parliamentary Sovereignty' is used within this thesis in order to avoid misinterpretations.

Since the aim is to demonstrate the influence of the European Communities legal order on this particular principle of British constitutional law, the ideal starting point must be a concept of Parliamentary Sovereignty which does not yet try to incorporate developments in connection with Britain's membership of the European Communities.

Notwithstanding the fundamental historic developments in the last 100 years, Albert Venn Dicey's traditional exposition on the nature of Parliamentary Sovereignty still dominates modern legal thinking.

The Diceyan definitions of Parliamentary Sovereignty in his magisterial² 'Introduction to the Study of the Law of the Constitution' have the advantage of being the most unequivocal and rigid and are

¹ For surveys of the variety of opinions see D.N. Clarke/ B.E. Sufin, Constitutional Conundrums: The Impact of the United Kingdom's Membership of the European Communities on Constitutional Theory, p. 32; H.G. Petersmann, Die Souveränität des Britischen Parlaments in den Europäischen Gemeinschaften, p. 165; T.R.S. Allen, The Limits of Parliamentary Sovereignty, p. 615; G. Winter-ton, Parliamentary Supremacy: The British Grundnorm Re-Examined, p. 591; H.R.W. Wade, The Basis of Legal Sovereignty, pp. 177 et seq.

² C. Turpin, British Government and the Constitution: Texts, Cases and Materials, p. 23.

therefore ideally suited as initial working hypothesis.³

I. The Nature of Parliamentary Sovereignty

A number of modern writers on the subject have argued that the term 'sovereignty' today is not altogether adequate in connection with the law-making power of Parliament and are therefore using 'Parliamentary Supremacy' instead.⁴ As De Smith has rightly pointed out, neither of the two terms is ideal, but "we shall use the phrase 'Parliamentary Sovereignty', but to denote a legal concept or rather a group of concepts which do not necessarily carry any implication about the effective seat of political power within the state"⁵

This last brief mention takes us directly to Dicey's methodical approach to sovereignty.

1. Dicey's Distinction between Legal and Political Sovereignty

Dicey was not the first to elaborate on the idea of sovereignty. The foundations had long been laid in the philosophical essays of writers like Bodin, Hobbes, Bentham, Blackstone and Austin⁶.

Dicey, in his 'Introduction' attempts a consistent application of Austin's doctrine of sovereignty, which was the prevailing legal theory in Great Britain in the 19th century.⁷

Generalising from what he observed in England, Austin had deduced that in every legal system there must be a person or a group of persons with the ultimate power to change every existing law. However, he was hesitant to tie himself down as to who precisely was

³ Interestingly enough, a lot of textbooks on constitutional law seem to adopt a similar approach: they devote a chapter to the description of the principle of Parliamentary Sovereignty, mainly based on the Diceyan body of thought, and deal with the implications of Community law separately: see e.g. Turpin, chapters 1, 3 b) and 5, 5 d).

⁴ See e.g. Hood Phillips/ Jackson, p. 41.

⁵ De Smith/ Brazier, pp. 64-65.

⁶ For details see Petersmann, pp. 252 - 260.

⁷ Petersmann, pp. 258 and 260; Hood Phillips/ Jackson, p. 41.

the sovereign in England. According to Austin, the sovereign power is vested in the King, the House of Lords, and the Commons or the electors.⁸

This vagueness went against Dicey's sense of accuracy. He pointed out "that the term 'sovereignty', as long as it is accurately employed in the sense in which Austin *sometimes* [italics added] uses it, is a mere legal conception, and means simply the power of law-making unrestricted by any legal limit."⁹

From that he inferred that under the English constitution, the sovereign must be Parliament, or, to be more precise, the King in Parliament. But 'sovereignty' was sometimes also used by Austin to describe the political fact that ultimately it is the electors who, through their votes (and their readiness or unreadiness to obey!), will ultimately enforce their will.

Consequently, Dicey distinguished between 'legal' and 'political' sovereignty¹⁰ and accused Austin of confusing those two distinct meanings: "The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, although intimately connected together, are essentially different, and in some part of his work Austin has apparently confused the one sense with the other."¹¹

Thus, 'Parliamentary Sovereignty' in Dicey's terminology by no means comprises effective political power. It only serves to denote the legislative omnipotence of Parliament.

In fact, Dicey went even one step further. Analysing the constitutional implications of the 1715 Septennial Act, he denied the existence of any legally relevant link between the political sovereign 'electors' and the legislative sovereign 'Parliament'.

Parliament in 1716 had prolonged its own period of office¹² from three to seven years. The validity of the Septennial Act was questioned on the ground that Parliament's power to legislate must expire with the end of the elector's mandate.

⁸ J. Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, pp. 251 - 255.

⁹ Dicey, Introduction, p. 79.

¹⁰ According to Petersmann, p. 265, this distinction had earlier been made by J. Bryce.

¹¹ Dicey, Introduction, p. 74.

¹² So did the Parliaments in both World Wars.

Dicey objected that "Parliament is, in a legal point of view, neither the agent of the electors nor in any sense a trustee for its constituents."¹³

He thus held that the 1715 Septennial Act was not only valid but at the same time proved the most significant illustration of legal omnipotence.

2. The Relationship between State Sovereignty and Parliamentary Sovereignty

At this stage it must be observed that there is a third sense in which the term 'sovereignty' is used. Sovereignty can also mean the more extensive notion of state-sovereignty, which is a concept of international law.

As Turpin has pointed out, "Parliamentary Sovereignty and the sovereignty of the United Kingdom as a state are different things, although they are not altogether unrelated."¹⁴

Basically a state is said to be sovereign when it has a territory, people, government and is not under any foreign control.¹⁵

Supreme legislative authority is not an indispensable component of state sovereignty. But the (internal) legal sovereignty of a parliament can only exist within the framework of the (external) sovereignty of the state.¹⁶

3. The Positive and the Negative Side of Legal Sovereignty

Dicey defines Parliamentary Sovereignty through a positive and a complementing negative aspect. The positive side is that Parliament "has, under the English constitution, the right to make or unmake any

¹³ Dicey, Introduction, pp. 47/48.

¹⁴ Turpin, p. 345.

¹⁵ Cf. A. Verdross / B. Simma, Universelles Völkerrecht, pp. 223 et seq., §§ 378 - 389.

¹⁶ For further thoughts on that relationship cf. K. Thelen, Die Vereinbarkeit des Vertrages zur Gründung der Europäischen Wirtschaftsgemeinschaft mit der Britischen Verfassung, p. 34.

law whatever"¹⁷, a law being "any rule which will be enforced by the courts"¹⁸. Parliament in Dicey's definition is the two Houses acting jointly with the monarch (hence, he sometimes refers to it as 'the King in Parliament').

The courts, however, do not enjoy discretion as to which rules they will enforce: "Any Act of Parliament [...] which makes a new law, or repeals or modifies an existing law, *will* [italics added] be obeyed by the courts."¹⁹

The negative side of the same principle is expressed thus: ".. no person is recognised by the law of England as having a right to override or set aside the legislation of Parliament."²⁰

These few sentences are sufficient to illustrate the paramount importance of the role of the judiciary: whether there is any truth in the concept of legal sovereignty ultimately depends on the unconditional allegiance of the courts. This coherence has been expressed most clearly by Sir Ivor Jennings: "[Parliamentary Sovereignty] is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the Courts."²¹

They must never recognise a rival legislative power and, when deciding if an Act of Parliament is valid, they must be content to ask whether or not the right people have acted together in the appropriate manner to create an Act of Parliament. They are not allowed to take into account any "higher" principles that might be thought of as ranking above man-made law.

4. Potential Legal Limitations on Parliamentary Sovereignty

The absoluteness of the claim for legal supremacy provokes the question as to possible legal limitations. There are a number of possible restrictions of different character which should be given

¹⁷ Dicey, Introduction, pp. 39/40.

¹⁸ Dicey, Introduction, p. 40.

¹⁹ Dicey, Introduction, p. 40.

²⁰ Dicey, Introduction, p. 40.

²¹ Jennings, The Law and the Constitution, p. 149; Allan, The Limits of Parliamentary Sovereignty, p. 621; only recently, this view has been affirmed by Lord Lowry, speaking for a unanimous House of Lords in *Harrison v. Tew*, [1990] 1 All ER 322 at 329.

some consideration.

a) Territorial Restraints

It would seem natural to assume that the law-making power of the British Parliament is confined to the UK and subordinated territories. In the orthodox view, however, there is no reason to suggest that Parliament cannot attribute legal consequences to events in independent foreign countries involving solely foreign nationals.²²

I. Jennings's well known illustration of this fact is the extreme hypothetical example of the British Parliament making it an offence for Frenchmen to smoke in the streets of Paris.²³ This would be a valid English law. But the fact that according to a domestic constitutional doctrine Parliament can legislate for all places and persons does not mean that the enactment will be applied by foreign courts. It is safe to assume that the French criminal courts would not be very impressed by the British smoking-ban. They owe loyalty not to English law but to French.

So, although it is true that Parliament is free to legislate on any matter anywhere in the world, its legislative will is enforceable only where the courts are paying attention to English law.²⁴

In the sense that the essence of Parliamentary Sovereignty is obedience by the courts, it could therefore be said that there are territorial limitations.

In practice, the British courts presume that Acts of Parliament apply only in the United Kingdom, unless stated otherwise: "Every Parliamentary draftsman writes on paper which bears the legend, albeit in invisible ink, 'This Act shall not have extraterritorial effect save to the extent that it expressly so provides.' The courts know this and they read it into every statute."²⁵

²² In fact, it has repeatedly done so, a recent example being the Aviation Security Act 1982.

²³ Jennings, The Law and the Constitution, pp. 170 -171.

²⁴ So in Jennings' example, the French offender has to spend a few hours in Folkestone in order to be prosecuted, p. 171.

²⁵ Donaldson L.J. in *R. v. West Yorkshire Coroner ex p. Smith*, [1983] Q.B. 325 at 358.

b) International Law

Ever since the evolution of the traditional *ius gentium* the nature of international law as law has been doubted. In a different context, Dicey referred to a befriended colleague who was a Professor of international law as "a teacher of law which is not law, and [...] accustomed to expound those rules of public ethics which are miscalled international law."²⁶

Today it is commonly accepted that international law is a form of law flowing from different sources. These sources are normally quoted following the pattern in Art. 38 sec. 1 lit a - c of the Statute of the International Court of Justice:

International treaties (which are normally relevant only *inter partes*), international customary law and the general principles of law of the civilized nations are generally recognized as the (only) sources of international law.²⁷

Whether a national legislature is in any way fettered by International Law depends on the status which international law holds within the legal order of a sovereign state.

Some countries, like the BENELUX-states, have in recent years conceded complete or partial supremacy of international law over national legislation.

In the UK, this is fundamentally different. Treaties, which are made under the prerogative of the Crown, do not automatically become a part of English law.²⁸ To have force in domestic law, they must be transformed by an Act of Parliament.

The general principles of international law (customary international law, on the other hand, are regarded as part of the common law of England.²⁹ As such, they undisputedly rank below statute law. Therefore, the British Parliament can legislate contrary to International law if it wishes to do so, and any such law would prevail over principles of international law before the British courts.

²⁶ Dicey, Introduction, p. 22.

²⁷ Verdross / Simma, pp. 321 et seq.; Buergenthal, T./ Doehring, K./ Kokott, J./ Maier, H. G., Grundzüge des Völkerrechts, pp. 18 et seq.

²⁸ *McWhirter v. Att.Gen.*, [1972] CMLR 882 at 886, per Lord Denning M.R.

²⁹ See *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All ER 881 at 888/9, per Lord Denning M.R.

The unabridged supremacy of Parliament over International law has often been confirmed by the courts: "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal."³⁰

Thus Judge Ungoed-Thomas dealt with the complaint of a taxpayer who had argued that part of the income-tax which was levied under the Finance Act 1964 would be used for the construction of nuclear weapons, which was, in the taxpayer's opinion, contrary to International Law.³¹

When confronted with a case involving international law, the courts again apply a rebuttable presumption that Parliament does not intend to legislate contrary to the UK's obligations from International treaties or inconsistent with general principles of International law.

c) Natural Law

Towards the end of the 18th century, there was still among lawyers the notion that Acts of Parliament contrary to any reason could be void. Sir William Blackstone claimed that "the law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries and at all times: no human laws are of any validity if contrary to this."³²

³⁰ *Cheney v. Conn*, [1968] 1 WLR 242 at 247 per Ungoed-Thomas J.

³¹ For further examples see *Mortensen v. Peters*, [1906] 14 S.L.T. 227 at 231 et seq.; *R. v. Jordan*, [1967] Crim. L. Rev. 483.

³² W. Blackstone, Commentaries on the Laws of England, p. 41. On the other hand, Blackstone also wrote : "True it is, that whatever Parliament doth, no authority upon earth can undo" (pp. 160-161). Over the years, he seems to have adapted to the tendency in professional opinion favouring parliamentary instead of judicial supremacy; cf. also Jennings, The Law and the Constitution, pp. 319 - 321, and A.F. Pollard, The Evolution of Parliament, p. 220.

From the preceding paragraphs it should be clear that such a view can not peacefully co-exist alongside a claim of Parliamentary Sovereignty. The existence of a law of reason which has to be applied and put into concrete form by the judges³³ means supremacy of the judiciary rather than of Parliament.

Consequently, Dicey reconstructed Blackstone's statements as aids to statutory interpretation. He said that the judges, when trying to expound on the meaning of an act, will presume that Parliament would not intentionally violate the ordinary rules of morality. But, over and above this, there was "no legal basis for the theory that judges, as opponents of morality, may overrule Acts of Parliament."³⁴

The courts accept this view and have on several occasions disclaimed of any right to interfere with Acts of Parliament.³⁵

d) Parliamentary Self-Limitation

aa) The Problem: Continuing or Self-Embracing Omnipotence ?

The question about the possibility of self-limitation is substantially different in nature from the objections that were discussed previously under a)-c).

Confining the scope of Parliamentary Sovereignty to a certain territory or subordinating it to natural or international law are attempts to qualify the absoluteness of the doctrine from outside. The starting-point for raising the problem of self-limitation is the inherent logic of the doctrine.

Does Parliament's omnipotence embrace the choice to limit that very power for the future? Can the will of the present legislator be effectively entrenched by Act of Parliament against future repeal?

³³ For arguments in favour of the idea see A.P. d'Entrèves, The Case for Natural Law Re-examined.

³⁴ Dicey, Introduction, p. 62. For a modern attempt to show that the doctrine of Parliamentary Sovereignty is (or should be) subject to judicial disobedience on the ground of 'political morality' see Allen's The Limits of Parliamentary Sovereignty.

³⁵ See e.g. *Manuel v. Attorney General*, [1983] Ch. 77 at 86 per Megarry V.C., or *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 at 723 per Lord Reid.

As H.L.A. Hart has rightly pointed out, a view of Parliamentary Sovereignty which would answer these questions in the affirmative would probably deserve the name 'sovereignty' better than any other. "This is the principle that Parliament should *not* be incapable of limiting irrevocably the legislative competence of its successors, but, on the contrary, should have this wider self-limiting power. Parliament would then at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted doctrine allows to it. The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself, is, after all, only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all matters not effecting the legislative competence of successive Parliaments, and an unrestricted *self-embracing* omnipotence, the exercise of which can only be enjoyed once."³⁶

To a logician, this matter would only be another interesting example of what is known as self-reflecting riddle or proposition.

In terms of actual politics, the answer to the question bears immense practical implications. If, for example, Parliament were to enact a Bill of Rights in order to guarantee the citizens a core of fundamental rights, this Bill would not be deemed to provide much security under a doctrine of *continuing* sovereignty. It would at any time be threatened by the prospect of being extinguished at the discretion of a new legislature. Public opinion would be the sole (and non-legal) safeguard to make a subsequent Parliament feel bound to the pledges of its predecessor.

In the past, the question of entrenchment has arisen in different contexts. A number of well known precedents still provide the basis for vigorous constitutional debate. One of these is the European Communities Act 1972, which will be given a detailed examination in the next chapters.

We shall look at the Acts of Union with Scotland (1706) and Ireland (1800)(examples given by Dicey to prove the inconceivability of parliamentary self-limitation) and the Northern Ireland Constitution Act 1973.

³⁶ H.L.A. Hart, The Concept of Law, pp. 145-146.

bb) The Acts of Union with Scotland and Ireland

In 1707 the Kingdom of England united with the Kingdom of Scotland to form the United Kingdom of Great Britain and in 1800 Ireland joined the United Kingdom. In both cases, certain portions of the accompanying Acts of Union passed by Parliament were phrased in a way ("for ever", "for all time" etc.) clearly aimed at protecting these provisions against repeal by a future Parliament.

The Union with Scotland Act 1706³⁷ embodied provisions for preserving the Protestant religion and the Presbyterian Church governments in Scotland. Section 2 of this Act made it compulsory for every Professor at a Scottish university to subscribe to the confession of faith³⁸. Section 4 found the strongest possible language in order to entrench this provision. It stated that the Act and its contents "shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two Kingdoms without any alteration thereof or derogation thereto in any sort forever."

Yet, notwithstanding this remarkable effort to lift the Act above the ordinary, the obligation to subscribe to the Confession of Faith was revoked in 1853 by the Universities (Scotland) Act³⁹. The validity of this Act has never been questioned before a court, but the argument put forward against it (mainly by Scottish lawyers), is that the Acts of Union (on the English and on the Scottish side taken together) were *constituent* Acts. Both the English and the Scottish Parliament ceased to exist and a new sovereign body, the Parliament of Great Britain, was created. This new body is limited in its power to alter the Acts of Union by the same legal authority it owes its existence to.⁴⁰

³⁷ 6 Anne, c.11. See also A.V. Dicey/ R.S. Rait, Thoughts on the Union between England and Scotland.

³⁸ A religious test.

³⁹ 16 & 17 Vict. c. 89, s. 1.

⁴⁰ See e.g. Mitchell, Constitutional Law, pp. 69 - 73; Upton, pp. 85 - 91. Cf. also the statement of Lord Cooper in *MacCormick v. Lord Advocate*, [1953] S.C. 396 at 411 et seq.

English constitutional lawyers have generally rejected this view⁴¹, claiming that the Parliament of Great Britain has inherited and further developed complete sovereignty from the English Parliament.

In a similar way as the Universities Act, the Irish Church Act 1869 swept aside regulations of the Act of Union with Ireland 1800⁴² whose language had clearly intended to bind subsequent Parliaments.⁴³

cc) The Northern Ireland Constitution Act 1973

The Northern Ireland Constitution Act 1973 is given by some⁴⁴ as an example of Parliament binding its successors. In s.1 the Act provides that "in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section [...]."

The question is whether or not Westminster can unilaterally revoke this provision, in which case there would be no obstacle to change the constitutional status of Northern Ireland without the consent of the people.

There are mainly two arguments which have been put forward in favour of a self-limiting effect:

First, it has been suggested that s. 1 may be construed as a procedural fetter, restricting Parliament from legislating on the status of Northern Ireland before its people have consented.

There are severe objections against this view. As will be shown in a moment⁴⁵, the courts in the UK do not recognize form requirements on legislation. But even if this were different, s. 1 of the Northern

⁴¹ R.F.V Heuston, Essays in Constitutional Law, p. 10; Hood Phillips/ Jackson, pp. 65-66; Wade, The Basis of Legal Sovereignty, pp. 173 et seq., esp. pp. 183-184.

⁴² 39 & 40 Geo. III, c.67.

⁴³ Cf. Dicey, Introduction, p. 66; for more examples in connection with the Acts of Union see Hood Phillips/ Jackson, pp. 62-66.

⁴⁴ See, e.g., B. Hadfield, Learning from the Indians? The Constitutional Guarantee Revisited, pp. 351 - 365 (with further references).

⁴⁵ *Infra*, pp. 17 et seq.

Ireland Constitution Act itself has not been made subject to a particular legislative procedure. In fact, no attempt at all has been made to entrench the provision against future repeal.

The second argument is that Parliament has redefined itself for the purposes of legislating on the future status of Northern Ireland by adding a fourth 'estate', namely the people of Northern Ireland. This sounds plausible until one looks at the Act in its historical context. Let us for a moment assume that Parliament has indeed redefined itself for this particular purpose. This would mean that no decision on the substantive issue could be taken by the Commons, the Lords and the Queen alone. Only with the consent of the people of Northern Ireland could such authority be restored to the 'old' Parliament.

Now, if we look at s. 1 (2) of the Ireland Act 1949, we find that it contained an identical provision to that of the 1973 Act, except that changes in the status of Northern Ireland had been made dependent upon the consent of the Northern Ireland Parliament. If it is accepted that in 1973 the UK Parliament redefined itself by including the people of Northern Ireland, then it is fair to say that in 1949 it did the same by including the Northern Ireland Parliament. Thus, any legislation on Northern Ireland should have required the cooperation of the Irish Parliament.

Yet, Westminster unilaterally abolished the Northern Ireland Parliament by s. 31 of the Northern Ireland Constitution Act and replaced the old provision on changes with the one now in force.

The only conclusion to be drawn from this is that the 'guarantee' in s. 1 of the Northern Ireland Constitution Act could just as easily be withdrawn in law as was s. 1 of the Ireland Act 1949.⁴⁶

Parliamentary practice in these cases obviously supports the orthodox view that Parliamentary Sovereignty is *continuing* and not *self-embracing*. The courts, too, assume that every Parliament exercises the same amount of legislative power as its predecessor and thus cannot be bound by earlier legislation. As early as 1686, Herbert C.J. held in *Godden v. Hales*⁴⁷ that "if an Act of Parliament had a clause in it that it should never be repealed, yet without question,

⁴⁶ See Hood Phillips/ Jackson, p. 63; also E.C.S. Wade/ A.W. Bradley, Constitutional and Administrative Law, p. 81.

⁴⁷ 11 St.Tr. 1165 at 1197 (KB).

the same power that made it, may repeal it."

The same conclusion was reached in *Ellen Street Estates Ltd. v. Minister of Health*⁴⁸ and, extrajudicially, Lord Reid observed: "It is good constitutional doctrine that Parliament cannot bind its successors."⁴⁹

dd) The Manner-and-Form-School (New View)

Finally, it has been suggested that although no Parliament has the power to determine the subject-matter of future legislation, it can set permanent rules about the "manner and form". This theory is based on the fact that the courts must have some scheme of authenticating Acts of Parliament. Once a court is satisfied that it is dealing with an Act of Parliament, there is, under the orthodox view, no way to refuse judicial obedience. But, logically prior, there must be criteria for the judges to identify the instrument before them as an Act of Parliament. This was an issue long ago in *The Prince's Case*⁵⁰, where it was made clear that an instrument, although entered on the Parliament Roll, "be penned, that the King, with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it, *scil.* the King, The Lords and the Commons or otherwise, it is not an Act of Parliament."

The advocates of the 'manner-and-form-school' or 'new view', as it is also called, suggest that Parliament itself can alter these formal criteria by effectively providing that certain categories of Acts might be created or existing Acts be amended or repealed only in a specified way.⁵¹ This could mean e.g. the requirement of a 2/3 majority in both Houses, the approval of the electorate in a referendum or the use of a special verbal formula (like in sec. 4 of the Statute of Westminster 1931).

The new view mainly relies on Commonwealth cases like *Harris v.*

⁴⁸ [1934] 1 KB 590.

⁴⁹ The Judge as Law-Maker, p. 25.

⁵⁰ [1606] 8 Co. Rep. 1a.

⁵¹ See e.g. Jennings, p. 153; critical Wade, The Basis of Legal Sovereignty, pp. 186 - 187.

*Minister of the Interior*⁵², *Attorney General for New South Wales v. Trethowan*⁵³ or *Bribery Commissioner v. Ranasinghe*⁵⁴.

In the *Harris* case for example, the court held that a parliament, although sovereign, could be subject to requirements of form and manner to effectively express its legislative will.

However, there are peculiarities in this case as well as in the other cases, which do not allow the ratio decidendi to be uncritically applied to the United Kingdom Parliament. Unlike the United Kingdom Parliament⁵⁵, the South African Parliament owed its existence to a constituent act, namely the South Africa Act 1909 (an Act of the UK Parliament!). It can therefore be said that only when acting in accordance with the procedural requirements of the constituent act the South African Parliament is enacting valid laws.

The same is true for the other cases mentioned. The limiting provisions derive their authority from the fact that they are part of the constituent instrument that bestowed legislative power on the respective parliament in the first place.

Since there is no comparable constituent act for the United Kingdom Parliament, it is hard to see why a provision in an 'ordinary' Act of Parliament should be considered to have the same special authority as in the Commonwealth cases.⁵⁶ This is, unless it is argued that with every such provision Parliament is effectively redefining itself as law-making body for certain purposes.

The second objection against the manner-and-form theory is that it is almost impossible to uphold a clear conceptual distinction between

⁵² [1952] 1 TLR 1245 (Appellate Division of the Supreme Court of South Africa).

⁵³ [1932] A.C. 526. For a detailed discussion of this case and thoughts on the *Harris* case see Wade, The Basis of Legal Sovereignty.

⁵⁴ [1965] A.C. 172.

⁵⁵ With the possible exception of the Act of Union with Scotland; see above.

⁵⁶ This squares with Dicey's distinction between sovereign and non-sovereign legislatures, Introduction, chapter II.

procedural limitations and limitations on subject-matter.⁵⁷

If the procedural hurdles are set high enough (e.g. a requirement of total unanimity in both Houses of Parliament *plus* 95% of the votes in a national referendum) it is virtually unthinkable that the substance of law thus protected can be lawfully altered by a future legislator. In practice, the manner-and-form provision would then have the same effect as an entrenchment of a certain subject-matter.

For the purpose of this thesis, it will be assumed that Parliament cannot bind its successors as to the manner and form of the legislation.

The orthodox view receives encouragement from the statements in *Ellen Street Estates v. Minister of Health*. Maugham LJ reaffirmed that "[t]he legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislator."⁵⁸

5. Transfer of Sovereignty

Results so far seem to indicate that Parliament can under no circumstance divest itself of its legislative power for the future.

Dicey himself was anxious to make clear that this would be a misunderstanding and that limitation and abdication of sovereignty were two totally separate issues: "[T]he impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit, either logically, or in matter of fact, the abdication of sovereignty."⁵⁹

In Dicey's view, there are two (and *only* two) ways in which a surrender of legislative sovereignty can be brought about.

⁵⁷ For an analysis of this problem and for suggestions for practicable delimitations cf. W. Friedmann, Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change, p. 105; see also Petersmann, pp. 291 et seq.

⁵⁸ [1934] 1 KB 590 at 597.

⁵⁹ Dicey, Introduction, p. 68 (in the long footnote).

The first could be called the 'suicide-method': if Parliament dissolved itself without leaving a means whereby a successor could be legally summoned, this would be the end for Parliament and everything that goes with it, including Parliamentary Sovereignty.

There is not much point in expounding on this alternative. The self-elimination of Parliament would leave a political and functional vacuum which would have to be filled and would be filled somehow.⁶⁰ Whether the new body entrusted with making laws would be a parliament or a single person, or whether it would have supreme legislative power would be absolutely open. But at least for the time being legal sovereignty would have ceased to exist.

The second alternative is more interesting. According to Dicey, Parliament may also transfer its sovereign power to another person or body of persons. Unfortunately, he doesn't pursue this matter much further and fails to explain exactly how such a transfer can be achieved. Can it be done by an Act of Parliament or is there a special method? Does 'transfer' mean that Parliament has to give up everything, the entirety of its legislative power? Or is it also possible to transfer parts of sovereignty? If so, what is the difference between a valid partial surrender and an invalid attempt of self-limitation?

At least one thing is certain: 'transfer' by definition means that the transferred powers are irrevocably lost. Anything else would not be a transfer but rather a form of delegation with Parliament still retaining the ultimate authority to restore the *status ante*.

At this point, it is useful to recall that the essence of Parliamentary Sovereignty is the political relationship between two separated powers in the state: Parliament as law-making body on the one side and the judges who have to apply the law in the cases before them on the other. Although this is not necessarily self-evident in a political system of separation of powers⁶¹, the courts in Great Britain play a subordinate role to Parliament. They do enjoy a certain extent of discretion in the process of interpretation, but at the end of the day they will apply every parliamentary enactment, whatever its contents.

So, if Parliament wanted to transfer its sovereign power (or parts of

⁶⁰ See Winterton, p. 600.

⁶¹ As any democracy with judicial review over parliamentary statute shows; e.g. in the United States or in Germany.

it) to another person or body of persons, what should prevent a subsequent Parliament (or, in fact, the same Parliament) from reversing the process by a later Act?

The answer is obvious: a genuine transfer of sovereignty must include a cut of the bond of loyalty between the old sovereign and the courts. The transfer of the power to legislate must be accompanied by a shift of the courts' allegiance towards the new sovereign; the judges must be *expressly or impliedly* released from the pledges of obedience they may feel bound to.

Once this link is destroyed⁶², the break is permanent; Parliament will have burnt its boats, there is no way back.

It should be evident that the obedience of the courts concerned cannot simply be restored by repealing the Act that initiated the process or by 'ordering' these courts to re-shift their loyalty back to the United Kingdom Parliament.

Now it is also clear that Parliament does not have to give up its legal sovereignty in its entirety. It is perfectly possible to confine the changes to a certain territory (e.g. a former colony).

In this case Parliament could always repeal the statute vis-a-vis the English courts (and of course any other courts which still owed their allegiance). As far as these courts are concerned, Parliament would regain supreme power.

But, vis-a-vis the courts in the territory concerned (for whom it is to decide who is actually the sovereign legislative force⁶³) such a repeal would not be binding⁶⁴. This position is clearly expressed by Stratford ACJ (South Africa) in *Ndlwana v. Hofmeyer*⁶⁵: "Freedom once conferred cannot be revoked."

On the whole, any repeal therefore could amount "to no more than a statutory reaffirmation of a power to legislate with extraterritorial effect, and thus would change nothing."⁶⁶

⁶² It may be noted here that this link could also be destroyed without the consent of Parliament, in the way of a legal revolution, overthrowing the old order.

⁶³ Wade, The Basis of Legal Sovereignty, p. 196.

⁶⁴ Cf. de Smith / Brazier, p. 77.

⁶⁵ [1937] AD 229 at 237. Cf. also Wade, The Basis of Legal Sovereignty, pp. 190-192.

⁶⁶ Mitchell, Constitutional Law, p. 80.

In the light of these conclusions it is now possible to examine a special category of parliamentary enactments: the various Acts of Independence.

Until the middle of this century, a large number of countries were dependencies of the United Kingdom in the sense that

- a) the respective parliaments could legislate only by virtue of delegated authority⁶⁷ and
- b) appeal from their courts lay to the Privy Council.

In reaction to the growing desire and pressure for independence in these countries, the United Kingdom Parliament first enacted the Statute of Westminster and later a number of single Acts of Independence⁶⁸.

In all these instances it may be asked whether the Acts involve an irreversible transfer of sovereignty or whether they may be subject to future reconsideration. The question, in other words, is, whether Parliament as a matter of abstract law could continue to legislate for present or former members of the Commonwealth which have been granted independence.

The general answer to this must be: it depends on the intent of Parliament and on how the courts in the relevant territory could reasonably understand the provisions of the Act.

An appropriately thorough appreciation of these crucial aspects must not exclusively rely on the wording of the statute.⁶⁹ It has to take into account the whole complexity of political and historical circumstances under which the Act was passed.

To attempt this assessment for every single Act of Independence would go far beyond the scope of this thesis.

Yet, it is worthwhile to look briefly at two examples in order to get a rough idea of the problems.

⁶⁷ Cf. Hood Phillips/ Jackson, p. 738.

⁶⁸ E.g. Independence Act for Ceylon (1947), Ghana (1957), Nigeria (1960), Zimbabwe (1979).

⁶⁹ Something which Mitchell apparently does by simply comparing sec. 4 of the Statute of Westminster with an 'equivalent provision' of the Independence Act for Ceylon, Constitutional Law, p. 79.

The Statute of Westminster 1931 altered the existing legal (and conventional) rules for the exercise of legislative authority in Canada, Australia, New Zealand, New Foundland⁷⁰, South Africa⁷¹ and the Irish Free State⁷². Sec. 4 of this statute provided that unless a subsequent Act expressly declared that a Dominion had requested, and consented to, its enactment, it shall not extend or be deemed to extend to this Dominion.

In 1982, the United Kingdom Parliament passed the Canada Act, which altered the Canadian Constitution. Robert Manuel and 127 other Canadian Indian Chiefs went to court and challenged the validity of this Act on the ground that Parliament had violated Indian rights confirmed under a Royal Proclamation made in 1763 (and reaffirmed in the British North America Acts) without acting in accordance with the requirements of sec. 4 of the Westminster statute.⁷³

They argued that in 1931 Parliament had given up part of its sovereignty by providing that any future legislation on specified Commonwealth subjects made without obtaining the prescribed specified consents should be void. The plaintiffs were of the opinion that the Canada Act 1982 needed the approval of the Indian people of Canada. Since it was enacted without this consent, it had to be *ultra vires*.

The Court of Appeal did not follow this kind of reasoning. Only for the sake of argument the court assumed that Parliament can bind its successor by requiring consents for legislation. Then it went on to say that even if Parliament had been forced to comply with sec. 4 of the Statute of Westminster in the process of enacting the Canada Act 1982, it had in fact done so. Slade LJ explained: "Section 4 itself does *not* provide that no Act of Parliament shall extend to a Dominion as part of the law of that Dominion unless the Dominion has *in fact* requested and consented to the enactment thereof. The condition that must be satisfied is quite a different one, namely, that it must be 'expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.' [...] If an Act of Parliament

⁷⁰ Now a province of Canada.

⁷¹ South Africa became a republic and seceded from the Commonwealth in 1961.

⁷² Now Republic of Ireland or Eire (1937). Eire seceded from the Commonwealth in 1949.

⁷³ *Manuel v. Attorney General*, [1983] Ch. 77.

contains an express declaration in the precise form required by section 4, such a declaration is in our opinion conclusive as far as section 4 is concerned."⁷⁴

In an earlier judgment, Lord Sankey in an obiter dictum with reference to section 4 of the Statute of Westminster had expressed the view that "it is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s.4 of the Statute."⁷⁵

So what had gone wrong for the Indian chiefs?

First of all, they in fact did not argue that the UK Parliament had transferred sovereignty to Canada but they claimed (although the difference was probably not realised) that Parliament had set manner-and-form conditions for its own legislative actions. But, as shown above⁷⁶, it is generally believed that procedural self-limitation is impossible.

Second, the Chiefs should not have ended with their complaint before an English court instead of an Canadian court.

Had Parliamentary Sovereignty actually been transferred to Canada as a result of the Statute of Westminster 1931, this would also have had included disentanglement of the judicial structures of the two countries. Not much is won if lower courts are released from their duty to carry out Parliament's will but an appeal will lead to a court that is bound to apply English laws (including any law reversing a previous 'transfer' of sovereignty⁷⁷).

Thus an attempt to challenge the legislative authority of Parliament before an English court was unlikely to succeed from the start. Considering this, the statement of Vice-Chancellor Sir Robert Megarry was hardly surprising: "On the authority of Parliament the courts of a territory may be released from their legal duty to obey Parliament, but that does not trench on the acceptance of the English courts of all that Parliament does."⁷⁸ And later he went on to say: "The Canada Act 1982 is an Act of Parliament, and sitting as a judge in an

⁷⁴ *Ibid.*, at 106.

⁷⁵ *British Coal Corporation v. The King*, [1935] AC 500, 520.

⁷⁶ See *supra*, pp. 17 et seq.

⁷⁷ See *supra*, pp. 20/21.

⁷⁸ [1983] Ch. 77 at 89.

English court I owe full and dutiful obedience to that Act."⁷⁹

But even apart from the 'bad luck' with the court, it is submitted that although the Statute of Westminster 1931 in sections 1-3 considerably enhanced the legislative rights of the Dominions (thus giving the force of law to constitutional conventions which had governed the relations to the Dominions before 1931⁸⁰), it was at the time not intended to confer complete sovereignty⁸¹ and could not have been interpreted in that way by Canadian courts.

So, at least 'as a matter of abstract law' it would have been possible for the UK Parliament to restore a status of unfettered legal authority over the countries concerned vis-a-vis the courts in those countries!

The second example is the Zimbabwe Act 1979. Section I (2) provides: "on and after Independence Day Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Zimbabwe; and no Act of the Parliament of the United Kingdom shall extend or be deemed to extend, to Zimbabwe as part of its law."

In this case, there was an *unqualified* surrender of legislative competence. There was no 'on request and with consent' clause as in the Statute of Westminster. The legislative shift was accompanied by a full transfer also of governmental powers.⁸² To emphasize that there was a totally fresh starting-point for Zimbabwe these changes took effect on a special 'Independence Day'. Immediately after gaining independence, Zimbabwe became a member of the United Nations. All these signs indicate that in 1979 Parliament irrevocably transferred sovereignty to Zimbabwe.

Whatever bonds of loyalty existed between the courts in Zimbabwe and the United Kingdom Parliament were untied and even as a matter of abstract law there is no means left by which this process could be reversed.

⁷⁹ *Ibid.*, at 87.

⁸⁰ De Smith / Brazier argue that this view is not entirely correct. It would be more precise to speak of 'supercession' of the conventions, p. 47.

⁸¹ Cf. Hood Phillips/ Jackson, p. 758.

⁸² Hood Phillips/ Jackson, p. 70, comment on the significance of this circumstance.

A political scientist will object that the mechanisms outlined above in some cases do not adequately explain what is actually happening. A close look might in fact reveal that often the allegiance of the judiciary in a dependent country had been withdrawn without the prior consent by Parliament as a result of developments on the political level. So, any attempt by Parliament to 'transfer' sovereignty can only serve to reconcile the law with reality.⁸³

But history shows that even if Parliament did not legalise such a 'technical revolution', legal theory could not indefinitely ignore the changes in reality.⁸⁴ Revolutions by definition are unlawful under the legal order which they seek to remove. But with time progressing, they can become a source of legal change.⁸⁵

6. Parliamentary Sovereignty as Legal Fiction

a) The Importance of Relating the Facts to Legal Fiction

The Swiss author J.L. De Lolme once remarked that the British Parliament could do anything except make a man into a woman and vice-versa. For this he was scolded by Jennings: "[...] like many of the remarks which De Lolme makes, it is wrong. For if Parliament enacted that all men should be women, they would be women so far as the law is concerned. In speaking of the power of Parliament, we are dealing with legal principles, not with facts. Though it is true that Parliament cannot change the law of nature, it is equally true that it cannot in fact do all sorts of things. The supremacy of Parliament is a legal fiction, and legal fiction can assume any-

⁸³ Cf. Hood Phillips/ Jackson, p. 69.

⁸⁴ As De Smith / Brazier put it: "Legal theorists have no option but to accommodate their concepts to the facts of political life.", p. 68; see also Wade, The Basis of Legal Sovereignty, p. 196 bottom.

⁸⁵ See Petersmann, pp. 47 - 51, and de Smith / Brazier, pp. 67-69; The German lawyer Georg Jellinek once called this "die normative Kraft des Faktischen".

The most striking examples for British history are probably the processes in which the United States and Southern Rhodesia gained independence.

thing."⁸⁶ Although he acknowledges the existence of actual limitations, Jennings does not bother to investigate them further.

In the same fashion, Petersmann mentions casually that Parliament's natural restraints are so obvious that they do not deserve any attention.⁸⁷ But this sort of attitude which completely disregards the actual problems of exercising legislative authority carries with it a potential danger.

The concept of absolute legal sovereignty is indeed legal fiction.⁸⁸

But what purposes does legal fiction serve?

One of the most basic motivations conceivable for employing legal fictions⁸⁹ is a desire for (scientific) simplification. The reality of life and human affairs is much too complex to be squeezed into any legal doctrine. So sometimes lawyers have to single out part of the truth for the sake of clarity.

Fiction is an instrument of science that is not only used in jurisprudence.⁹⁰ It is an expedient and powerful tool, but it carries some risks when not used responsibly. Responsible use should "force upon our attention the relation between theory and fact, between concept and reality, and remind us of the complexity of that relation."⁹¹

So when a Lawyer employs a fiction that serves as a manageable filtered picture of a certain part of reality, it is important to keep the facts from which the fiction emanated in the back of his mind. By this he makes sure that the fiction (as a pure creation of the mind) does not become totally detached from what is actually going on and starts leading an artificial life of its own.

Only a constant examination of these interrelations ensures that the

⁸⁶ Jennings, The Law and the Constitution, p. 170.

⁸⁷ Petersmann, p. 166.

⁸⁸ L. Fuller describes legal fictions as statements by lawyers who know that they are false, Legal Fictions, p. 1; Similarly, H. Vaihinger calls fiction an "expedient, but *consciously false*, assumption, Die Philosophie des Als Ob, 4th ed. 1920, p. 130, as cited by Fuller, p. 7.

⁸⁹ For a thorough analysis see Fuller, pp. 49 - 92.

⁹⁰ In physics, for example, light is sometimes regarded as corpuscular and sometimes as wavelike, according to the respective purpose.

⁹¹ Fuller, p. IX.

time is not missed when the theory should be (re-)adjusted to the changed facts.⁹²

b) Actual Restraints on Legal Sovereignty

Dicey recognized and acknowledged a discrepancy between legal theory and reality and spoke of the "coexistence of Parliamentary Sovereignty with the fact of actual limitations."⁹³

It would have seemed consistent with his whole constitutional theory to put the 'actual limitations' down to his earlier distinction between legal and political sovereignty (the political sovereign being the people). However, he did not take this logical step, but divided the actual limitations into 'external' and 'internal' limits. This distinction between 'in-' and 'external' is obviously to be understood from the point of view of Parliament. The internal limits he saw in the character, education and political experience of the individuals of which Parliament was composed. The external limits he described as (with reference to David Hume⁹⁴) the likelihood or even certainty that the people will refuse to obey a law whose contents violates general and fundamental moral convictions.⁹⁵

Although there is nothing logically wrong with this distinction, it is not quite clear what ends it serves.

If one really wanted to classify actual limitations today, it would seem more appropriate to distinguish a domestic and an international level.

The most obvious and embracing limitation, as Jennings rightly remarked, is the fact that Parliament cannot change the course of

⁹² See C. Rix-Mackenthun, Die Funktion des Britischen Parlaments und die Mitgliedschaft in den Europäischen Gemeinschaften, p. 7.

⁹³ Dicey, p. 76.

⁹⁴ *Ibid.*, referring to D. Hume, Essays, Moral Politic and Literary, ed. 1875 vol. I, pp. 109 - 110.

⁹⁵ The resistance to the Community Charge (or poll-tax) shows that even lesser causes can trigger this mechanism.

nature.⁹⁶

But there are more practical limitations to Parliament's theoretical omnipotence.

On the international level, Parliament does not want to disturb the comity of nations and will therefore not make use of its power to legislate with extraterritorial effect unless it has good reasons to do so. At the moment (1991), the United Kingdom is signatory to hundreds of multilateral and bilateral treaties. Parliament will avoid legislating contrary to the obligations under these treaties in order to preserve respect and credibility in the international community.⁹⁷ For the same reason, it will also be anxious to comply with general principles of international law.

Being a trading nation, Great Britain must also pay tribute to economic pressures. It could for example not afford to introduce protectionist measures⁹⁸ as the countries concerned will take retaliatory steps.

On the domestic level, the scope of feasible policies is limited by the available resources, financial or otherwise.

Parliament will take into account 'public (or rather publicised?) opinion'. The members of (any) parliament, even if they lack a character determined by high moral standards, at least have a fine-tuned antenna for actions that could spoil their chances for re-election.⁹⁹

Decision-making is also influenced by well-organized private groups of people pursuing narrowly defined interests ('pressure groups').

The government, which is formed by the majority party in Parliament, is expected to carry out the policies they presented to the

⁹⁶ Parliament could for example decree that it will never rain again!? If Parliament enacted that all men should be women, this would mean a lot of complicated surgery, if taken literally. To treat men exactly like women, as Jennings suggests in his riposte to De Lolme, is something quite different.

⁹⁷ On the other hand, compliance is less certain where positive action is required: see e.g. the European Convention on Human Rights.

⁹⁸ As far as they are not already prohibited by GATT or EC-Law.

⁹⁹ Cf. Jennings, The Law and the Constitution, p. 148.

electorate during their election campaigns.¹⁰⁰

Many of the actual limitations (especially the vast number of treaties) that bridle Parliament's power today did either not exist or were less noticeable a century ago. Concerning foreign policy, the United Kingdom in the time between between the end of the Napoleonic wars and the beginning of the First World War was on the peak of its power. The Parliament of Westminster was hardly vulnerable from the inside or from the outside.

So, without drawing any further conclusions at this stage, one could say that Dicey's constitutional doctrine was more in accord with the political and historical realities of the 19th century than it is with the post-industrial, interdependent and international society of the late 20th century.

II. A Brief Outline of the History of Parliamentary Sovereignty

Although the doctrine of Parliamentary Sovereignty is deeply rooted in English history, neither Parliament as an institution nor the political concept of sovereignty has existed from the beginning of time.

To trace back the origins of the institution is comparatively easy. Any endeavour to pinpoint a specific moment in history from which on Parliament was sovereign in the sense outlined above is much harder. Though there are a number of single instances of particular importance (from which the Glorious Revolution of 1688 stands out), legal sovereignty was no ad-hoc creation.¹⁰¹ There was never a constitutional assembly that conferred ultimate power to the English Parliament. Instead, sovereignty had steadily grown over a long time, and for considerable periods of its growth it rested with the monarch or was divided between the monarch, Parliament and even the common law courts.

¹⁰⁰ In the opinion of some writers this expectation even has the status of a constitutional doctrine ('doctrine of the mandate') which is, according to Hood Phillips/ Jackson, p. 56, "rather vague"; also critical: De Smith/ Brazier, p. 83.

Also cf. Mitchell, p. 68; Petersmann, pp. 244 - 245.

¹⁰¹ Cf. A.F. Pollard, The Evolution of Parliament, p. 216 et seq.

This development was also closely linked to events which were not confined to England. The Reformation in the 16th century challenged the until then recognized claim of papacy to hold kings or territorial princes responsible for the violation of certain rules of conduct. Thus the Reformation was a pre-condition for the evolving of the Modern State.

1. The Origin of Parliament

'Parliament' comes from the french word for 'talk' (*parler*) and this was the original function of the 11th century *curia regis*¹⁰² (from which Parliament evolved): to talk and give counsel to the King.

In the 12th century, the boroughs and cities began to send representatives with petitions, mainly in judicial and financial matters.¹⁰³

These men also became involved in the judicial process. Although they did not act as judges, they sat in joint sessions with the courts (High Court of Parliament¹⁰⁴) where they could give their opinion on difficult cases.¹⁰⁵

The legislative function of Parliament emerged from the practice of simple petitions which was extended to the presentation of fully formulated drafts (bills).

Under the Lancastrian and Yorkist Kings, Parliament consolidated the rights it had won in earlier contests with the Crown, namely examining public accounts, controlling the internal administration, voting taxes ('no taxation without representation') and participating in legislation.¹⁰⁶

The latter two were of particular importance. During the reign of Henry VI Sir John Fortescue wrote: "...nor does the King himself, or by his ministers, impose tallages, subsidies, or any other burdens

¹⁰² The *curia regis* consisted of the King's feudal vassals who were under a duty to appear in the Great Councils (*magna consilia*) when summoned by the monarch.

¹⁰³ T.F.T. Plucknett, Taswell-Langmead's English Constitutional History, pp. 134-135.

¹⁰⁴ The word 'parliament' comes from the french *parlement* (*parler* = to talk).

¹⁰⁵ Pollard, p. 112.

¹⁰⁶ Plucknett, p. 184.

whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed by Parliament."¹⁰⁷

2. Parliament Under the Tudors (1485 - 1603): A Time of Co-operation

The period of 1485 - 1603 stands for a remarkable juxtaposition of a formal assertion of Parliament's constitutional rights and the exercise of de-facto absolute monarchical despotism which culminated in the long reign of Henry VIII (1509-1547).¹⁰⁸

Under Henry's rule Parliament's "privileges were consolidated, its personnel was improved, its constituency enlarged, its political weight enhanced in foreign eyes, its authority increased, its sessions made more frequent and prolonged."¹⁰⁹ In the words of Theodore Plucknett, "Henry VIII liked to regard Parliament as adding lustre to his already glittering majesty, and thus employed it for the purpose of impressing his brother monarchs. [...] Parliament was no cypher, but an active part in the Tudor adventure - unwilling, perhaps, critical and sometimes recalcitrant, but still an essential partner which had to be hectorred or humoured into collaboration."¹¹⁰

The skill with which Henry did just that is illustrated by an address which he delivered to the Commons in connection with the well-known Ferrers' Case (1543).¹¹¹ Reportedly he said: "And further we be informed by our judges that we at no time stand so highly in our estate royal, as in the time of Parliament; wherein we as head, and you as members, are conjoined and knit together in one body politick, so as whatever offence or injury, during that time, is offered to the meanest member of the House is to be judged as done against our

¹⁰⁷ In: De Laudibus Legum Angliae, as cited by K. Löwenstein, Der britische Parlamentarismus: Entstehung und Gestalt, p. 31.

¹⁰⁸ Cf. Plucknett, pp. 228 et seq.; Petersmann, p. 231; Pollard, p. 215.

¹⁰⁹ Pollard, p. 215. Henry VIII's predecessor Henry VII summoned Parliament only seven times during his twentyfour years of reign.

¹¹⁰ Plucknett, p. 242.

¹¹¹ George Ferrers was a member of the House of Commons who had been arrested as surety for the debt of another, by process out of the King's Bench.

person and the whole Court of Parliament."¹¹²

Henry was even able to talk a reluctant Parliament into passing the Statute of Proclamations 1537¹¹³ which gave the King the power to make proclamations with the force of statutes. Although the Act was repealed in the first year of the reign of Edward VI¹¹⁴, Queens Mary and Elizabeth I continued the practice of making and enforcing proclamations on matters of lesser importance.¹¹⁵

The balance of powers was also greatly changed by the effects of the Reformation in England. On the 31st of October 1517 Martin Luther nailed his 95 theses to the door of the *Schloßkirche* in Wittenberg in Germany. Henry VIII was initially opposed to the Lutheran ideas and even received the title *Defender of the Faith* from Pope Leo X for his polemic treatise *Assertio Septem Sacramentorum adversus Martinum Lutherum*. On the other hand, Henry was annoyed by the excess of clerical power¹¹⁶ and its abuse by the church.

The relations to Rome were irreparably damaged when on March 23, 1534 the Pope required the King under the threat of excommunication to take back Catherine of Aragon as his wife (by then, Henry had already celebrated his marriage to Anne Boleyn). But even before this incident, the King had begun to cut the ties with papacy in Rome with the help of the 'Reformation Parliament', which met in London on Nov. 4, 1529 and was (unusual in that time) not dissolved before April 14, 1536.

Within those seven years, Parliament abolished papal supremacy in England (thus establishing *royal* supremacy) and totally reformed the Anglican Church. The Act of Appeals to Rome¹¹⁷ forbade all appeals from the spiritual judges in England to the court of the pontiff. After the news of Pope Clement VII's annulment of the divorce to Catherine arrived, Henry issued a Royal Proclamation ordering "all manner of prayers, orations, rubrics, canons, or massbooks, and all other books in churches, wherein the Bishop of Rome is named, or his presumptions and proud pomp and authority referred, utterly to be

¹¹² As quoted by Plucknett, p. 250.

¹¹³ 31 Hen. VIII, c.8.

¹¹⁴ (1547), 1 Edw. VI, c. 12.

¹¹⁵ Hood Phillips/ Jackson, p. 42.

¹¹⁶ For a description see Pollard, pp. 221 et seq.

¹¹⁷ 24 Hen. VIII, c. 12.

abolished, eradicated and rased out."¹¹⁸ And Parliament decreed in the Supremacy Act 1534¹¹⁹ that the King was "the only supreme head in earth of the Church of England called *Anglicana Ecclesia*, and shall have and enjoy, annexed, and united to the imperial crown of his realm, as well as the title and style thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the said dignity of supreme head of the same church belonging and appertaining."

Summing up, the time between 1485 and 1603 saw two important developments that in the long run contributed to Parliament's supreme power.

First, the Tudors had freed themselves from the papal claim to supremacy.

Second, there was a 'fusion of powers'¹²⁰ of the monarch and of Parliament. The growth of interdependence began to promote the idea that omnipotence rested in the 'King-in-Parliament' rather than in the King acting alone.

It must be noted, however, that the break-up with Rome only ended the accountability of the King to the Pope, but not necessarily to divine law. Opinion on this question is quite controversial. Some authors thinks that Parliament had already established supremacy over the Common Law¹²¹. But the more convincing arguments support the view that the King-in-Parliament as legislator was not (yet) considered to be above the law and thus still had a rival for power in the common law courts.¹²²

3. Parliament under the Stuarts (1603–1688): A Time of Confrontation

Whereas the Tudors had sought to use and manipulate Parliament for their own purposes, James I (James VI of Scotland) soon after the

¹¹⁸ As quoted by Plucknett, p. 280.

¹¹⁹ 26 Hen. VIII, c. 1.

¹²⁰ C.H. McIlwain, The High Court of Parliament and its Supremacy, p. 385.

¹²¹ See e.g. F.W. Maitland, The Constitutional History of England, p. 251 et seq.

¹²² See McIlwain, pp. 126 et seq.

beginning of his reign in 1603 encountered severe collisions with the House of Commons. Not being familiar with the English system, he lacked the expertise of pragmatically exercising his power *through* Parliament. Instead, he and his successors openly claimed supremacy of the King-out-of-Parliament over the King-in-Parliament. He constantly asserted a theory of his divine right to the throne and enunciated a doctrine according to which the Commons derived all matters of privilege from him and also attempted to manipulate parliamentary elections.¹²³

Naturally, this provoked resistance by the Commons. They presented James with a protestation of their rights and liberties. In it they expressed their desire "to remove from the King's mind certain misinformations under which he appeared to be labouring, namely: First, that the privileges of the Commons were not held 'of right, but of grace only, renewed every Parliament by way of donature, upon petition' [...] - assertions against which, as 'tending directly and apparently to the utter overthrow of the very fundamental privileges of our House, and therein of the rights and liberties of the whole Commons of the realm of England which they and their ancestors from time immemorial have enjoyed', they protest, 'in the name of the whole Commons of the realm of England, with uniform consent.'"¹²⁴

The King also annoyed the Commons by his extensive employment of Royal Proclamations. But in this matter the Commons found an ally in the courts. James I had prohibited by proclamation the building of new houses in London in order to control the rampant growth of the capital. Against this, the Commons appealed to Chief Justice Coke and three of his colleagues. In their judgment in the famous *Case of Proclamations*¹²⁵ the judges denied James the power to create new offences by proclamation.¹²⁶

This was all the more a serious blow against the royal prerogatives as the courts had previously supported the King with great vigour,

¹²³ *Ibid.*, p. 332.

¹²⁴ *Ibid.*, pp. 334 - 335.

¹²⁵ (1610) 12 Co.Rep. 74.

¹²⁶ 30 years later, in 1641, the so-called 'Long Parliament' also abolished the Court of the Star Chamber (created 1487, Star Chamber Act, 3 Hen. VII, c. 1) which was a special court for the enforcement of proclamations (Star Chamber Abolition Act, 16 Car. I, c. 10); cf. Plucknett, p. 397.

e.g. in the important *Case of Impositions* (or Bates Case, 1606).

John Bates was a Levant merchant who refused to pay an import duty on currants that James I had imposed without the consent of Parliament. The court of the Exchequer unanimously held in favour of the King that foreign affairs, and therefore all measures relating to foreign trade, were part of the absolute (!) power of the King.¹²⁷

After his defeat in the *Case of Proclamations*, James I tried to govern as long as possible without summoning a new Parliament. Only in 1614 his financial difficulties forced him to call in Parliament, but he soon found himself in conflict with the Commons again, dissolved Parliament and even sent some of the members to the tower. The King was now at open war with the Commons.

But, still worse, also his relations to the judiciary deteriorated. The key-figure in this process was the Chief Justice of the King's Bench, Sir Edward Coke, who was not easily intimidated by the Crown¹²⁸ and on all occasions sturdily asserted the supremacy of the common law. But he held this principle also high against the legislative power of Parliament.¹²⁹

The most frequently cited example is *Dr. Bonhams Case*¹³⁰ where Coke said *obiter* that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act void."

The constitutional struggle between the Crown and the House of Commons followed the same pattern for the rest of James' reign: the King boasting of absolute power and the Commons vigilantly rebuffing

¹²⁷ Cf. Plucknett, p. 338.

¹²⁸ Highly illustrative for this fact is an account of the events in connection with the *Case of Commendams* (1616, reported as *Colt and Glover v. Bishop of Coventry*, Hobart 140) in Plucknett p. 350 - 352.

¹²⁹ Hood Phillips/ Jackson maintain that Coke was inconsistent in his statements on sovereignty. As a Law Officer he supported the prerogative, as a judge the supremacy of the common law and as a parliamentarian the sovereignty of Parliament; p. 48 note 41. Petersmann thinks that in spite of Coke's ambiguous writings it can be shown that his real conviction was the supremacy of the common law, pp. 252 et seq.

¹³⁰ [1610] 8 Co.Rep. 114; cf. S.E. Thorne, *Dr. Bonham's Case*.

every attempt to curtail their privileges, and in between the courts, exposed to pressures from both sides.¹³¹

James was succeeded in 1625 by his son Charles I. If anything, matters got worse with the new King who had been brought up to believe in his divine right to absolute despotic power. Charles was not particular in the choice of his methods; scheming and intriguing on his side embittered the conflict. He even provoked a quarrel with the House of Lords.¹³²

Desperate to raise the money he needed to carry on the war with Spain, Charles invented all sorts of illegal ways of extracting money from his citizens, including a general loan from every subject. People who refused were impressed into the army or the navy. Financial necessities forced him to summon his third Parliament in 1628. Although the King tried to threaten the Commons into co-operation with menacing language¹³³, the Commons formed a committee to discuss "the liberty of the subject in his person and in his goods".

They drew up a Petition of Right which also passed the Lords and to which the King finally (and grudgingly) gave the Royal Assent.¹³⁴ In return Parliament granted a number of subsidies. In the years that followed, the King dishonoured the provisions of the Act.

He was all the more determined to govern without the interference of the national council and between 1629 and 1640 did not summon Parliament again.

But in 1640 Charles had brought the country to the brink of ruin and met a humiliating military defeat against the Scots. The fifth ('Long') Parliament he summoned in his despair swiftly took the opportunity to pass the Triennial Act 1641¹³⁵ ("Act for the preventing of inconveniences happening by the long intermission of Parliaments") providing that Parliament should assemble even without the summons of the King after three years had passed since the last

¹³¹ Especially the King exerted severe pressure by his habit of consulting the judges extra-judicially.

¹³² Plucknett, p. 364.

¹³³ *Ibid.*, p. 367.

¹³⁴ (1628), 3 Car. 1, c.1. The full text is printed in Plucknett, pp. 370 et seq.

¹³⁵ 16 Car. 1, c. 1.

Parliament. It also abolished the controversial Ship-money¹³⁶ and a number of other long-contested royal prerogatives.¹³⁷

In November 1641, Parliament took (with a majority of only 11 votes) the most daring step in drafting The Great Remonstrance, in which they challenged the idea of the King's absolute powers.

The King's attempt to arrest five members¹³⁸ who had signed was the cause for the Civil War that started in 1642 and ended three years later with the defeat of the King who was executed in 1649.

The revolutionary period between 1642 and 1660 broke with every constitutional tradition, but most of the ordinances carried out under Cromwell were reversed in the Restoration.

What remained was a conviction among revolutionists and royalists alike that the days of absolute royal power were over and that the country was best served by a mutual interdependence of kings and parliaments. Apart from that, the House of Commons had now firmly established its predominance over the House of Lords.

In 1660 Charles II ascended the throne. Parliament industriously exercised its legislative authority during the next years.

The first record of the Whig and Tory parties is shown for the year 1679.¹³⁹ The Tories were loyal supporters of the Crown and of the royal prerogative, the Whigs were more concerned with the welfare of the people. Charles II exploited the differences between the two parties and in spite of the Triennial Act did not summon a Parliament in the last four years of his reign.

In 1685 Charles was succeeded by James II who had "a fixed design to make himself an absolute monarch, and to subvert the established church."¹⁴⁰

Soon after the dissolution of his first (and only) Parliament, James began to carry out his plans to re-instate Roman Catholic faith in England. In direct defiance of the Act abolishing the High Commission

¹³⁶ 16 Car. 1 c. 8. The King had in 1637 won the famous Case of Ship-Money at the Court of the Exchequer, *R. v. Hampden*, 3 St.Tr. 825 VI, 48-50.

¹³⁷ For details see Plucknett, pp. 396 et seq.

¹³⁸ For an account see Plucknett, pp. 402 - 412.

¹³⁹ *Ibid.*, p. 436.

¹⁴⁰ *Ibid.*, p. 438.

Court¹⁴¹ he created a Court of Commissioners for Ecclesiastical Causes.

He eliminated from other courts the judges who he thought would not act according to his wishes and appointed others in their place. Then he thought the time fit to procure judgments to establish the disputed royal prerogatives of dispensing and suspending laws¹⁴². In *Godden v. Hales*¹⁴³ the courts of law recognised the dispensing power which James II thenceforth systematically exercised.

But the turning-point was to come when the King tested the even more embracing power to suspend laws.

In the Seven Bishops Case¹⁴⁴ the jury decided against him "amidst the enthusiastic rejoicings of the whole nation"¹⁴⁵.

James, having aroused the anger of his people and finding himself cornered with hardly an ally left eventually fled from England.

The Glorious Revolution of 1688 marks the final victory of Parliament in its constitutional battle with the Crown.

4. The Revolution Settlement (1688)

The rapid developments in the revolution year 1688 left England in a sort of legal vacuum. For three years there had been no Parliament and now there was no monarch either who could summon a new parliament. Even the Great Seal had been lost.

The constitution had not foreseen an emergency like this. In this situation an assembly of the Lords spiritual and temporal met with those who had been members of the House of Commons under Charles II and asked Prince William of Orange to assume provisional government of the country. Furthermore, all the constituent bodies of the realm were summoned to send representatives to a Convention Parliament

¹⁴¹ 16 Car. 1, c. 11.

¹⁴² The dispensing power enabled the monarch to exempt certain persons from the operation of penal laws.

By employing the suspending power it was even possible to temporarily suspend the entire operation of any statute (or number of statutes); cf. Petersmann, p. 236.

¹⁴³ (1686), 11 St.Tr. 1165.

¹⁴⁴ (1688), 12 St.Tr. 183.

¹⁴⁵ Plucknett, p. 443.

which met in January 1689. This Convention passed a resolution condemning the unlawful conduct of James and offered William and his wife Mary the vacant throne. Unlike in 1660, when the beginning of the reign of Charles II was backdated to the death of Charles I, the new joint reign was officially dated from February 13, 1689. The constructed 'abdication' of James II took place December 12, 1688. So it was clear that the kingship was solely given by the will of the people represented in the Convention Parliament and not by any divine hereditary right.¹⁴⁶

It is important to note that this assembly, too, could not derive any legitimacy from the existing legal order. Whether itself could subsequently become a new source of legitimate power also depended on the attitude of the judges. It soon emerged that the courts had completely and unconditionally transferred their loyalty to the new Parliament. The revolutionary character of the overthrow of the old legal order was probably psychologically mitigated by the facts that it was not very violent and that the original assembly consisted largely of the same persons as the last regular Parliament.

The Glorious Revolution permanently established a number of principles which had been the subject of clashes with the Stuart Kings. The predominance of the Commons over the Lords was still more a political fact than a legal one, but it has never been challenged since.

In the famous Bill of Rights¹⁴⁷ the suspending and dispensing powers were taken away and legal sovereignty de-iure given to the King-in-Parliament. The King's prerogative of imposing taxes was abolished and likewise his right to raise an army. Free parliamentary elections and unhindered debate in Parliament were laid down. The provisions of the Triennial Act were confirmed.

Further constitutional restrictions were imposed on the Crown (or rather for Queen Anne's Hanoverian heirs) by the Act of Settlement 1701.¹⁴⁸

¹⁴⁶ Plucknett, p. 449.

¹⁴⁷ (1689), 1 Wil. III and Mary, sess. 2, c. 2. Text printed in Plucknett, pp. 449 et seq.

¹⁴⁸ 12 & 13 Wil. III, c. 2.

5. Parliament since 1714

Since the Glorious Revolution the principle of Parliamentary Sovereignty has not undergone any drastic changes. However, some political developments must be mentioned which stand in close connection with the doctrine as it presents itself today.

a) The Establishment of Cabinet Government¹⁴⁹

One of the most pressing problems in the beginning 18th century was to redefine the political conventions governing the relation of the royal ministers to Parliament. Until then, the ministers of the Crown, who had taken the place of the Privy Council as consulting and executive body,¹⁵⁰ were men of confidence of the monarch to whose free discretion their appointment and dismissal was left.¹⁵¹

A new parliamentary law of succession enabled George I of Hanover to ascend the throne in 1714. With the shifts of power from the monarch to the House of Commons and the succession of a new foreign dynasty¹⁵² the role of the ministers changed from an agent of the King to an instrument of government of the House of Commons.

The appointment of the Prime Minister is still today a royal prerogative¹⁵³ but there exists a constitutional convention to the effect that the Crown is obliged to appoint the leader of the

¹⁴⁹ For detailed information cf. I. Jennings, Cabinet Government.

¹⁵⁰ K. Löwenstein, Staatsrecht und Staatspraxis von Großbritannien, p. 15.

¹⁵¹ Löwenstein, Staatsrecht und Staatspraxis von Großbritannien, p. 15; Petersmann, p. 258.

¹⁵² George I did not speak English very well and often showed a lack of interest in current developments. After a short while he ceased to attend the Cabinet-meetings (and since that time it has been the practice that Cabinet discusses matters in the absence of the monarch). The firm establishment of the principle of Cabinet government was assisted by the fact that in the following years the monarchs lacked the personality and the prestige to exercise a strong influence in government business; see Löwenstein, Staatsrecht und Staatspraxis von Großbritannien, pp. 16 and 17.

¹⁵³ Turpin, p. 146.

majority party in the Commons. Likewise, the monarch appoints the other state ministers according to the suggestions of the Prime Minister.

As Cabinet depended on the support of a majority in the House, it soon emerged that a Cabinet which consisted only of members of one party¹⁵⁴ had better chances to co-operate with the majority in Parliament.¹⁵⁵

The political influence of Cabinet was enhanced further during the 19th century. Although it is technically correct to say that Cabinet is nothing but a parliamentary committee this hardly reflects the importance it has gained within the political system. H. J. Laski has pointed out that today it is more apt to think of Parliament as a governmental instrument of Cabinet and of the respective Prime Minister than vice-versa.¹⁵⁶

It must be noted, though, that this change of roles is confined solely to the political level and does not in any way fetter the *de-jure* sovereignty of Parliament.¹⁵⁷ From the point of view of the courts, Parliament alone is the ultimate authority in the British legal system.

b) The Reform Acts¹⁵⁸

Another important development on the political level was marked by a number of so-called Reform Acts. Although they didn't have a direct influence on the principle of legal sovereignty, they provided Parliament and its powers with a broader basis of democratic legitimacy by improving the representation of the people in Parliament. They broke with the obsolete idea that the electorate should consist

¹⁵⁴ For a long time this was the Whigs.

¹⁵⁵ Löwenstein, Staatsrecht und Staatspraxis von Großbritannien, p.16.

¹⁵⁶ H.J. Laski, A Grammar of Politics, has described Parliament as a 'machine for registering decisions arrived at elsewhere'.

¹⁵⁷ From a lawyers point of view, Löwenstein is not correct in saying that the principle of Parliamentary Sovereignty has given way to the sovereignty of the people as a result of the general election of 1868, Staatsrecht und Staatspraxis von Großbritannien, p. 20.

¹⁵⁸ For historical details see Plucknett, pp. 560 - 580.

of selected persons who bore the main burden of taxation. The Reform Act 1832¹⁵⁹ restructured the constituencies and redistributed a large number of seats. It also extended the franchise to some groups of people who had until then been excluded. An even further extension of electoral rights was achieved by the Reform Act 1867¹⁶⁰. The newly won franchise of workmen and tenants could hardly be genuinely exercised as long as they had to vote under the scrutiny of their landlords and employers. Secret ballots were therefore introduced by the Ballot Act 1872¹⁶¹. The Representation of the People Act 1884¹⁶² increased the electorate by some 2 million new voters, namely industrial workers (mainly miners) and rural labourers. Two member constituencies were abandoned by the Redistribution of Seats Act 1885¹⁶³.

Suffrage for women was introduced in 1918¹⁶⁴ but the basis of their qualification was different from that of men until 1928¹⁶⁵.

c) The Deprivation of Political Power of the House of Lords

Whereas the curtailment of the powers of the Crown were brought about as a result of custom and political conventions, the legislative functions of the Upper House were undermined by legislative reform. The first Parliament Act of 1911¹⁶⁶ ended the equal standing of the two Houses. These severe constitutional changes were initiated by the crisis following the election win of the Liberals in 1906 and the progressive policies of the Chancellor of the Exchequer Lloyd George which the peers sought to impede. With the help of the monarch who threatened to create 400 additional peers, Prime Minister Asquith and a vast majority in the Commons forced the Lords to collaborate in

¹⁵⁹ 2 & 3 Will. IV, c. 45.

¹⁶⁰ 30 & 31 Vict., c. 102.

¹⁶¹ 35 & 36 Vict., c. 33.

¹⁶² 48 & 49 Vict., c. 3.

¹⁶³ 48 & 49 Vict., c. 23.

¹⁶⁴ Representation of the People Act 1928, 7 & 8 Geo. 5, c. 64.

¹⁶⁵ The Representation of the People Act 1928, 18 & 19 Geo. 5., c. 12, placed women on an equal footing with men in respect of the franchise.

¹⁶⁶ 1 und 2 Geo. 5, c. 13.

their own devaluation. Any possibility for the House of Lords to veto Money Bills was abolished altogether and the veto against other kinds of bills was reduced to a suspensive right.¹⁶⁷ The Upper House could only delay parliamentary enactments for two years at the end of which a bill gained the force of law even without the assent of the Lords.¹⁶⁸

The second Parliament Act of 1949¹⁶⁹ shortened this period to one year.

Considering the the predominance of the Lower House in the legislative process it can be said that the legal sovereignty of Parliament is in fact the sovereignty of the Commons.

¹⁶⁷ See Löwenstein, Staatsrecht und Staatspraxis von Großbritannien, pp. 258 et seq.

¹⁶⁸ Some think that Parliament has redefined itself for certain purposes by the 1911 Act, see e.g. de Smith / Brazier, p. 88; others think that Parliament (consisting of both Houses plus the monarch) has delegated legislative authority to another body (House of Commons plus monarch), e.g. Wade, The Basis of Legal Sovereignty, p. 172.

¹⁶⁹ 12, 13 & 14 Geo. 6, c. 103.

III. What are the Legal Foundations of the Doctrine of Parliamentary Sovereignty?

In 1971, Stanley de Smith expressed his expectation that as a result of the forthcoming British membership of the European Communities, the legal concept of Parliamentary Sovereignty may "drift away into the shadowy background from which it emerged."¹⁷⁰

In order to understand in which ways the EC could possibly influence a British constitutional doctrine, it is important to illuminate the legal side of that 'shadowy background'. Only if one knows what the foundations of legal sovereignty are¹⁷¹ it becomes clear what mechanisms are at work in the interrelations of the national and the Community's legal order.

Having defined the (pre-Community) nature of Parliamentary Sovereignty and against the outlined historical background we can try to assign the doctrine to one (or several) of the recognized sources of British constitutional law.

1. The Recognized Sources of the British Constitution

It has often been pointed out that the absence of a comprehensive written document does not help to clarify the precise contents of the British constitution¹⁷² and it can sometimes be difficult to distinguish principles of the constitution from 'ordinary' law¹⁷³.

These difficulties are caused more by the necessity to determine whether a rule is sufficiently connected with questions of the creation and regulation of power within the state to be regarded as

¹⁷⁰ S.A. de Smith, The Constitution and the Common Market: A Tentative Appraisal, p. 614.

¹⁷¹ Unfortunately, one must resist the temptation to follow the charming explanation by Charles Dickens's Mr. Podsnap to a foreign gentleman: 'We Englishmen are proud of our constitution...It was bestowed upon us by Providence'; in: *Our Mutual Friend*.

¹⁷² Turpin, p. 3; Thelen, p. 7.

¹⁷³ Or indeed from mere political theories; see Mitchell, Constitutional Law, p. 5.

part of the constitution¹⁷⁴ than by an uncertainty about the sources of constitutional law.

There is a far-reaching consensus that the sources of constitutional law are principally the same as of other branches of the law.¹⁷⁵ The two most important pillars are statute law and judicial decisions (common law). A further source is called 'the law and custom of Parliament' (*lex et consuetudo parliamenti*) and some writers also count books of authority as a source of constitutional law.¹⁷⁶

Finally there is a special category of political understandings of obligatory nature, called constitutional conventions, which form part of the constitution in its broader sense.

We will first briefly look into those last three sources which seem less likely to provide an answer.

a) Books of Authority

As a rule, textbooks on the law, however qualified and knowledgeable their authors, are not regarded as authoritative by English courts.¹⁷⁷ Even the works of some earlier writers which have been treated by the courts as conclusive evidence of the author's contemporary law¹⁷⁸ are only 'auxiliary' sources of the constitution, not a primary ones¹⁷⁹.

¹⁷⁴ Mitchell, Constitutional Law, p. 3; similarly Jennings, The Law and the Constitution, p. 14, according to whom the British constitution consists of 'the rules determining the creation and operation of governmental institutions'.

¹⁷⁵ Mitchell, Constitutional Law, pp. 18 et seq.; Turpin, p. 80 et seq.; see also Hood Phillips/ Jackson, p. 21; Jennings, The Law and the Constitution, p. 66.

¹⁷⁶ Cf. e.g. Hood Phillips/ Jackson, p. 24; Mitchell, Constitutional Law, pp. 19 and 25.

¹⁷⁷ *Cordell v. Second Clanfield Properties Ltd.*, [1969] 2 Ch. 9, 16 per Megarry J.

¹⁷⁸ Among these works are e.g. Coke's Institutes of the Laws of England and Blackstone's Commentaries on the Law of England (cited for example in *Thomas v. Sawkins*, [1935] 2 K.B. 249 at 254 and 256 or *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese*, [1948] 1 K.B. 195 at 208 et seq.).

¹⁷⁹ Likewise de Smith/ Brazier, pp. 27 and 28: 'persuasive authority'.

Hence, the sovereignty of Parliament cannot be based on books of authority.

b) The Law and Custom of Parliament¹⁸⁰

The law and custom of Parliament have evolved as a separate source of rules concerning the procedures, functions, privileges and immunities of the Houses of Parliament¹⁸¹

As they are concerned only with the internal organisation of Parliament and not with a definition of its external powers, these rules obviously cannot be the source of the doctrine of Parliamentary Sovereignty.

c) Constitutional Conventions¹⁸²

"The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas." Thus Sir Ivor Jennings¹⁸³ vividly described the immense importance of constitutional conventions for the British constitution.

In Great Britain, four major and significant sectors of political life are governed by conventions.

First, there is a group of conventions controlling the relationship between parliament/government and the Crown and especially the exercise of the royal prerogatives¹⁸⁴ (for example dissolving parliament or appointing ministers including the prime minister).

¹⁸⁰ For a detailed treatise on this subject see T.E. May, Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament.

¹⁸¹ De Smith / Brazier, p. 25; for details see also Thelen, p. 18.

¹⁸² Treated at great length by G. Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability, Oxford 1984.

¹⁸³ The Law and the Constitution, pp. 81/82.

¹⁸⁴ Thelen, p. 20; Jennings, The Law and the Constitution, pp. 87 - 89; de Smith / Brazier, p. 28.

Second, there are conventions relating to the system of cabinet government¹⁸⁵ which deal for example with such important and actual questions as ministerial responsibility¹⁸⁶.

A third group of conventions regulates the relations between the two Houses of Parliament as far as they are not determined by the Parliament Acts 1911 and 1949. An example is the rule that Money Bills must be introduced into the House of Commons.¹⁸⁷

Finally, conventions were and are still employed (though to a lesser extent) to govern the mutual relations of Britain with other Commonwealth countries.¹⁸⁸

It therefore seems justified to treat conventions as a part of the constitution since excluding them would "give a grotesquely misleading picture of the rules actually observed"¹⁸⁹

There is also a recognised link between the doctrine of Parliamentary Sovereignty and constitutional conventions. One function for conventions is to control the exercise of theoretically untrammelled legal power and to keep it within the boundaries of general public acceptance.¹⁹⁰ Furthermore, it has also been suggested even before Britain's accession to the European Communities that constitutional problems in connection with the doctrine of Parliamentary Sovereignty arising from her forthcoming membership could be circumvented by the development of special conventions.¹⁹¹

The question remains if the doctrine of Parliamentary Sovereignty could itself be based on a constitutional convention. The answer must

¹⁸⁵ Jennings, The Law and the Constitution, pp. 85 - 86; Thelen, p. 21.

¹⁸⁶ Cf. de Smith / Brazier, p. 28 as well as Turpin, p. 428. In contrast, Thelen thinks that the principle of ministerial responsibility is based on a rule of law, not on convention, p. 21.

¹⁸⁷ De Smith / Brazier, p. 28. There is obviously a close relation between this group of conventions and the 'custom of Parliament'.

¹⁸⁸ For a detailed account see Jennings, The Law and the Constitution, pp. 96 et seq.

¹⁸⁹ De Smith / Brazier, p. 29.

¹⁹⁰ See Marshall, pp. 201 - 209. Also compare *supra*, B.I.6.b).

¹⁹¹ A. Martin, The Accession of the United Kingdom to the European Communities: Jurisdictional Problems, pp. 23-25.

For convincing reasons against this approach see Petersmann, pp. 208 - 213.

clearly be 'no'. Strictly speaking, it is not entirely correct to count conventions among the sources of constitutional law. In contrast to statute law or common law, conventions of the constitution are non-legal rules which are not enforced by the courts. In spite of the controversy about the distinction between law and convention¹⁹² there is no doubt that the law-making power of Parliament is a legal rule¹⁹³ which is 'enforced' by the courts simply by applying every parliamentary enactment and by not tolerating rival law-making bodies. The courts, too, see obedience to acts as a strictly legal duty¹⁹⁴ and not as one based on an informal understanding. Hence, Parliamentary Sovereignty is not based on constitutional conventions.

¹⁹² Opinion as to whether 'enforcement' is an apt criterion for distinguishing conventions of the constitution from rules of law is divided. One view, on which again Dicey had a forming influence, makes a sharp distinction between strict law and conventions. The decisive criterion is whether or not the common law courts will sanction a breach of the rule. Conventions, according to Dicey, are not "'laws' in the true sense of that word, for if any or all of them were broken, no court would take notice of their violation" (Introduction, p. 27).

The validity of this plain distinction has been vehemently denied, notably by Jennings (The Law and the Constitution, chapter 3; see also Mitchell, Constitutional Law, pp. 26 - 39). In short, Jennings argues that it is arbitrary and misplaced to define the relation between the law and conventions solely from the point of view of the courts (pp. 103/104). Often 'enforcement' of the law is entrusted to administrative authorities and sometimes, when a law obliges the government to act in a certain way, this can not even be enforced by the courts. The decisive question is not the sanction, but why conventions are obeyed. In this respect, Jennings sees no fundamental difference between law and convention. For a subtle defence of Dicey's distinction see O. Hood Phillips, Constitutional Conventions: A Conventional Reply, or C. Munro, Studies in Constitutional Law, ch. 3.

¹⁹³ J. Salmond, Salmond on Jurisprudence, pp. 111 et seq. (esp. 117).

¹⁹⁴ See e.g. Megarry V.C. in *Manuel v. Attorney General*, [1983] Ch. 77 at 89: '...legal duty to obey'.

d) Statute Law

The most important single source of constitutional law is legislation.¹⁹⁵ Although generally held in high esteem, even the most famous 'constitutional' laws are technically not different from any ordinary statute. Some of the outstandingly significant statutes have already been mentioned: The Bill of Rights 1689, the Act of Settlement 1701, the Acts of Union with Scotland 1707 and Ireland 1800, the Reform Acts 1832 and 1867, the Statute of Westminster 1931, the Parliament Acts 1911 and 1949 and of course also the European Communities Act 1972 have all played a major part in the development of the constitution.¹⁹⁶

Some of the above mentioned statutes are also undeniably connected with the initial establishment of Parliament's unlimited law-making power (especially the Bill of Rights 1689). But is there a case to say that Parliamentary Sovereignty is ultimately a creation of statute law?

In my view, there is a compelling argument of logic against this assumption. This argument has been convincingly formulated by Sir John Salmond. Expounding on the question why acts of Parliament have the force of law Salmond set out: "No statute can confer this power upon parliament, for this would be to assume and act on the very power that is to be conferred."¹⁹⁷

Indeed, if Parliament had not already had the power to legislate, the self-empowering act would not have been a law at all. And if Parliament had acted on an existing but limited legal authority, whence came the extra amount of power? Such a deus-ex-machina effect could not be plausibly explained with legal constructions. In this respect legal authority is similar to energy in physics: it can be used and transformed but it can not increase itself. Likewise no limited legal authority can breed unlimited legal authority.

¹⁹⁵ De Smith / Brazier, p. 22.

¹⁹⁶ This list is by no means comprehensive. An enumeration of more than 300 constitutional statutes of the UK (date: 1982) is presented by A.P. Blaustein and G.H. Flanz (eds.), Constitutions of the countries of the World, ranging from Magna Charta 1215 to the British Nationality Act 1981.

¹⁹⁷ Salmond on Jurisprudence, p. 111. Supported by Wade, The Basis of Legal Sovereignty, p. 187.

Statute law can therefore not be the source of the legal sovereignty of Parliament.

e) Common Law

A substantial part of constitutional law is common law. Before we take a look at the cases relating to Parliament's legal omnipotence, it is useful to remember some of the principles of the common law. It is now commonly accepted that the reported cases are more than simply evidence of existing customs and of the law derived from those customs. Judicial precedence is itself authoritative; it is a source and not only a proof of the law.

One may distinguish between 'authoritative' and 'persuasive' precedents. Only authoritative precedents are binding on the courts. Persuasive precedents¹⁹⁸ may be given consideration if such a course of action seems reasonable to the judges.

A further distinction can be made between 'creative' and 'declaratory' precedences. The latter applies an existing rule of law, the former creates and applies a new rule at the same time. Their legal authority is equal. Both establish the applied rule as law for the future.

As for the doctrine of Parliamentary Sovereignty, the courts assert this principle in two different ways. The first way may be called 'negative' or 'indirect' and is possible only due to the peculiarity of this special rule of law¹⁹⁹: The courts a) simply apply every act of Parliament without questioning its validity and b) do not recog-

¹⁹⁸ Persuasive precedents can flow from different sources:

- 1) decisions of foreign courts (esp. American courts)
- 2) decisions of higher courts in certain Commonwealth countries
- 3) decisions of the Privy Council acting as a Court of Appeal for the colonies
- 4) obiter dicta.

¹⁹⁹ Namely, that it is the courts themselves who are required to act in accordance with that rule.

nise other law-making bodies²⁰⁰ unless they derive their authority from Parliament. But this is only supportive evidence and not case-law. What we need to look for is solid authoritative precedent.

As we have seen²⁰¹, in 1610 Sir Edward Coke remarked obiter in *Dr. Bonham's Case*²⁰² that the common law courts reserved the right to examine acts of Parliament and declare them void when necessary. Four years later it was said in *Day v. Savadge*²⁰³ that "even an Act of Parliament made against natural equity, as, to make a man judge in his own case, is void in itself; for iura naturae sunt immutabilia, and they are leges legum."

Over 250 years later, this statement was referred to in *Lee v. Bude and Torrington Junction Railway Co.*²⁰⁴ This case had been concerned with the validity of a private Act (on the grounds that the promoters of the Act had fraudulently misled Parliament).

Willes J set out: "It was once said, - I think in Hobart, - that, if an Act of Parliament were to create a man judge in his own case, the court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and of the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, Lords and Commons? I deny that such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the courts are bound to obey it."²⁰⁵

The attitude of the courts has obviously changed completely in the time between these two judgments, but the exact moment is hard to determine as the validity of Acts of Parliament has only rarely been challenged before the courts.

²⁰⁰ See for example *Bowles v. Bank of England*, [1913] 1 Ch. 57: The House of Commons by means of a resolution had attempted to empower the Crown to levy income tax. The court held that only an Act of Parliament could authorize taxation and that resolutions of neither House of Parliament had the force of law.

²⁰¹ *Supra*, p. 36.

²⁰² 8 Co. Rep. 114a.

²⁰³ [1614] Hob. 87.

²⁰⁴ [1871] L.R. 6 C.P. 576 at 582.

²⁰⁵ A similar reasoning was given by Lord Campbell in *Edinburgh and Dalkeith Railway Co. v. Wauchope*, [1842] 1 Bell 252 at 278.

One example is *Ex parte Canon Selwyn*²⁰⁶ in which the validity of the Irish Church Act 1869 was questioned. Cockburn C.J. observed: "[T]here is no judicial body in the country by which the validity of an act of parliament could be questioned. An act of the legislature is superior in authority to any court of law."

In spite of the unambiguous ruling in *Lee's* case, there was another attempt to bring down a private Act in *British Railways Board v. Pickin*. But the court confirmed that there is no difference in legal status between a public and a private act and also addressed the question of judicial review of parliamentary legislation: "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of history and law of our constitution."²⁰⁷

An even stronger reaffirmation of Parliament's legal sovereignty can be found in Megarry V.C.'s statement in *Manuel v. Attorney General*²⁰⁸: "[O]nce an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity."

Other cases have looked at the principle from the angle of possible legal limitations: *Mortensen v. Peters*²⁰⁹, *Salomon v. Commissioners of Customs and Excise*²¹⁰ and *Cheney v. Conn*²¹¹ all assert the supremacy of Acts of Parliament over international law.

*R. v. Jordan*²¹² made clear that any individual common law right can be taken away by statute.

Finally, there is also a line of authority for the view that Parliamentary Sovereignty is continuing rather than self-embracing; see *British Coal Corporation v. The King*²¹³, *Vauxhall Estate Ltd. v. Liverpool Corporation*²¹⁴ and *Ellen Street Estates Ltd. v. Minister of Health*²¹⁵.

²⁰⁶ [1872] 36 J.P. 54.

²⁰⁷ [1974] A.C. 765 at 782 per Lord Reid.

²⁰⁸ [1983] Ch. 77, 86; also see *supra*, p. 24.

²⁰⁹ [1906] 14 SLT 227.

²¹⁰ [1967] 2 QB 116.

²¹¹ [1968] 1 All ER 779.

²¹² [1967] Crim. LR 483.

²¹³ [1935] AC 500; especially the dictum by Lord Sankey at p. 520.

²¹⁴ [1932] 1 K.B. 733.

²¹⁵ [1934] 1 K.B. 590.

2. The Non-legal Part of Parliamentary Sovereignty

The cases mentioned seem to support the view that the principle of Parliamentary Sovereignty has evolved from the common law and indeed this is the opinion of many writers.²¹⁶ On the other hand, the last three cases shed some doubt over precisely that conclusion. H.R.W. Wade put it like this: "At the heart of the matter lies the question whether a rule of common law which says that the courts will enforce statutes can itself be altered by statutes."²¹⁷ Under normal circumstances this shouldn't be a question at all since statutes as the higher form of law can change the rules of the common law at any rate.²¹⁸ But the continuing nature of Parliamentary Sovereignty means that the courts will disregard any attempt by Parliament to detract from its own legal power or from that of future parliaments. In other words, Parliament may not tell the courts what to regard as a valid Act of Parliament.

Like Wade I am inclined to think that Sir John Salmond has given a clear and satisfying answer to that question. He explained²¹⁹: "All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived. [...] Whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal."

This coincides with Hans Kelsen's model of the *grundnorm* (basic norm).²²⁰ Kelsen starts by asking why a norm of a certain legal order is valid, i.e. determining in a *binding* way how an individual ought to behave. According to Kelsen, the fact that a norm exists cannot be the reason for its validity. The reason for the validity of a norm

²¹⁶ De Smith/ Brazier, p. 83.

²¹⁷ Wade, The Basis of Legal Sovereignty, p. 186.

²¹⁸ Halsbury's Laws of England, Vol. 8, No. 811.

²¹⁹ Salmond on Jurisprudence, p. 111.

²²⁰ See H. Kelsen, Pure Theory of Law, pp. 193 et seq.; also, by the same author, General Theory of Law and State, pp. 110 - 122. See also Salmond, p. 112.

can only be another (higher) norm.²²¹ However, the quest for the reason of the validity of a norm (unlike the quest for the cause of an effect) must be terminated at some point by a norm the validity of which cannot be derived from a superior norm. Such a norm "must be *presupposed*, because it cannot be "posited", that is to say: created, by an authority whose competence would have to rest on a still higher norm. This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned. Such a presupposed highest norm is referred to [...] as basic norm."²²²

This corresponds largely to what Hart has called the 'rule of recognition'²²³: [...] older constitutional theorists wrote as if it were a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its prior legislation. That parliament is sovereign in this sense may now be regarded as established, and the principle that no earlier Parliament can preclude its 'successors' from repealing its legislation constitutes a part of the ultimate rule of recognition used by the courts in identifying valid rules of law."²²⁴

Hence, notwithstanding the fact that there is ample justification to say that Parliamentary Sovereignty is a principle of the common law, there is a part of this rule so fundamental that it has no legal basis and is thus out of the reach of the legislator.

Wade put it like this: "The role of judicial obedience is in one sense a rule of the common law, but in another sense - which applies to no other rule of common law - it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to

²²¹ Kelsen, *Pure Theory*, p. 193; *General Theory*, p. 111.

²²² Kelsen, *Pure Theory*, p. 195. Kelsen maintains that the *grundnorm* of a legal order does not predetermine the contents of the norms based on it (he calls this a 'static norm system'). It only contains a rule stipulating how and by whom valid new norms can be created ('dynamic principle'), *ibid.*, at pp. 196 and 201.

²²³ Also see *supra*, pp. 12 et seq.

²²⁴ H.L.A. Hart, *The Concept of Law*, pp. 145/146.

legislation."²²⁵

However, although the rule of recognition cannot be altered by statute, it is by no means immutable. As this rule has evolved as a product of certain historic conditions, it is well conceivable that if these conditions cease to exist or change substantially the courts might adapt the old rule to the new functional requirements of the changed political contexts.²²⁶

From the foregoing it follows that for any indication of changes to the doctrine of Parliamentary Sovereignty as a result of Britain's membership of the European Communities we have to look at the judgments of the British courts. If there is any change in the attitudes of the judges towards the rule of recognition, it will become apparent in the case law.²²⁷

IV. Summary

The doctrine of Parliamentary Sovereignty describes the relation between the judicature and the legislature in Great Britain. Parliament may enact whatever laws it likes and the courts will apply these laws.

Although Parliament can be expected to act in accordance with political conventions and practical necessities, there are no legal

²²⁵ Wade, The Basis of Legal Sovereignty, p. 188; see also O. Dixon, Common Law as an Ultimate Constitutional Foundation, pp. 240 - 245.

²²⁶ De Smith / Brazier, p. 69, put it this way : "The doctrine [of absolute parliamentary sovereignty] grew out of a particular state of affairs. A fundamental change of a political nature may bring about a fundamental change in legal doctrine". This is also the evaluation of Turpin, p. 36: "The rule of recognition, which affirms the sovereignty of Parliament, may change over time; political developments may eventually cause the courts to give obedience to a modified or new rule of recognition".

See also Kelsen, Pure Theory, p. 210: "The change of the basic norm follows the change of facts that are interpreted as creating and applying valid legal norms".

²²⁷ The political preconditions for such a change are discussed *infra*, chapter D. I.

restrictions on Parliament's law-making power. The following analysis of the influence of Community law will be based on the orthodox view that Parliament's omnipotence is 'continuing'. Parliament cannot limit its own power or that of its successors as to subject-matter or manner and form of legislation.

A transfer of sovereignty can be achieved if legislative power is surrendered by the UK Parliament to another body *and* the courts concerned shift their allegiance to the new 'sovereign'.

The concept of Parliamentary Sovereignty is deeply rooted in the English history. Historically, it is the result of a long-lasting struggle between Parliament and the monarchs. The supremacy of the King-*in-Parliament* was *de facto* established with the Glorious Revolution of 1688.

The doctrine of Parliamentary Sovereignty is "at once historical reality, theory of the constitution and a fundamental principle of the common law."²²⁸ Because of its unique character it cannot be changed by statute, but due to changed political conditions the courts may decide to modify the underlying rule of recognition.²²⁹

²²⁸ Turpin, p. 24.

²²⁹ See also *infra*, chapter D., IV.

C. The Supremacy and Direct Effect of Community Law

In 1964, the European Court of Justice (ECJ) declared in the famous case *Costa v. ENEL*¹ that "[b]y 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." The Belgian Cour de Cassation was the first high national court to assert this notion. In a historic decision it said: "... the treaties which have created Community law have instituted a new legal system in whose favour the member states have restricted the exercise of their sovereign powers in areas determined by those treaties."² In the words of the German Federal Constitutional Court, "Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source."³

In anticipation of a detailed examination of the relevant case-law of the European Court of Justice, we shall look at some of the characteristics which distinguish the Community's legal framework from 'ordinary' international treaties.

I. The Special Nature of the Community's Legal Order – Comparison of the Community with other International Organisations

The European Communities were established by three separate founding treaties. The Treaty concerning the European Coal and Steel Community (ECSC) was signed on 18 April 1951 and came into force on the 23rd of July 1952. The European Atomic Energy Community Treaty (Euratom Treaty) and the European Economic Community Treaty (EEC Treaty) were both finalized on the 25th of March 1957 and entered into force on

¹ Case 6/64 *Flaminio Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, [1964] ECR 585 at 593.

² *Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse 'Le Ski'*, [1972] CMLR 330 at 373 paragraph 10.

³ *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide*, [1974] 2 CMLR 540 at 549 para 19.

the first of January 1958.⁴

At a first glance, nothing suggests that there is anything special. The form of the founding treaties, the amending treaties (for example the Merger Treaty⁵ or the Single European Act⁶) and the treaties of accession are not different from other international treaties.⁷ Neither is the fact that Art. 210 EECT⁸ confers legal personality on the EEC a novelty. The United Nations, for example, are also recognised to have a legal personality which is distinct from that of its members⁹ and there are plenty more examples.

Yet, there are aspects in which the EC is different from other organisations established by international treaties. Most of these differences are matters of degree rather than principle.

1. Wide Scope of the (EEC) Treaty¹⁰

The EEC Treaty, which is the most important of the three founding treaties, stands out from most other international treaties in the broadness of its objectives. Its general aims are set out in Art. 2:

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the member States, to promote throughout the Community a harmonious development of economic expansion, an increase in stability, an accelerated raising of the standard of living and closer

⁴ All three Communities will be referred to as the 'European Community' (EC) or simply 'the Community'.

⁵ Officially known as the *Treaty establishing a Single Council and a Single Commission of the European Communities*; signed in Brussels on 8 April 1965; entered into force 1 July 1967 (OJ No. L 152, 13 July 1967, p. 2).

⁶ Cmnd. 9758, Bull. EC, suppl. 2/86.

⁷ Petersmann, p. 57.

⁸ Art. 6 II ECSC and Art. 184 Euratom respectively.

⁹ So decided by the International Court of Justice in the *Reparation for Injuries* case, 1949 ICJ Rep. 174.

¹⁰ See B. Bieber/ R. Beutler/ J. Pipkorn/ J. Streil, Die Europäische Gemeinschaft - Rechtsordnung und Politik, pp. 45 et seq.

relations between the states belonging to it."¹¹

The activities by which the Community intends to achieve these aims are listed in Art. 3, ranging from the elimination of customs duties and of quantitative restrictions on the trade of goods between member states to the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social developments.

Some of these principles are elaborated in further provisions of the Treaty. The scope of the EEC Treaty has been enhanced by the Single European Act (SEA). It has added the objectives economic and monetary co-operation, protection of the environment, regional policy, research and technological development. In its Art. 30 the SEA has also provided a formal framework for political co-operation of the member states.

All of this has to be seen in the light of the extensive perspective laid down in the preamble of the EEC Treaty: "Determined to lay down the foundations of an ever closer union among the peoples of Europe." This political dimension has been reaffirmed by Art. 1 of the SEA.

Summing up, the EEC, although (as the name indicates) it was primarily aimed at economic integration, goes far beyond the scope of other organisations with economic objectives like the General Agreement on Tariffs and Trade (GATT) or the European Free Trade Association (EFTA). It is also concerned with encouraging a greater sense of European awareness, identity and common purpose: to create a people's Europe. Today, the activities of the Community comprise many areas which are only loosely connected with economic questions, like education (e.g. the ERASMUS program) social policy (e.g. the transferability of social security, pension and health care rights) or cultural policy and still shows a tendency to widen the issues.¹²

¹¹ This is not merely rethoric, but has direct legal implications: Case 6/72, *Europemballage Corporation and Continental Can Inc. v. Commission*, [1973] CMLR 199 at 223 - 225, paragraphs 23 - 26.

¹² The President of the Commission of the EC, Jaques Delors, predicted in a speech before the European Parliament in July 1988 that "in ten years, 80 per cent of economic legislation - and perhaps tax- and social legislation- will be directed from the Community.", Official Journal of the EC, Annex, Debates of the European Parliament, 1988-9, no. 2-367/140.

2. The Momentum of the Community

Another peculiar feature of the Community and its legal order is its dynamic nature. Although there have been phases of evident stagnation in the political impetus of the member states on the way to closer integration, the Community has hardly ever stood still. It is more or less in a constant progress of redefining itself or being redefined, examples being the Single European Act 1986 or, at present, the Intergovernmental Conferences (IGC)¹³ on Economic and Monetary Union and on Political Union.

There is also a continual flow of new, volume-filling secondary legislation to remind us of the important role that the Community plays in everyday life.

The dynamism of Community law was in particular fuelled by the courageous and innovative fashion in which the ECJ (esp. in the 1960s and 1970s) adopted the spirit of the preamble of the EECT and introduced principles which gave the Treaty some characteristics of a constitution.¹⁴

In this context it should also be pointed out that the EEC Treaty has been expressly concluded for an unlimited period, Art. 240. The Treaty does also not envisage the possibility of the withdrawal of a member.¹⁵

The Community can thus be more adequately understood as a 'process'

¹³ For details see *infra*, 6).

The member states are acting *outside* the Community when they negotiate in the IGCs, not as a Community institution.

¹⁴ This view is held by many distinguished writers on Community law, see e.g. G.F. Mancini, The Making of a Constitution for Europe, p. 596; J. Temple Lang, European Community Constitutional Law: The Division of Powers Between the Community and Member States, p. 209; T.C. Hartley, Federalism, Courts and Legal System: The Emerging Constitution of the European Community; Beutler/ Bieber, pp. 44/45.

¹⁵ Cf. Beutler/ Bieber, p. 73 on the legal problems of a withdrawal.

rather than as a static entity.¹⁶

3. The Autonomy of Community Institutions

In September 1974, Jean Monnet told President Valerie Giscard d'Estaing of France: "I think what's lacking more than anything in European affairs [...] is authority. Discussion is organized: decision is not. By themselves, the existing Community institutions are not strong enough."¹⁷

This statement shows the ambitious designs of the great European Monnet, because actually the extent to which the member states have endowed the Community's institutions with autonomous power is quite unusual compared with other international organisations.

Art. 4 EECT lists the four main institutions which exercise the powers of the Community: The European Parliament, the Council, the Commission and the Court of Justice.

Although the position of the European Parliament has been somewhat strengthened by the SEA¹⁸, it does not play the same important role as the national parliaments.

The central decision- and law-making body of the Community is the Council. It decides and acts on the basis of proposals submitted by the Commission. Apart from the vast amount of specified competences, the Council may, under certain conditions, also resort to the 'blanket power' of Art. 235 EECT.

The Council is normally also responsible for the external relations of the Community. It concludes agreements between the EC and other international organisations or states, but the negotiations are carried out by the Commission.¹⁹ Such agreements are binding also on member states. Furthermore, the member states are limited in their own treaty-making power by the ERTA-principle, which says that they

¹⁶ J. Weiler, The Community System: The Dual Character of Supranationalism, p. 269. This is also the view of the German Constitutional Court which describes the EC as 'a *sui generis* Community in the process of progressing integration', *Internationale Handelsgesellschaft*, [1974] 2 CMLR 540 at 549 para. 19.

¹⁷ J. Monnet, Memoirs, p. 513.

¹⁸ See Turpin, p. 306.

¹⁹ Art. 228 (1).

may not enter into a treaty with a non-member state which could "affect" Community legislation or alter its scope.²⁰

The independence of the Council's power from the interest of single member states can best be seen in those cases when it decides by qualified (or, less often, simple) majority voting.²¹

Whereas the Council is composed of representatives of national governments, the members of the Commission are required to be above national loyalties²². Its function is to act as guardian of the Treaty²³ and to carry through Community interests, which, in fact, it does quite vigorously.

The fourth principal institution is the Court of Justice which has been equipped with comprehensive competences²⁴ and whose judgments are binding not only on Community institutions, but also on the member states²⁵.

4. The Principles of Direct Effect and Supremacy of Community Law

Perhaps the most important feature which distinguishes the Community from other international organisations is the extent to which primary²⁶ and secondary Community law permeates the national legal systems and creates directly enforceable rights and obligations for

²⁰ See Case 22/70 *Commission v. Council*, [1971] ECR 263; ERTA = European Road Transport Agreement (sometimes cited with the French abbreviation AETR).

²¹ See Art. 148 EECT. The principle of majority voting has been extended to new areas by the SEA. On the other hand, the member states have protected vital national interests by the so-called 'Luxembourg Accord' of 28 January 1966. It is a sort of political convention to the effect that certain decisions may only be taken unanimously.

²² See Art. 10 (2) Merger Treaty.

²³ See Art. 155 EECT.

²⁴ See Art. 164 EECT.

²⁵ Art. 171 EECT.

²⁶ Primary Community law are the founding and amending treaties themselves.

individuals.²⁷

The practical importance of Community law is due to the combined operation²⁸ of two key principles: Direct effect and supremacy of Community law.

Whenever a rule of Community Law creates rights for individuals which have to be protected by municipal courts it is said to be 'directly effective'.²⁹ A precondition for direct effect is the 'direct applicability'³⁰ of a law. 'Directly applicable' means that a Community provision becomes automatically part of a domestic legal system without the necessity of further national measures of incorporation.

As for the instruments of secondary Community legislation, Art. 189 EEC attributes direct applicability only to regulations, but not to directives or decisions. Neither does the Treaty make any statements about the direct applicability of Treaty provisions. The further development of the principles of direct applicability and direct effect was left to the European Court of Justice.

The notion of direct effect consistently led to another question the Treaties had left open: which provisions should prevail in the case of a conflict between Community law and national law?

In response to that question the Court of Justice created the second key concept: the doctrine of supremacy of Community law over any form of national law.

Here is the answer to the question why the British concept of Parliamentary Sovereignty faces a much stronger challenge from the EC than from traditional international organisations. It is therefore worthwhile analysing in greater detail the relevant case-law of the ECJ and its implications for the legal authority of national parlia-

²⁷ See G. Howe, Sovereignty and Interdependence - Britain's Place in the World, p. 683; see also L. Collins, European Community Law in the United Kingdom, pp. 7-8.

²⁸ See U. Everling, Zum Vorrang des EG-Rechts vor nationalem Recht, pp. 1201, 1203.

²⁹ J. Steiner, Textbook on EEC Law, p. 20.

³⁰ For the relation of the two concepts see J.A. Winter, Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law.

However, The ECJ tends to use the two terms interchangeably, Steiner, Textbook on EEC Law, p. 20.

ments.

5. Summary: Some Elements of Federalism

"[W]here you have an association of States which in one form or another have agreed to divide power and control between centralised and regional authorities, you have at least the essential elements of the federal concept."

This was the conclusion of Lord Mackenzie Stuart, then President of the European Court of Justice.³¹ Of course, the EC is at present neither a state nor a federation. But it does come to one's mind that in addition to the division of powers, many of the features distinguishing the Community from other international organisations also occur in federal systems.³²

Federations are set up by a constitution. The basic document of the Community is not a constitution, but a Treaty. On the other hand, the Treaty was designed to be what is called a 'Framework Treaty' (*traité cadre*), establishing legislative, executive and judicial institutions of the Community, and has been further 'constitutionalised' by the ECJ.

As in federations, there is a central court with exclusive jurisdiction to give authoritative rulings on the interpretation of Community law and its decisions are binding on the member states in order to ensure a unified system of common law.

As in federations, legislation by the central authorities of the Community can apply directly to citizens and companies in the member states and even prevail over national legislation in cases of conflict.

Finally, the Community has its own diplomatic relations and has the right to conclude treaties with non-member states which have direct force for the member states.

³¹ Lord Mackenzie Stuart, Problems of the European Community: Transatlantic Parallels, p. 185.

³² Cf. Hartley, Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community; also D. Lasok, in: D. Lasok / P.A. Stone, Conflict of laws in the European Community, pp. 6, 17 - 18.

6) Outlook: Economic/Monetary and Political Union

The future shape of the Community is being discussed in the ongoing Intergovernmental Conferences on Economic and Monetary Union and on Political Union. Final results are not expected before the summit of the heads of government in Maastricht (Netherlands) by the end of 1991. Negotiations so far have proved very difficult³³ which is hardly surprising considering the sensitivity of the areas concerned and the possible far-reaching implications of any decision. As new proposals are being put forward all the time, any attempt to anticipate the particulars of the final outcome would be pure speculation. I will therefore confine the following to a sketch of the broad issues on the agenda.

a) Economic and Monetary Union

The discussion on Economic Union is directed at an open market system, combining growth and employment with price stability and environmental protection. Such a system should be dedicated to sound and sustainable financial and budgetary conditions and to economic and social cohesion and is likely to entail a strengthening of Community institutions.

At the moment, public attention is focused on the aim of European Monetary Union (EMU) which hopes to accomplish:

- the integration of financial markets and complete freedom of capital transactions,
- the irrevocable fixing of currency exchange rates and, ultimately,
- a single currency for Europe.

On a meeting on Rome in October 1990, eleven member states agreed in

³³ See e.g. *Financial Times*, 8 April 1991, EMU train stopped dead in its tracks.

principle on a timetable for EMU³⁴ which followed the three-stage approach suggested by the *Delors Report*³⁵.

Stage One³⁶ aims at a single free market in financial services; the inclusion of all member states' currencies in the exchange rate mechanism (ERM); the removal of impediments to the private use of the *ECU*; and a more salient role for the Committee of Governors of the Central Banks.

Stage Two requires a new Treaty to establish an independent European Central Bank which will eventually acquire full responsibility for the formulation and implementation of a Community monetary policy (thereby absorbing the existing arrangements of coordinating national monetary policies) and the intervention *vis-a-vis* foreign currencies on the exchange markets.

The final stage will bring an irreversible fixing of exchange parities and the adoption of a single currency.

The UK government had and still has reservations to the idea of an independent Central Bank and objects against the 'imposition' of a single currency³⁷. Instead, it favours a 'hard ECU' option which would mean a common currency besides the national currencies.

³⁴ The UK objected to the setting of a timetable before decisions on the substance had been taken in the IGC, see *The Times*, 29 October 1990, Britain alone as date is set for monetary union.

³⁵ Report of the Committee for the Study of Economic and Monetary Union, published 17 April 1989; text in (1989) *Europa-Archiv*, pp. D283 et seq.

³⁶ This stage has already officially begun on July 1st 1990, following the European Council meeting in Madrid.

³⁷ It is hard to see how a single currency could be imposed. All the other member states could do is to conclude a separate treaty without Britain. One of the options being discussed now is a Commission proposal that would allow the UK to sign a treaty now, but making actual participation dependent on the decision of a future Parliament.

b) Political Union

Because no blueprint, comparable to the Delors Report on EMU, exists for Political Union, there is a confusing welter of proposals on the table.

However, the idea behind Political Union is to remedy three major deficiencies in the present framework of the Community.

The first issue is the Community's representation to the 'outside' world. The EC has undoubtedly become an economic giant, but it has failed to develop a matching coherent political identity which would allow it to adopt a higher profile on the international scene. The present framework of European Political Co-operation (EPC) is too cumbersome and too slow to respond efficiently to urgent events. Community foreign policy is often limited to belated joint declarations. The Gulf crisis and the GATT negotiations have shown the deficiencies of the existing system.

There are plans for introducing a (parallel) European citizenship. The changing role of NATO has also led to a debate about a joint security policy.

The second aim of Political Union is to put an end to the infamous democratic deficit of the Community. Legislative powers once held by national parliaments lie now mainly with the unaccountable Council of ministers³⁸ and executive functions are assigned to unelected Commissioners³⁹.

There are several ways in which the democratic legitimacy of the Community could be strengthened. An obvious measure would be to extend the powers of the EP in the legislative process⁴⁰; there could be vetos for certain areas or Strasbourg might be given the right to initiate legislation. The appointment of Commissioners could be made subject to confirmation by the EP. Another idea is to remove the

³⁸ For a detailed analysis see S. Williams, Sovereignty and Accountability in the European Community.

³⁹ The Commission as a whole is under a limited control by the EP, see Art. 140 III and 144 EECT.

⁴⁰ The EP has aired its own ideas in a Resolution which is to serve as the basis of a Draft Constitution for European Union, see *Europe Documents*, Nr. 1674, 19 December 1990.

secrecy which surrounds Council meetings.

Accountability could also be achieved by involving national parliaments in EC law-making.⁴¹

The third concern is the improvement of the decision-making process. The general idea is that efficiency can be greatly increased by applying majority voting to more areas. The calls for the majority rule become more urgent as new applicants like Turkey and Sweden are knocking on the doors.

Another 'magic' concept that has gained enormous popularity is the subsidiarity principle.⁴² Basically it means that tasks which may be undertaken more effectively in common should be carried out by the Community; all other tasks should be left to the member states.

c) Comment

Whatever the exact outcome in the IGCs will be, one thing seems certain: the trend will definitely be to broaden the Community's powers and to reinforce the existing federalist traits.⁴³ All the questions about national and parliamentary sovereignty will recur with renewed vigour.

⁴¹ Michael Heseltine e.g. has advocated the establishment of a second chamber ('senate') consisting of representatives of national parliaments, *Financial Times*, 20 November 1990, Co-operation, not federation. See also the views of the Commission, *Europe Documents*, Nr. 1659, 31 October 1990.

⁴² See the Editorial Comment, (1990) 27 *Common Market Law Review*, pp. 181 - 184.

⁴³ As a matter of fact, the word 'federal' has now appeared for the first time in a new draft Treaty for the EC; see *Financial Times*, 18 June 1991, UK rejects 'federal' Europe move.

II. Direct Effect and Supremacy in the Case-Law of The European Court of Justice

1. Introduction

The European Court of Justice is not modelled after any particular court of the member states. Its powers, tasks, procedures and methods of interpretation are distinct both from continental and from common-law courts. It seems therefore justified to make in advance some brief introductory remarks in as far as they might be useful for the following analysis of the cases.

Tasks

The Court's main task is to "ensure that in the interpretation and application of this Treaty the law is observed".⁴⁴

It decides⁴⁵ disputes between member states⁴⁶, disputes between the EC and member states⁴⁷, disputes between Community institutions⁴⁸ and, in some cases, disputes between the Community and individuals⁴⁹. One of its most important tasks is to give preliminary rulings to references made by national courts under Art. 177. Under this procedure, the ECJ is only concerned with the application and interpretation of *Community law*⁵⁰, not with national law, which remains in the exclusive domain of municipal courts.

Methods of interpretation⁵¹

Like any continental or common-law court, the ECJ will start with a

⁴⁴ Art. 164 EECT, Art. 31 ECSCT, Art. 136 EuratomT.

⁴⁵ Some of its duties are now delegated to the new Court of First Instance, which was established in 1989 under Art. 168a EECT (Council decision 88/591, OJ No. L 319, 25 November 1988, p. 1).

⁴⁶ Art. 170, 219 EECT.

⁴⁷ Art. 169 EECT.

⁴⁸ Art. 173, 219 EECT.

⁴⁹ See list in Beutler/ Bleber, p. 139.

⁵⁰ The ECJ's power to rule on the validity of Community Acts is exclusive, see Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1988] 3 CMLR 57.

⁵¹ For a detailed treatise see A. Bredimas, Methods of Interpretation and Community Law; cf. also Collins, pp. 130 - 134.

literal translation and will normally not depart from the wording of a provision if it is clear and compelling⁵², but it is, of course, most of the time faced with the extra difficulty of several authentic versions⁵³.

Historical interpretation is only of limited importance as the *travaux préparatoires* of the Treaties are secret.⁵⁴

Sometimes the Court employs a systematic interpretation, giving relevance to the place of an Article in a particular chapter of the Treaty or its coherence with other provisions.⁵⁵

Some of the most important and far-reaching judgments were reached when the Court resorted to the purpose or intent of a provision or of the treaties in general. This coincides with the systematic approach inasmuch as the aims of the treaties have been incorporated in the treaties⁵⁶. Its leading motives are the principles of non-discrimination, freedom (of persons, trade, services and capital), solidarity between the member states and economic and legal integration.⁵⁷

The Court has developed two special forms of teleological interpretation called *effet utile* and *effet nécessaire*. The first denotes "such a minimum result as is required to make the Treaty effective" and the second "such an interpretation as must necessarily flow from the existence in fact of the common market and the Community or from the principles laid down in the founding treaties."⁵⁸

⁵² See e.g. Case 40/64 *Sgarlata v. Commission*, [1965] 1 ECR 215 at 227; Case 10/61 *Commission v. Italy*, [1962] ECR 1.

The ECJ does not avail itself of the literal method to the extent English courts do: see P.D. Dagoglou, The English Judges and European Community Law, p. 76.

⁵³ For the EECT this follows from Art. 248.

⁵⁴ H.G. Schermers, Judicial Protection in the European Communities, §25; Bredimas, pp. 57 et seq.

⁵⁵ See e.g. Case 59/75 *Pubblico Ministero v. Manghera*, [1976] 1 ECR 91 at 100, paragraphs 6 and 7: "[Art. 37 (1)] must be considered in its context in relation to the other paragraphs of the same article and its place in the general scheme of the Treaty". See also Beutler/ Bieber, p. 223.

⁵⁶ Art. 2 EECT, Art. 2 ECSCT, Art. 1 EuratomT.

⁵⁷ Beutler/ Bieber, p. 226.

⁵⁸ G. Slynn, The European Court of Justice, p. 415.

Case-Law

In continental legal theory courts are to *apply* the law in the cases at issue and not to *make* it.⁵⁹ Nevertheless, it is recognised also in non-common-law systems that court decisions can be a source of law when they fill gaps in the existing legal frameworks.⁶⁰

As the founding treaties left quite a number of such gaps, there were many uncertainties even about fundamental principles of Community law. Normally one should expect the legislature to fill these gaps, but the Council showed itself rather reluctant to act. Thus the ECJ (which could not postpone its judgments until the Council had made up its mind) frequently found itself in the unexpected role of the Community's law-creating institution.⁶¹ In some areas of Community law the decisions of the ECJ can be the most important or even only source of law.

Strictly speaking, the judgments of the Court are binding only *inter partes*⁶² unless the a provision is declared void, in which case the effect is *erga omnes*⁶³. The Court itself has pointed out in *Da Costa en Schaake*⁶⁴ that it is not legally bound by its previous rulings and that national courts are free to make a reference for a preliminary ruling even if the same question has been decided in a prior case.

On the other hand, the Court in the same judgment also allowed national courts ruling in last instance to rely on previous preliminary rulings in cases where they would normally have been obliged to consult the ECJ under Art. 177 (3) EECT.⁶⁵ In addition, the ECJ seldom overrules its previous decisions but generally follows the precedents it has established, sometimes quoting from or simply

⁵⁹ Schermers, Judicial Protection in the EC, § 166.

⁶⁰ In Germany, for example, a large part of labour law is judge-made (*Richterrecht*).

⁶¹ See Beutler/ Bleber, pp. 213/214; Schermers, § 35.

⁶² Beutler/ Bleber, pp. 244, 245.

⁶³ Case 66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato*, [1981] 2 ECR 1191 at 1215, 1216, paragraphs 11-13, 18.

⁶⁴ Joined Cases 28-30/62 *Da Costa en Schaake*, [1963] ECR 31 at 37-39.

⁶⁵ This is part of the now commonly accepted *acte clair* principle, see e.g. Collins, pp. 156 - 162.

referring to earlier judgments⁶⁶. It thus gives its rulings a force that goes beyond the decided case.⁶⁷

As Schermers has pointed out, decisions of the Court of Justice cannot be formally divided into the *ratio decidendi* and *obiter dicta*.⁶⁸ Although the Court naturally avails itself of arguments which would be classified as *obiter* under English law, they have the same force of precedent as other forms of reasoning.

2. Van Gend en Loos⁶⁹

Van Gend en Loos is arguably the most creative and salient judgment ever delivered by the Court. It has laid the foundations for almost every major development in Community constitutional law.

a) Background of the Case

In 1957 the Netherlands had ratified the EEC Treaty, which entered into force 1 January 1958. Two years later another Dutch law ratified a Benelux customs protocol.

The Dutch forwarding agency Van Gend en Loos had imported glue from Germany on which a customs duty of 3 per cent was levied. Under the new Benelux customs protocol, the product was classified differently with the result that Van Gend had to pay 8 per cent duty. The firm brought an action against the new classification in the Amsterdam *Tariefcommissie* ('Customs Court'). The Dutch court realised that the case before them concerned trade between two member states of the European Economic Community and was uncertain about the effect of the

⁶⁶ See e.g. Case 54/80 *Wilner*, [1980] 3 ECR 3673 at 3681, paragraphs 6 - 8, in which the ECJ repeats the decision of Case 65/79 *Chatain*, [1980] 2 ECR 1345.

⁶⁷ To English lawyers, this is familiar as the *stare-decisus* doctrine.

⁶⁸ Schermers, § 855. See also N.P. Gravelles, Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?, p. 586.

⁶⁹ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

Treaty (in particular Art. 12 EECT) on this import. Consequently, it made use of its discretion under Art. 177 EECT to ask the European Court of Justice to explain Art. 12 of the Treaty.

The crucial question (abridged) was:

"Does Art. 12 EECT have direct application⁷⁰ within the territory of a member state, in other words, can nationals of such a state, on the basis of this article, lay claim to individual rights which the court must protect?"

b) The Arguments of the Netherlands and Belgian Governments

Under the rules of procedure for Art. 177, the firm itself, the Nederlandse Administratie der Belastingen, the Commission and the Dutch, Belgian and German governments submitted written observations to the ECJ.

The arguments put forward by the governments of the Netherlands and Belgium were particularly powerful and highlight the issues at stake.⁷¹

Both member states objected against the admissibility of the question, thus denying the jurisdiction of the ECJ, and also against the idea of a direct effect of Treaty provisions.

The Netherlands government disputed that a request of a national court for a preliminary ruling under Art. 177 may concern an alleged infringement of the Treaty by a member state. It suggested that action in such cases could only be taken on initiative of another member state or the Commission under Articles 169 and 170. In other words, whether or not the Netherlands was fulfilling its EEC Treaty obligations was relevant only on the international level, between the contracting parties, and could not be of any consequence to an individual.

The Belgian government maintained that the Amsterdam *Tariefcommissie* was confronted with two international treaties which both had become

⁷⁰ In the now established terminology of the ECJ this should read 'direct effect'.

⁷¹ The following account is taken from the summary contained in the judgment of the ECJ.

part of the Dutch national law. To decide which treaty prevailed in case of a conflict was solely a problem of national constitutional law and had nothing to do with the interpretation of an article of the EEC Treaty. Hence, the case fell within the exclusive jurisdiction of the Netherlands court and the request to the ECJ for a preliminary ruling was inadmissible.

The Belgian government added that no answer which the ECJ could give to the first question would have any bearing on the proceedings brought in the *Tariefcommissie*. Thus, a preliminary ruling was not 'necessary to enable it [the Dutch court] to give judgment' and the ECJ should consequently reject the request.

As to the substantive issue, Netherlands government distinguished between 'internal effect'⁷² and 'direct effect', the first being a precondition to the second. It pointed out that the actual wording showed that Art. 12 only placed an international obligation on member states, who were free to decide how they intended to fulfil it.⁷³ Since Art. 12 had no internal effect, it could not, *a fortiori*, produce direct effect. Even if it had internal effect, it could not be construed in a sense that would permit individuals to claim subjective rights which the national courts must protect.

Similarly, the Belgian Government argued that Art. 12 merely obliged member states to *refrain* from measures which would amount to new or increased customs duties, but it did not provide that any such measure would automatically be void. Art. 12 did therefore not create directly applicable rights which nationals could invoke and enforce.

At this point the orthodoxy in international law of all of these propositions must be emphasized. It was not the governments, but the ECJ which was treading on new and untested ground in the following judgment.⁷⁴

⁷² By which it meant 'direct applicability'.

⁷³ A similar reasoning was given by the German government.

⁷⁴ Cf. D. Wyatt, New Legal Order or Old?, for an attempt to explain the Community with traditional concepts of International Law.

c) The Judgment of the Court

After reiterating the arguments put forward against the admissibility of the first question, the ECJ set out: "However in this case the Court is not asked to adjudicate upon the application of the Treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but it is asked, in conformity with subparagraph (a) of the first paragraph of Article 177 of the Treaty, *only to interpret the scope of Article 12 of the said Treaty within the context of Community law and with reference to its effects on individuals* [italics supplied]. This argument has therefore no legal foundation."⁷⁵

The style in which the Court dismissed the objections against its jurisdiction is typical in its harsh brevity for the ECJ's mode of reasoning. It sounds more like an inviolable statement than like an argument. To understand why the ECJ is so adamant, one has to look at the alternative. Suppose, the Court had denied its own jurisdiction, Van Gend might still have won its case before the *Tariefcommissie* on grounds of Dutch constitutional law. But exactly the same case would probably have been resolved differently under a different national legal order⁷⁶ with the paradoxical result that Art. 12 EEC Treaty offers direct protection to some traders but not to others, although it is supposed to cover *all* trade within the Community. It is understandable that the Court was anxious to avoid this result. But how is its answer to the arguments of the two member state governments justified?

When the Court stated that it was only asked to explain the scope of Art. 12 with reference to its effect on individuals, it impliedly assumed that it could answer this question *exclusively* on the basis of Community law, without looking at national constitutional concepts

⁷⁵ *Op. cit.*, note 69, p. 11.

⁷⁶ For example, in Italy the constitution did not recognize the internal primacy of international treaties as did the vague Art. 66 of the Dutch constitution then in force.

of how international treaties are incorporated into national law.⁷⁷ The Court thus already anticipated the argument which, as we will see, it later used to decide the substantive issue.

The ECJ also rejected the second objection against the admissibility of the first question by stating that it was for the national court alone to determine when a preliminary ruling was needed to enable it to give judgement.⁷⁸

It then went on to deal with the question of direct effect of Article 12 and eventually concluded: "[A]ccording to the spirit, the general scheme, and the wording of the Treaty, Art. 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."⁷⁹

The Court principally used three arguments to support this finding.

First, instead of analysing Art. 12, the Court started its reasoning with an outline of the objectives of the EEC Treaty. In choosing this unusual⁸⁰ approach the Court indicated that the real question raised by the Dutch court was of a fundamental and general nature which was not confined to a particular article of the Treaty. It said: "The objective of the Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states".⁸¹ The Court then mentioned the facts that the Preamble of the Treaty refers not only to governments but to peoples, that the Community institutions had been endowed with sovereign rights and,

⁷⁷ This is exactly what the Commission had contended in its written observation: "Community law must be effectively and uniformly applied throughout the whole of the Community. The result is first *that the effects of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law*" [italics supplied], cf. [1963] ECR p. 6.

⁷⁸ This has considerably strengthened the position of the national courts.

⁷⁹ *Op. cit.*, note 69, p. 13.

⁸⁰ See *supra*, II. 1) on interpretation techniques.

⁸¹ *Op. cit.*, note 81, p. 12.

finally, that the nationals of member states participated in the functioning of the Community through the European Parliament and the Economic and Social Committee. The key-point of the Court's first argument was the *function* of the Community. It said, in effect, that although the Treaty was an international treaty, its far-reaching aims required that it be treated differently from ordinary treaties in order to make it work.

The Court backed this up with its second argument, which was based on a systematic analysis of Art. 177 EECT: "In addition, the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals."⁸²

The idea behind this was the following: Art. 177 empowers national courts to refer a question to the ECJ only "if it considers that a decision on the question is necessary to enable it to give a ruling". Such a decision could only be 'necessary' if the legal position of individuals is affected by Treaty provisions.

From the two arguments the ECJ concluded that "the Community constitutes a new order of international law⁸³ for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but it is also intended to confer upon them rights which become part of their legal heritage."⁸⁴

Thus having declared that it is principally possible for Treaty provisions to confer enforceable rights on individuals the ECJ took the third step and examined Art. 12 EECT. It found the provision to be

- a) a clear and unconditional negative obligation and
- b) not dependent on further measures under national law

⁸² *Op. cit.*, note 69, p. 12.

⁸³ The substance of this sentence has often been repeated (most recently in Case 2/88 *J.J. Zwartveld*, [1990] 3 CMLR 457), with the subtle difference that in later cases the ECJ has wisely refrained from describing the Community as an order of 'international law'.

⁸⁴ *Op. cit.*, note 69, p. 12.

and thus "ideally adapted to produce direct effects between Member States and their subjects [...] The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."⁸⁵

Finally, the Court also dismissed the argument based on Articles 169 and 170 of the Treaty: "A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles would remove all direct legal protection of the individual rights of their nationals. [...] The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 189 and 170 to the diligence of the Commission and the Member States."⁸⁶

d) Summary

To summarise, the ECJ has made three important points in *Van Gend*: First, the EEC Treaty is different from other international treaties and extends beyond the usual mutual commitment of states on an *inter-se* level. From its whole purpose and institutional framework it follows that it can directly confer rights upon individuals which are enforceable against member states. This is all the more remarkable since three of the six founding members revealed a directly opposing understanding of the Treaty⁸⁷.

Second, it follows from *Van Gend* that the main burden of protecting these Community rights falls on the national courts.⁸⁸

Third, the Court has offered some criteria as to what Treaty provisions can produce direct effects.

⁸⁵ *Op. cit.*, note 69, p. 13.

⁸⁶ *Ibid.*

⁸⁷ They must have felt as if confronted with Dr. Frankenstein's monster: a life of its own, independent of its creators and becoming difficult to keep under control. See also U. Everling, Sind die Mitgliedstaaten noch Herren der Verträge?, p. 178.

⁸⁸ The implications of this will be discussed in greater detail under III. 3.

3. Costa v. ENEL⁸⁹

In Van Gend en Loos the ECJ only developed the principle of direct effect. This automatically leads to the question which rule the national judge has to obey if a directly applicable Community rule and a rule of national law contain contradicting instructions for the same situation. This problem was broached in *Costa v. ENEL*.

a) Background of the Case

In 1962, private Italian electricity undertakings were nationalised by a statute of 6 December and their assets transferred to the Ente Nazionale per l'Energia Elettrica, ENEL⁹⁰.

The lawyer Flaminio Costa, a shareholder in one of the private firms and an opponent of nationalisation, refused to pay an invoice over 1.925 lira⁹¹ charged by ENEL for supply of electricity. When sued, he pleaded before the Milanese *giudice conciliatore*⁹² that the nationalisation legislation was not only a breach of the Italian constitution but also incompatible with Art. 102, 93 (3), 53 and 37 EECT.

The Milanese judge did not bother to frame a question, but simply cited Art. 177 EECT and sent the whole case file to the ECJ.

The legal issues in this case were threefold. First, the Court again had to decide about the admissibility of the reference. Second, it concerned the relation between national and Community law and third, it raised questions about the Treaty Articles on which Costa had based his refusal to pay.

⁸⁹ [1964] ECR 585.

⁹⁰ National Electricity Board.

⁹¹ Roughly £1.

⁹² The *giudice conciliatore* is similar to a small claims court in Britain.

b) The Observations of the Italian Government and the Opinion of the Advocate General

The Italian government's arguments in *Costa v. ENEL* mostly fall into line with the reasoning of the three other governments in *Van Gend*. Italy challenged the admissibility of the reference on two grounds. First, it objected to the wording of the question which asked the ECJ to decide on the validity of an Italian law.

Second, it maintained that the *giudice conciliatore* did not need an interpretation of an international Treaty to decide a dispute over a ridiculous amount of money. Should the Italian legislation happen to be a breach of the Treaty of Rome, this matter would have to be resolved under the procedures provided for by Articles 169 and 170. The Milan judge, meanwhile, only had to apply domestic law in order to give a ruling: "In this case, the court has no provision of the Treaty of Rome to apply and cannot therefore have any of the doubts on the interpretation of the Treaty that Article 177 of the Treaty itself clearly requires; it merely has to apply the national law (that concerned precisely with ENEL) which governs the question before it."⁹³

The Advocate General (A.G.) M. Lagrange retorted with two considerations, one concerning the formal entitlement of the Italian judge and the other concerning the substantive issue whether the Italian judge must also apply Community law.

The right of the *giudice conciliatore* to refer his question to the Court in Luxembourg follows from Art. 177 (2) EECT. The power to decide *if* a request for a preliminary ruling is 'necessary' is vested alone in the national judges. This decision cannot be questioned or dismissed by the ECJ.⁹⁴

The A.G. then proceeded to explain, again treading along the way the ECJ had paved in *Van Gend*, that in each Member State, two legal systems coexisted and that particular situations may be subject to both. The real problem, according to the A.-G. was: if a national court finds that there are two opposing rules which cover the same situation, "one deriving from the Treaty or the Community institutions, the other from national legislature and institutions: which

⁹³ As quoted by Advocate General Lagrange, [1964] ECR 585 at 602.

⁹⁴ This is exactly what the Court had already decreed in *Van Gend*.

must predominate [...]?"⁹⁵

c) The Judgment of the Court

Since the Milanese judge in effect had asked the ECJ to rule on the compatibility of Italian law with the Treaty, the Court extracted from the reference those questions which alone pertained to the interpretation of the Treaty. It thus neutralised the first objection of the Italian government.

It then echoed the Advocate General's reply to the submission that an interpretation of the Treaty was not 'necessary' by pointing to the clear separation of functions between national courts and ECJ set up by Art. 177.

Then the Court tackled the potentially most dangerous argument put forward by the Italian government: that the *giudice conciliatore* was obliged to decide the case before him by applying only national law. Again the ECJ went far afield in its endeavour to invalidate the objections, reiterating the essence of its judgment in *Van Gend*. It set out: "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."⁹⁶

So far, there are only a few arguments which have not already been used in *Van Gend*. The Court points out every characteristic⁹⁷ it can think of that justifies the claim that the Treaty of Rome is different in its legal nature and effects from every known traditio-

⁹⁵ *Op. cit.*, note 89, p. 602.

⁹⁶ *Op. cit.*, note 89, p. 593.

⁹⁷ See the comparison in C. I.

The Court not only introduces the arguments of unlimited duration and international representation, but, slightly unusual, also refers to the *real powers* of the Community, thus availing itself of a purely political argument.

nal international treaty. From this it had inferred in its previous judgment the direct effect of suitable provisions of Community law. In the following crucial sentences the Court consequentially extends the implications of the special nature of Community law to the question which rules prevail in cases of conflict: "The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in defence of subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2)".⁹⁸

It could be objected that the acceptance of the legal system established by the Treaty of Rome 'on the basis of reciprocity' is nothing unique. Quite the reverse, reciprocity is a feature common to most international treaties. Whenever one signatory fails to fulfil its duties under a treaty this entails the danger that the goals of the respective treaty might be jeopardized. International law provides certain mechanisms for such cases. The general idea is that any breach of one party suspends the obligation of the other party (or parties) to adhere to the infringed rule.⁹⁹

What the Court says in *Costa v. ENEL*, by referring to the 'terms and the spirit of the Treaty', is that the objectives of the EECT are too comprehensive and too valuable to be frustrated unilaterally. The system of suspension may work for ordinary treaties, but not for the Treaty of Rome. The Court made this very clear in a judgment which it delivered shortly after *Costa v. ENEL*, when it held that the relevant principle of international law "cannot be recognised under Community law".¹⁰⁰ In other words, the functioning of the Community law depends

⁹⁸ *Op. cit.*, note 89, pp. 593 - 594.

⁹⁹ For members of the Vienna Convention on the Law of Treaties, this follows expressly from Art. 60. Over and above that, the principle behind these Art. is regarded as a general rule of international law, see I. Brownlie, Principles of Public International Law, pp. 19 and 618.

¹⁰⁰ Joined Cases 90 and 91/63 *Commission v. Luxembourg and Belgium*, [1964] ECR 625.

so much on its unconditional and uniform application in the member states that opposing national measures cannot be tolerated under any circumstance.

The ECJ has condensed these conclusions in one memorable sentence: "It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."¹⁰¹

The Court went on to examine the different Treaty provisions on which Mr. Costa had based his complaint and found that at least Article 53 and Article 37 (2) were capable of creating individual rights.

d) Summary

Costa v. ENEL is important for several reasons. First, the ECJ disappointed whoever had felt that it had overshot the mark in *Van Gend en Loos* and confirmed the course it had adopted then. It became evident that the direct applicability and effect of Art. 12 was not an isolated exception but that quite a number of provisions might prove to fall into the same category.¹⁰²

Second, the ECJ maintains that a Treaty provision may not only be directly effective, but it must also prevail over any conflicting rule of national law, even if it was enacted subsequent to the rule of Community law.¹⁰³

¹⁰¹ *Op. cit.*, note 89, p. 594. See also A.J. Mackenzie Stuart, The European Communities and the Rule of Law, pp. 16 et seq.

¹⁰² For a detailed account of directly effective Treaty provisions and the respective case-law of the ECJ see Schermers, § 187.

¹⁰³ This principle has been held up unwaveringly by the ECJ, see e.g. Case 14/68 *Walt Wilhelm v. Bundeskartellamt*, [1969] ECR 1.

4. Simmenthal II¹⁰⁴

In this case the Court of Justice was requested to further clarify the relationship between national law and Community law.

a) Background of the Case

Under Italian law¹⁰⁵ importers of meat into Italy had to allow and to pay for, veterinary and public health checks on their merchandise at the frontier.

Simmenthal S.p.A., which imported beef from France, had challenged this legislation before an Italian court and sued the Italian Minister of Finance for return of the fees paid. The court had made a reference¹⁰⁶ under Art. 177 (2) EECT to the European Court of Justice, asking the Court to explain Articles 12 and 30. From the interpretation the ECJ gave it was clear that the health checks amounted to measures having equivalent effect to quantitative restrictions (and hence were contrary to Art. 30 EECT) and the fees were a charge having equivalent effects to customs duties (which was a breach of Art. 12).

Consequently, the Italian court had ordered the Ministry of Finance to repay the unlawfully charged inspection fees, together with interest, to Simmenthal.

The Minister appealed against this order, arguing that until the 1970 statute had been set aside by the Italian Constitutional Court (which is under Art. 136 of the Italian Constitution the only body which can lawfully annul statutes) it had to be applied by all lower courts. The Minister could support his view by citing some recent judgments

¹⁰⁴ There are four cases known under the name 'Simmenthal'. The first is Case 35/76 *Simmenthal SpA v. Amministrazione delle Finanze dello Stato*, [1976] 3 ECR 1871, the third is Case 70/77 *Simmenthal SpA v. Amministrazione delle Finanze dello Stato*, [1978] 2 ECR 1453, and the fourth is Case 92/78 *Simmenthal SpA v. Commission*, [1979] 1 ECR 777.

We are dealing with the second, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] 1 ECR 629.

¹⁰⁵ In particular a 1970 statute.

¹⁰⁶ First *Simmenthal* case, *op. cit.*, note 104.

of the Constitutional Court which had said that the question whether an Italian law is unconstitutional under Art. 11¹⁰⁷ of the Constitution can only be decided by the Constitutional Court.

The lower court, aware of the decision of its highest court, but also familiar with the case-law of the ECJ in *Van Gend and Costa v. ENEL*, in its dilemma made another reference to the ECJ:

It wanted to know whether every national court has the power under Community law to immediately set aside national legislation incompatible with directly effective Community provisions, even if under the constitutional law of a member state this right is reserved to special authorities.

b) The Judgment of the Court

The clear answer the Court gives to the question at the end of its judgement reflects exactly the attitude which had led to the bold decisions in the previous two cases. The Court ruled: "A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."¹⁰⁸

It is interesting to see how the Court justifies this result. It starts by pointing out that direct applicability means that rules of Community law must be fully applied in all member states from the very moment of their entry into force and proceeds: "Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but -

¹⁰⁷ Art. 11 of the Italian Constitution provided for the possibility to set aside statutes which are incompatible with certain types of international treaties.

¹⁰⁸ *Op. cit.*, note 104, pp. 645 - 646.

in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions."¹⁰⁹ The Court, playing it safe, added the ultimate threat that anything short of this would "imperil the very foundations of the Community."¹¹⁰

The other argument put forward by the Court follows again from the function of Art. 177 EECT. If the national court could not apply Community law after receiving of a preliminary ruling of the ECJ to this effect, the effectiveness of Art. 177 would suffer.

The arguments of the Court so far have been powerful, but they have not answered one decisive question: Why should a lower national court be entitled to disregard a provision of the constitution which reserves the right to annul national legislation exclusively either to the legislature or to a special Constitutional Court?

This problem is solved in the next passage of the judgment.

"...[a]ny 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 Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary."¹¹¹

This is a clever but also rather tricky argument. From the fact that the full, uniform and undelayed application of Community rules is dependent on the ability of every court concerned to set aside conflicting national legislation, the Court infers that any second-

¹⁰⁹ *Op. cit.*, note 104, p. 643 paragraph 17.

¹¹⁰ *Op. cit.*, note 104, p. 643 paragraph 18.

¹¹¹ *Op. cit.*, note 104, p. 644 paragraphs 22 - 23.

order national norm confining this ability to other authorities is consequently itself inconsistent with Community law.

At this point the Court has touched on a fundamental problem which always occurs when two different legal orders enter into competition. The problem becomes clear when one tries to formulate a hypothetical objection of the Italian Constitutional Court to the ECJ's conclusions. It might go like this: 'From its point of view, the ECJ may be perfectly right in saying that every rule of national law which reserves the power to set aside national legislation to a special court is incompatible with Community law. But does this automatically entitle lower courts to ignore this rule? Under Italian law, Art. 11 of the Constitution is valid until we, the Constitutional Court, say otherwise. This decision cannot be preempted by the ECJ or anyone else. As long as Art. 11 exists, every Italian judge is bound it.'¹¹² So, the ECJ, applying Community law, arrives at one conclusion, and the Italian Constitutional Court, applying Italian law, arrives at the opposite conclusion.

Thus the logically prior question is, *who decides* what happens to the conflicting rules. Even before this one has to ask *which legal order determines who decides* and so on and so on. Because this is a case of infinite regression, there is ultimately no 'correct' answer.

At this point the wheel turns full circle to the Kelsian *grundnorm*, because this is exactly what lies at the heart of the matter: each court has to presuppose a norm which does not derive its validity from a higher norm.

The ECJ of course insists that the Community can only function if Community law decides in the last instance¹¹³ and expects national courts to assume the right to disregard national legislation which is in conflict with Community law. The success of the Simmenthal II judgment depended very much on the acceptance of this authority by the national courts.¹¹⁴

¹¹² In effect, this was the Constitutional Court's argument in a judgment of 27 December 1973, Case 183 *Frontini v. Ministero delle Finanze*, [1974] 2 CMLR 372.

¹¹³ See Everling, Zum Vorrang des EG-Rechts vor nationalem Recht, p. 1206; Steiner, Textbook on EEC Law, p. 35.

¹¹⁴ See G. Bebr, Development of Judicial Control of the European Communities, pp. 664 et seq.

c) Summary

Simmenthal confirmed the precedence of Community law over national law, whether prior or subsequent to the conflicting Community rule. It also told national courts that, when called upon to apply Community law, they are entitled to set aside national measures which are contrary to the respective rule. Any national provision which withholds this power from them is itself incompatible with Community law and can be ignored.

5. Internationale Handelsgesellschaft¹¹⁵

In the previous cases Community law had conflicted either with ordinary statutes or with constitutional provisions of 'minor' importance.¹¹⁶ In this case the conflict arose between Community law and fundamental human rights guarantees in the constitution of a member state.

a) Background of the Case

A German exporter of cornflour was required by a Community agricultural Regulation to obtain a licence for its trade. On application for the licence the firm had (under another Regulation) to pay a 'performance deposit' which was forfeit in case the exports were not managed within the period allowed for by the licence.

After the firm exceeded the licence period and lost its money, it brought an action against the cereals intervention agency before the *Verwaltungsgericht*¹¹⁷ Frankfurt-am-Main for the return of all the deposit.

The German court had in a number of earlier instances declared the

¹¹⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

¹¹⁶ It has to be pointed out that unlike in the UK, in most continental member states constitutional law is formally distinguishable from ordinary statute law.

¹¹⁷ This is a specialised Administrative court.

Community Regulations void because they were in breach of the elementary rights protected by Articles 1-20 of the German Grundgesetz (GG)¹¹⁸. In particular, it had established an infringement of Articles 14¹¹⁹ and 2 (1)¹²⁰ GG in conjunction with the principle of proportionality.

This time, the Frankfurt court under Art. 177 (2) EEC referred the matter to the ECJ. It pointed out that according to Art. 1 (3) of the Constitution, all three powers in the state, including the legislature, are bound by the fundamental rights.¹²¹ German membership of the EC is based on Art. 24 (1) GG which allows the transfer of sovereign rights to international institutions. But the German Parliament could not transfer powers which it did not possess under the Constitution to the EEC, and this included the power to violate fundamental rights.

The crucial question which the ECJ had to answer (although this was not the one drafted by the national court) was whether Community law could be reviewed against the constitution of a member state.

b) The Judgment of the Court

Bearing its earlier statements in mind, the Court's solution to the problem was well predictable. Had it conceded that the supremacy of Community law should yield to the basic rights under the German constitution, this would have opened the way for judicial review of Community acts against the constitution of every single member state. Ignoring the specific constitutional problems of Art. 24 (1) GG the Court held: "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institu-

¹¹⁸ *Basic Law* = Constitution of West Germany.

¹¹⁹ Art. 14 protects 'ownership rights'. Under the German Constitution this is a rather wide concept which also comprises the right to collect and enjoy the fruits and benefits from an industrial or commercial enterprise.

¹²⁰ Art. 2 covers all areas of human activities which are not covered by 'specialised' guarantees and protects them against unjustified encroachments.

¹²¹ Quite unlike the UK Parliament, the German *Bundestag* is not sovereign in the sense outlined under B.

tions of the Community would have an adverse effect on the uniformity and efficacy of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, *however framed* [italics supplied], without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principle of a national constitutional structure."¹²²

The message is, quite bluntly, that Community law is superior to every aspect of national constitutional law, even its most fundamental principles.¹²³ However, the Court did not stop here. It probably realised that this answer had to be most unsatisfying not only for the Frankfurt court and that it was likely to conjure up the danger that national courts might refuse to follow this view.¹²⁴

As there is no express Bill of Rights in the Treaties the Court's next consideration seems to be a kind of peace-offer meant to ease the implications of the previous passage: "However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."¹²⁵

¹²² *Op. cit.*, note 115, p. 1134 paragraph 3.

¹²³ What this implies for the doctrine of Parliamentary Sovereignty will be discussed *infra*, III.

¹²⁴ In fact, the case before the court in Frankfurt had a sequel before the Federal Constitutional Court, see *infra* IV. 1. c).

¹²⁵ *Op. cit.*, note 115, p. 1134 paragraph 4. On the facts of the case, the Court held that the Regulations in question (102/64, 120/67, 473/67) had not violated fundamental rights protected by Community law.

In its later case-law¹²⁶ the ECJ has often referred to the European Convention of Human Rights and Fundamental Freedoms (ECHR of 4 November 1950) to which all the members of the EC are party. Although the ECJ has never gone so far as to declare the Convention part of EC law¹²⁷ one may assume that the principles to which the Community is bound are identical.¹²⁸

Meanwhile, the Court's attitude towards the question of fundamental rights has been reinforced by the joint statement of the European Parliament, Council and Commission of 1977¹²⁹ and by the fact that the preamble of the SEA 1986 confirms adherence to fundamental rights as formulated in the ECHR.

6. Factortame

On June 19 1990, the European Court of Justice delivered a preliminary ruling requested by the House of Lords under Art. 177 EEC in the case *Regina v. Secretary of State for Transport, ex parte Factortame Limited and others*.¹³⁰

For the present we will look at the case from the European angle but it will also be analysed from the point of view of the British Courts.¹³¹

¹²⁶ See e.g. Case 4/73 *Nold v. Commission*, [1974] 1 ECR 491 at 507 paragraph 13; Case 36/75 *Rutili v. Minister for the Interior*, [1975] ECR 1219 at 1232 paragraph 32; Case 44/79 *Hauer v. Land Rheinland-Pfalz*, [1979] ECR 3727 at 3745 paragraphs 17 - 19; Case 136/79 *National Panasonic (UK) Ltd v. Commission*, [1980] ECR 2033 at 2057 paragraph 19.

¹²⁷ Cf. Case 98/79 *Josette Pecastaing v. Belgian State*, [1980] ECR 691 at 716.

¹²⁸ Collins, p. 9; Schermers, § 182.

¹²⁹ OJ 1977 No. C 103, p. 1.

¹³⁰ Case C-213/89 [1990] 3 CMLR 1.

¹³¹ See *infra*, chapter D., IV. 2. a).

a) Background of the Case¹³²

In 1983, the EC Council adopted a Regulation¹³³ concerning the management and fair distribution of fishery resources. It allotted fixed quotas of total allowable catches to each individual member state.

In the UK, non-British nationals were excluded from owning British fishing vessels (only the catches of vessels sailing under the British flag count against the British quota) under the Merchant Shipping Act 1894. However, the Act did not preclude corporate ownership by British companies. A number of Spanish fishermen took advantage of this, incorporated companies under UK law (one of which is Factortame Ltd), purchased 42 existing British fishing vessels and re-registered another 53 vessels in the UK which had formerly flown the Spanish flag. Most of the catches made by these boats were landed directly in Spain.

The UK government was concerned that the British quota was being exploited by vessels without a genuine economic link to the United Kingdom (a practice for which the term 'quota-hopping' was forged). Consequently it enacted the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulation 1988, changing the existing rules for registration with the explicit intention to protect the interests of the UK fishing industry.

The most important change was that only those vessels qualify for registration which are owned at no less than 75 per cent by British citizens resident and domiciled in the UK ('qualified persons'), or are owned by companies incorporated in the UK which in turn must be controlled at no less than 75 per cent by 'qualified persons'.¹³⁴

Under the new system, the 'Spanish' vessels could not satisfy the conditions for British ownership.

Factortame and the other companies in question, by means of an application for judicial review, challenged the compatibility of Part II of the 1988 Act with their rights under directly effective Community law before the Divisional Court of the Queen's Bench

¹³² For a very detailed account of events see Gravelles, Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?, pp. 568 et seq.

¹³³ Council Regulation 170/83, OJ 1983 No. L 24, p. 1.

¹³⁴ Part II, section 14 of the Merchants Shipping Act 1988.

Division and also applied for the grant of interim relief.

On 10 March 1989, the Divisional Court made a reference under Art. 177 EECT for an explanation of the relevant provisions of Community law (Articles 7, 52, 58, 221)¹³⁵ and at the same time ordered that pending final judgment the national statute be disapplied as regards the applicants.

The Court of Appeal unanimously allowed the appeal of the Secretary of State for Transport and, on March 22 1989, set aside the order for interim relief, arguing that under national law the courts had no power to suspend the application of Acts of Parliament.

The matter was then brought before the House of Lords¹³⁶ which supported the view of the Court of Appeal concerning national law. It held that British courts were prevented from granting interim relief by two jurisdictional obstacles: 1) according to an established common law rule this remedy is not available against the Crown and 2) the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible.

However, the House of Lords referred to the ECJ the question whether, notwithstanding the rule of national law, English courts had the power or even the duty to grant an interim injunction against the Crown *under Community law*.

b) The Judgment of the Court

In his written opinion the Advocate General Guisepppe Tesauero had remarked that "[t]he reply which the Court is called upon to give [...] in the Factortame case certainly will rank amongst those which help to define the context of relations between national courts and

¹³⁵ Case 221/89, lodged at the European Court Registry on July 17, 1989, is still pending.

On August 4 1989, the Commission on the same grounds brought an action under Art. 169 EECT against the UK before the ECJ (Case 246/89, pending before the Court). Simultaneously, it applied for an interim order requiring the UK to suspend the provisions in question (Case 246/89R). This order was granted by the President of the Court on 10 October 1989.

¹³⁶ [1989] 2 All ER 692.

Community law".¹³⁷

The actual reasoning (paragraphs 18 - 24) of the ruling which the ECJ returned to the House of Lords turned out to be soberingly short and half of it is a repetition of the judgment in the *Simmenthal* case¹³⁸. Nevertheless, the Court took its *Simmenthal* judgment one discernible step further.

The Court started by pointing out the importance of full, uniform and undelayed application of directly applicable Community rules. Every conflicting provision of national law would be rendered automatically inapplicable. Then it stressed that it is for the national courts to ensure the legal protection of individual rights under Community law. Having prepared the ground for the decisive argument, the Court went on: "The Court has also held 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 [...] 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 those requirements, which are the very essence of community law [¹³⁹]. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."

At a first glance, this seems like a perfectly natural extension of the *Simmenthal* judgment. The inherent novelty can be perceived more clearly if one looks at an argument which the UK government had put forward in its written observations before the judgment. It had confirmed that the implications of the *Simmenthal* judgment were

¹³⁷ Opinion of the Advocate General, paragraph 1, *not yet published*.

¹³⁸ Case 106/77, see *supra*, II. 4.

¹³⁹ So far the Court claims to be following paragraphs 22 and 23 of *Simmenthal*, which is not entirely true, since it added 'even temporarily'.

fully recognised in United Kingdom law. Nevertheless, "[i]n Simmenthal the rights in question were not theoretical, because they had already been established by the Court in a previous judgment [Case 35/76 Simmenthal I]; furthermore, the action brought by Simmenthal before an Italian court was a well-established remedy in the national legal order. The contrast with the present case is therefore striking."¹⁴⁰

Both are indeed true. But by ignoring these differences the ECJ impliedly makes two important points:

First, the concept of primacy of Community law over national law is not only effective once an individual Community right is definitely established. It also affects the stage of uncertainty while the claim to a Community right is being examined. It follows from the principle of effectiveness or *effet utile* that even the protection of an *alleged* or *putative* Community right must be given priority over national legislation.

Should the alleged right under Community law later be found to exist, the setting aside of national law is *ex post facto* vindicated because the national provision had in fact always been contrary to Community law.

The interesting and new development in *Factortame* becomes apparent if the claimed Community rights are found to be illusory. In this case, a national law which is perfectly in line with Community law will have yielded, if only temporarily, not to a conflicting Community rule but to the temporary possibility that such a rule might exist. To the ECJ, this is more tolerable than depriving an individual of a possible Community right.

The second point concerns the availability of interim measures. In *Rewe v. Hauptzollamt Kiel*¹⁴¹ the Court had held that the Treaty "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law".

Factortame qualifies this judgment to some extent. If a remedy is generally known to a national legal system and the question is only

¹⁴⁰ Paragraph 32; also cf. A. Barav, Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant an Interim Relief, p. 374.

¹⁴¹ Case 158/80 [1981] 2 ECR 1805 at 1838 paragraph 44.

whether the remedy is available in a particular case, the principle of *effet utile* requires national courts to ignore rules which would deny the interim protection to an applicant who can reasonably claim a right under Community law. This is not equivalent to the creation of a new remedy.

7) Further Cases Concerning the Principle of Direct Effect

The preceding cases are the most fundamental and have therefore been discussed in some detail. However, a number of additional elements have evolved in other cases before the ECJ which should be mentioned briefly.

a) The Status of Secondary Community Law

First it must be pointed out that once the Court has established that a particular measure of secondary Community law is directly effective there is no difference¹⁴² in legal force to a Treaty provision. This can clearly be seen in the *Internationale-Handelsgesellschaft* case where a number of simple Council Regulations took precedence over the core of German constitutional law.

aa) Regulations

According to Art. 189 EEC Regulations are directly applicable but this does not necessarily mean that they are also directly effective.¹⁴³ The ECJ has underlined this by its frequent use of the formula that "by virtue of Article 189 regulations are directly applicable and, consequently, *may* [italics supplied] by their very nature have direct effect".¹⁴⁴ Whether or not they confer directly enforceable rights on private nationals remains to be seen in every individual

¹⁴² With one exception concerning Directives which will be explained later.

¹⁴³ Collins, p. 73; Schermers, § 253; Steiner, Textbook on EEC Law, p. 24.

¹⁴⁴ Case 4/74 *Van Duyn v. Home Office*, [1974] ECR 1337 at 1348 paragraph 12.

case.

bb) Decisions

A Decision "is binding in its entirety upon those to whom it is addressed" (Art. 189 (4) EECT). Decisions may be issued by the Council or by the Commission and may be addressed to individuals or to member states.

Decisions addressed to individuals will by their very nature produce direct effects.¹⁴⁵ But even if the addressee is a member state, a decision may be invoked by individuals if it meets the same conditions which have been set up for the test of primary law for direct effects: above all there must be a clear and unconditional obligation.¹⁴⁶

cc) Directives

One of the most controversial aspects¹⁴⁷ of the principle of direct effect is the fact that it has been extended to Directives.

A Directive is "binding, as to the results to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods" (Art. 189 (3) EECT).

On the face of it, Directives are not even directly applicable (since they require implementing measures by the member states), let alone directly effective. Notwithstanding this apparent obstacle the Court of Justice found in *Grad v. Finanzamt Traustein*¹⁴⁸ that Directives, too, could under certain circumstances be directly effective. An indispensable requirement for the direct effect of Directives is that

¹⁴⁵ Schermers, § 254.

¹⁴⁶ This was held by the ECJ in three related judgments of October 1970: Case 9/70 *Grad v. Finanzamt Traustein*, [1970] 2 ECR 825; Case 20/70 *Lesage v. Hauptzollamt Freiburg*, [1970] 2 ECR 861 and Case 23/70 *Haselhorst v. Finanzamt Düsseldorf*, [1970] 2 ECR 881.

¹⁴⁷ See Collins, pp. 94 et seq.

¹⁴⁸ Case 9/70 [1970] ECR 825.

the time-limit for their implementation has expired.¹⁴⁹ The member states enjoy discretion as to the course of action they want to adopt while the implementation period lasts. But after that, their obligation becomes an absolute one and they will not be allowed to benefit from their own failure to implement the Directive.¹⁵⁰

A Directive may also be invoked by individuals if its implementation by the national authorities appears to fall short of the requirements.¹⁵¹ A Directive may also be (immediately) directly effective when it does not specifically call for implementation measures, provided the other criteria for direct effect are satisfied.¹⁵²

The direct effect of non-implemented Directives must not be confused with the obligation of all the authorities in the member states to interpret all their domestic law in a way that will secure the achievement of the result of Directives referred to in Art. 189 (3)

¹⁴⁹ It was unsuccessfully attempted to invoke a Directive before the expiry of the time-limit in Case 148/78 *Pubblico Ministero v. Ratti*, [1979] 2 ECR 1629.

¹⁵⁰ Beutler/Bieber, p. 230. See also Case 148/78 *Ratti*, *op cit.*, at 1642.

¹⁵¹ See Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, [1977] ECR 113, or Case 8/81 *Becker v. Finanzamt Münster-Innenstadt*, [1982] ECR 53 at 70. Much of the litigation concerning the direct effect of EC equal pay and treatment Directives was caused by the UK governments view that only minor alterations to the Equal Pay Act 1970 and the Sex Discrimination Act 1975 was required; see *Pickstone v Freemans plc*, [1988] 2 All ER 803 HL.

Cf. also J. Steiner, Coming to Terms with EEC Directives, p. 144.

¹⁵² See Case 4/74 *Van Duyn v. Home Office*, [1974] ECR 1337. In this well-known case Miss Iyonne Van Duyn, a Dutch national who wanted to work for the Church of Scientology, was able to challenge the Home Office's refusal to allow her enter the country by citing Art. 3 of the Directive 64/221 (relating to the free movement of workers).

See HL Select Committee on the European Communities (1974-5), 10th Report, on the consequences of the Van Duyn case for the UK government.

EECT.¹⁵³

b) Direct Effect Between Individuals¹⁵⁴

As to primary Community Law, the direct effect of suitable Treaty provisions is not limited to cases between individuals and public authorities but can also play a role in the litigation between private parties (this is also sometimes called 'horizontal effect').¹⁵⁵

Regulations, too, may have horizontal effect.

Directives, on the other hand, only oblige member states to take implementing measures. Thus the ECJ held: "It follows that a directive may not of itself impose obligations on such an individual and that a provision of a directive may not be relied upon as such against such a person."¹⁵⁶

¹⁵³ See Case 14/83 *Von Colson v. Land Nordrhein-Westfalen*, [1984] 2 ECR 1891 at 1909; Case 79/83 *Harz v. Deutsche Tradax GmbH*, [1984] 2 ECR 1921; also Case 222/84 *Johnston v. Chief Constable of Royal Ulster Constabulary*, [1986] ECR 1651 at 1690.

¹⁵⁴ See Bieber/ Beutler, pp. 231-2.

¹⁵⁵ See e.g. Case 43/75 *Defrenne v. SABENA (No. 2)*, [1976] ECR 455, which concerned Art. 119 EEC and the principle of 'equal pay for equal work' contained therein.

¹⁵⁶ Case 152/84 *Marshall v. Southampton and South West Hampshire Authority (Teaching)*, [1986] ECR 723 at 749 paragraph 48.

III. The Implications of the Principles of Direct Effect and Supremacy of Community Law for the National Legal Systems

Against the background of the case-law of the European Court of Justice concerning the principles of direct effect and supremacy of Community law it is now possible to give a summarised description the relationship of Community law and national law as it presents itself today.

The conclusions which can be distilled from the cases are of course valid in relation to all the member states, but particular emphasis will be laid on such aspects which bear relevance to the doctrine of Parliamentary Sovereignty. For the sake of clarity, the consequences of the two principles will be considered in three sections: the implications for 1) the mode of incorporation of Community law, 2) for national legislators and 3) for national courts.

The different aspects are of course closely interrelated and complement each other.

It must be borne in mind that this part represents solely the 'European' point of view. As we shall see shortly, the member states do not necessarily concur. Depending on their respective starting points, full compliance with the views put forward by the ECJ required (or still requires) fundamental departures from deeply rooted legal traditions which can not be expected to be brought about over night.

1. The Implications for the Incorporation of Community Law into National Legal Systems

The problem of the relationship between the national legal order of a state and the international legal order is nothing new. Somehow the modus of their co-existence has to be regulated. There are (without going into the subtleties of the subject) basically two solutions to this problem: *Monism* and *Dualism*.

a) The Monist Approach

The monist theory is based on the assumption that national and international law are part of the same legal system. This means that



rules of international law can be directly applied within the national legal order without the need of incorporating measures.

This compensates the relative weakness of international law which is due to the fact that it lacks an effective institutional framework for its enforcement.

The concept of monism does not necessarily pre-empt the question of the status of international law in cases of conflict¹⁵⁷, although ideally the rules of the larger Community should prevail over domestic law.

Among the member states of the European Community, the BENELUX-countries, France and Greece have a monist system.

b) The Dualist Approach

According to the dualist theory, international and national law are two distinct and separate legal systems. The former has no effect in municipal law unless it is expressly incorporated.

None of the member states of the Community adheres to the dualist theory in this extreme form as *customary* international law is generally treated as law of the land.¹⁵⁸

Compared to the monist approach, dualism has a number of drawbacks as far as international treaties are concerned: first, it leads to a rather cumbersome process since every transformation takes time. Second, the transformed national rule may differ from the original wording of the treaty provision (or, in the context of Community law, of binding decisions adopted by Community institutions), thus spoiling the objective of uniformity. Third, the courts might be induced by the fact that they are concerned with a rule of national and not of international law to employ their usual domestic methods of interpretation. Lastly, any implementation by a national legislator would be subject to the *lex posterior* rule and could easily be repealed.

¹⁵⁷ See Schermers, § 210; Steiner, Textbook on EEC Law, p. 34. This is disputed, however, as some writers maintain that monism automatically entails the priority of international law, see e.g. Collins, p. 14.

¹⁵⁸ For the United Kingdom see Brownlie, pp. 43 et seq., with further references.

On the other hand, the main advantage of the dualist system is that it fully sustains the freedom of action of national parliaments. Not only can they decide if, but also when, how and to what extent they are going to incorporate the international rule.

The dualist system can be found in Ireland, Denmark, Portugal and, not surprisingly, in the United Kingdom¹⁵⁹.

Germany and Italy, too, favour the dualist approach, with the variation that the laws by which the respective parliaments authorize their governments to ratify the treaty simultaneously incorporate it into the national legal system.¹⁶⁰

A similar approach can be found in the Spanish Constitution, Art. 96 (1): "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order."

c) The Attitude of the European Court of Justice

As we have seen, the ECJ clearly advocates a strictly monist view. Although the Treaty itself is silent on this point (except for regulations in Art. 189 EECT), the Court insists that the Community can only function if member states adopt a monist approach where Community law is concerned: Community law does not require any transformation into national law (in other words, from the Community's point of view the European Communities Act 1972 is superfluous; the Westminster Parliament might as well repeal it without making the slightest change to the operation of Community law in the UK!).

It must be absolutely identical in all member states and it is effective from the moment of its entry into force without further need for approval by national authorities.

Furthermore, Community law must prevail over municipal legislation (including provisions of the constitution), irrespective of which is first in time.

¹⁵⁹ For the UK, this principle was only recently confirmed by Lord Oliver in *J.H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*: "[A] treaty is not part of English law unless and until it has been incorporated into the law by legislation."; [1989] 3 WLR 969 at 1002, [1989] 3 All ER 523 at 544-545, HL.

¹⁶⁰ Art. 59 (2) German constitution; Art. 80 Italian constitution.

2. The Implications For the National Parliaments

On a political level, the consequences of Community membership for national parliaments are quite obvious: certain policy areas are separated from their immediate sphere of responsibility. For some areas, like customs duties, this separation is total, in other areas, like competition law, competences are shared. Speaking in the categories that were used above¹⁶¹ to explain the fictional character of Parliamentary Sovereignty, EC-membership has very substantially added to the actual restraints of legal sovereignty, thus even widening the gap between constitutional theory and political reality.

The legal control of national parliaments over the decision-making process on the European level is limited: it cannot extend much further than to instruct government ministers how to vote in Council meetings.¹⁶² National parliaments have to accept that they are no longer the only legitimate source of legislation. Community institutions have the power to make rules which directly affect the same people and the same territory.

In areas where the Community has taken action, the national legislators must abstain from from passing conflicting legislation. In the Community context, this is not only an obligation on the international level which leaves intact the theoretical power to enact contravening laws. In the view of the ECJ, "to the extent that the Member States have transferred legislative powers [...] they no longer have the powers to adopt legislative provisions."¹⁶³

3. The Implications For National Courts

The most profound repercussions of the principles of direct effect and supremacy of Community law fall on the national judiciaries.

¹⁶¹ *Supra*, chapter B. I. 6. b).

¹⁶² This is a prerogative exercised by the Danish parliament, see D.A.C. Freestone/ J.S. Davidson, The Institutional Framework of the European Communities, pp. 105 - 106. For the UK cf. *infra*, chapter D. III. 1. b).

¹⁶³ Case 40/69 *Hauptzollamt Hamburg v. Bollmann*, [1970] ECR 69 at 79 paragraph 4.

In *Van Gend* it was made clear that the national courts play a vital role in the European Community, since they (and not the ECJ) in practice have to protect individuals against any kind of encroachment of their rights under Community law.¹⁶⁴ The essence of 'direct effect' is that every national may invoke a suitable rule of primary or secondary Community law in his favour directly before a municipal court.

The judges are thus called upon to apply a new range of legal rules in addition to the rules of their own national legal system. As we have seen, they are supposed to apply these rules as such (!); because they exist *as rules of Community law* and not because it is the (unspoken) will of their national legislator. In other words, they, too, are asked to accept that there are new organs with an independent legislative authority.

If we at this point recall the orthodox definition of Parliamentary Sovereignty¹⁶⁵ the conflict is obvious. The Westminster Parliament is considered to be the only legitimate legislative authority; every other form of legislation in the state can only be a delegated one which is rooted in, and accountable to, Parliament. The courts are not supposed to accept a rival legislative power.

The problem becomes even clearer if we include the element of supremacy of Community law in our considerations.

The national courts are not only expected to apply these new rules, but also to grant them priority in cases of conflict with a national law. In the present context we may safely bypass the old dispute whether this means that the national law must be 'declared void', 'set aside' or 'disregarded'. It doesn't matter as in any case the clash with the idea of Parliamentary sovereignty is unavoidable: in the UK, no person is recognised as having a right to override or set aside the legislation of Parliament.¹⁶⁶

The Community not only presents the courts with a new source of legislation but also sets up a hierarchy in which the national parliaments are only second. Even national constitutional law must yield to the Community's legal order.

This hierarchy also excludes the *lex posterior* rule: national legislation cannot repeal prior Community law.

¹⁶⁴ See Schermers, §§ 674/5.

¹⁶⁵ See *supra*, chapter B.

¹⁶⁶ See *supra*, p. 8.

In the early days of the Community it has been suggested that the problem could be solved if the national Courts adopted new, Community-sociable techniques of interpreting national law.¹⁶⁷ Such pragmatic approaches are desirable and appropriate. But they can only serve to minimize the number of times in which the two laws are truly irreconcilable and the question of which will prevail must be decided.

The conclusions which have to be drawn from the case-law of the ECJ go further than that. Ultimately, the ECJ envisages a change of role of the national courts. As far as Community law goes, they are no longer seen as a purely national institution but as an instrument of 'the law' in general (including Community law), doing justice independently of any national authority.¹⁶⁸ Bebr has remarked that "since Community law is [...] applied by national courts, its supremacy depends on the readiness of these courts to follow the case-law of the Court."¹⁶⁹ Asking the national courts to uphold Community rules even against the contravening will of the national legislator, however framed, calls for a transfer of judicial loyalty to Community institutions.¹⁷⁰ Thus, from the point of view of the ECJ, the transfer of political sovereignty is complemented by a transfer of legal sovereignty which is essential for the effective functioning of the Community.

In effect, national courts are asked to act upon a new *grundnorm* or *rule of recognition* in favour of the Community.

Such an idea must be a serious inroad on the national legal systems of all member states, especially those who traditionally follow the dualist view.

But for the UK, this shakes the very foundations of the doctrine of Parliamentary Sovereignty, which, as we found, is based on the total allegiance of the courts to the UK Parliament.

¹⁶⁷ See the discussion in Petersmann, pp. 78 - 81.

¹⁶⁸ See Schermers, § 201; J.D.B. Mitchell, "What do you want to be inscrutable for, Marcia?" or The White Paper on the Legal and Constitutional Implications of UK Membership of the European Communities, pp. 121 et seq.; Beutler/Bieber, p. 215.

¹⁶⁹ Bebr, p. 664.

¹⁷⁰ See Petersmann, p. 104.

Summary

The ECJ uses 'sovereignty' in an interdisciplinary, embracing sense. The transfer of sovereign rights is at the same time a political and a legal process, both inseparably linked.¹⁷¹

The ECJ's theory of a 'new legal order' is a direct challenge to the traditional constitutional understandings as far as they are based on the idea of an autonomous nation state.¹⁷² Taken at its face value, it is in particular irreconcilable with the orthodox doctrine of Parliamentary Sovereignty.

IV. The Reaction in the Member States

Traditionally, the questions of direct applicability and direct effect of an international treaty are answered not from the point of view of this treaty but according to the constitutional rules of the contracting states (simply because they are the *lex fori*). For the UK, it has been argued that this rule applies also to the EC, without any qualification.¹⁷³

The ECJ, on the other hand, has a strong case by pointing out that the EC is not just another international organisation but stands for a unique and ongoing process of political integration which involves the member states in their entirety. This process could easily be jeopardized by an inflexible insistence on concepts which are oblivious to the special problems arising from Community membership.

Then again, the fact that we are dealing with a political process works both ways. The Community must be anxious not to overtax the ability or the readiness of its members to commit themselves to irreversible integrational steps at a given time.¹⁷⁴

From the ECJ's point of view, the question of the relationship has been clearly and logically answered on the basis of the efficacy of

¹⁷¹ See Petersmann, p. 102.

¹⁷² See Rix-Mackenthun, p. 122; Petersmann, p. 105.

¹⁷³ Collins, pp. 40-41.

¹⁷⁴ This could lead to the same sort of political crisis which the Community experienced in 1965, when France abstained from Council meetings for several months because of grave disagreements over the future course of the Community; see Beutler/ Bieber p. 34.

the Community.

This cannot simply be ignored. The special nature of Community's legal order demands that all member states, and especially those which usually follow the dualist theory, take the ECJ's views into account.

Before we examine the situation in the United Kingdom, we shall briefly look at how the other member states and in particular their courts handle the principles of direct effect and of supremacy of Community law. Generally, the municipal courts seem now prepared to follow the ECJ's view that the Community is an autonomous source of law which takes precedent over national law in cases of conflict.¹⁷⁵ However, the development of attitudes in the individual member states was heterogenous due to the differing constitutional foundations.

1. The Founding Member States

a) The BENELUX States

The countries with the least problems in connection with Community law are the Netherlands and Luxembourg. The revised Dutch constitution of 1958 lays down in its Art. 66 the supremacy of international law even over subsequent national law. This provision is also applied to Community law. Luxembourg, too, has traditionally held a monist view which poses no problems for the courts which loyally apply Community law.¹⁷⁶

The situation was slightly more complicated in Belgium, where the constitution did not comprehensively regulate the conclusion and the effect of international treaties. In addition, the Belgian system of separation of powers prevented courts from reviewing the validity of national legislation.

But in a historic and fundamental decision of May 27 1971, the Belgian *Cour de Cassation* acknowledged both the principles of direct effect and of supremacy of Community law and the lower courts' power

¹⁷⁵ See Everling, Zum Vorrang des EG-Rechts vor nationalem Recht, p. 1201.

¹⁷⁶ See G. Olmi, Les rapports entre droit communautaire et droit national dans les arrêts des juridictions supérieures des Etats membres, pp. 246 et seq.

of judicial review.¹⁷⁷ The judgment was particularly remarkable because the *Cour* did not attempt to prove the validity of these principles by re-interpreting the national provisions on the relationship between domestic and international law, but instead adopted the ECJ's theory of a 'new legal order'.

b) France¹⁷⁸

In France, the constitutional starting conditions for Community membership seemed rather favourable. Traditionally, France has tended towards a monist view of the relationship between national and international law.¹⁷⁹ Both the constitution of 1946 (in Art. 26) and the constitution of 1958 (in Art. 55) give international treaties priority over national law.

Still, the enforcement of Community law in France was difficult right from the beginning. First of all, French courts, and above all the *Conseil d'Etat*, were extremely hesitant to make references to the ECJ under Art. 177 EECT.¹⁸⁰ They had developed their own *acte clair* doctrine¹⁸¹ which they applied generously to Community matters.

Secondly, the priority of international treaties was conditional on reciprocity¹⁸². It was only in 1975 that the *Cour de Cassation* set this restriction aside for the application of Community law: "But in the Community legal order the failure of a Member State of the EEC to comply with its obligations under the Treaty [...] is subject to the procedure laid down by Article 170 of that Treaty and so the plea of lack of reciprocity cannot be made before the national courts."¹⁸³ In

¹⁷⁷ *Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse Le Ski*, [1972] CMLR 330.

¹⁷⁸ See in greater detail D. Baumgartner, Der Vorrang des Gemeinschaftsrechts vor französischem Recht.

¹⁷⁹ See Schermers, § 210.

¹⁸⁰ For examples see Beutler/Bleber, p. 93. The *Conseil d'Etat* asked the ECJ for an interpretation of a Community provision for the first time in 1970!

¹⁸¹ See Schermers, §§ 727 et seq.

¹⁸² Meaning their application by the other party. See *supra*, p..

¹⁸³ *French Cafés Jaques Vabre Case, Cour de Cassation*, 24 May 1975, (1976) 13 CMLRev, pp. 128 - 132 with note by G. Bebr.

the same judgment the *Cour* removed another obstacle: since the French Revolution the French courts were not permitted to hold parliamentary enactments void, with the consequence that they were bound to a strict *lex posterior* rule. The *Cour de Cassation* now ruled that even subsequent French statutes had to yield to Community law.

Only months later the *Cour* confirmed the primacy of Community law¹⁸⁴, but this time the result was not inferred from Art. 55 of the constitution but from the special nature of the Community's legal order!

Whereas the jurisdiction of the *Cour de Cassation* (and of most other French courts) is fully in line with the requirements of Community law, the opposite was true for the *Conseil d'Etat*. It had shown a steadfast reluctance to set aside national statutes which conflict with prior Community law.¹⁸⁵ According to the *Conseil d'Etat*, only the *Conseil Constitutionnel* could decide on the constitutionality of national law.¹⁸⁶ Since the *Conseil Constitutionnel* itself does not regard the compatibility of national law with Community law as a problem of constitutionality, there was a serious jurisdictional gap.

In 1980, the *Conseil d'Etat* in a much criticised judgment¹⁸⁷ also blithely refused to accept the direct effect of a particular Directive, which had been positively established by the ECJ in its *Van Duyn* judgment¹⁸⁸. It repeated this obstinate refusal in 1986, when it disregarded a decision of the ECJ which had held the Sixth VAT Directive to be directly effective, but recently, the *Conseil d'Etat* seems to have accepted at least the direct effect of the Sixth VAT Directive¹⁸⁹. This apparent change of attitude in the last year has

¹⁸⁴ See Beutler/Bieber, p. 94 note 74.

¹⁸⁵ See in particular the judgment of 1 March 1968, (1968) Recueils des Décisions du Conseils d'Etat; more recently judgment of 23 November 1984, (1985) Actualités juridiques de droit administratif (AJDA), p. 216.

¹⁸⁶ Judgment of 15 January 1975, (1975) Journal droit international, p. 416; also cf. Everling, Zum Vorrang des Gemeinschaftsrechts vor nationalem Recht, pp. 1203 et seq.

¹⁸⁷ *Minister of the Interior v. Daniel Cohn-Bendit*, [1980] 1 CMLR 543.

¹⁸⁸ See *supra*, p. 99.

¹⁸⁹ *Compagnie Alitalia*, [1990] 1 CMLR 248.

been confirmed in an important judgment of 24 September 1990 in which the court fully accepted the supremacy of Community law over subsequent French statutes.¹⁹⁰

c) Federal Republic of Germany

Germany is one of the member states with a dualist approach to international law. In spite of this, the problem for the German Courts was not so much the idea of Community law as an autonomous legal order¹⁹¹ which has to be applied directly and prevails over national law in cases of conflict.

The *Bundesverfassungsgericht* has acknowledged that Community law prevails over subsequent incompatible legislation and has also confirmed that lower German courts can, in accordance with the *Simmenthal* principle, set aside such provisions without having to wait for an authoritative ruling by the Constitutional Court¹⁹² (which otherwise has the exclusive power to review statutes¹⁹³).

The problem in Germany was (and in theory still is) the question of constitutional review of Community legislation. Under the *Grundgesetz* the legislator is bound by the catalogue of fundamental rights and by a number of basic structural principles. Consequently, any power which the German parliament transfers to an international organisation under Art. 24 GG is subject to the same limitations.

This was exactly the objection of the *Verwaltungsgericht Frankfurt* in the *Internationale Handelsgesellschaft* Case.¹⁹⁴ The Frankfurt Court, discontented with the preliminary ruling it received from the ECJ, asked the *Bundesverfassungsgericht* to decide on the constitutionality of the EC Regulations. The *Bundesverfassungsgericht* answered the question of its own jurisdiction in the affirmative, arguing that only thus would a comprehensive protection of fundamental rights be

¹⁹⁰ *Maurice Boisdet*, [1991] 1 CMLR 3.

¹⁹¹ In fact, the German Constitutional Court (*Bundesverfassungsgericht*) has given up the dualist view as far as Community law is concerned and has expressly adopted the ECJ's concept.

¹⁹² BVerfGE 22, 292 et seq.; see also BVerfGE 73, 339 et seq.

¹⁹³ Articles 93 and 100 of the *Grundgesetz*.

¹⁹⁴ See *supra*, pp. 89/90.

guaranteed.¹⁹⁵ This jurisdiction would exist so long as there is no Community Bill of Rights similar to the one set out in the German constitution.¹⁹⁶ But in the following years, the court progressively narrowed the scope of its own jurisdiction, most profoundly by exempting primary Community law.¹⁹⁷

Eventually, in 1986, the court took a major step forward and declared that it would refrain from exercising its jurisdiction to check the constitutionality of secondary Community law against the Grundgesetz.¹⁹⁸ The consistent case-law of the ECJ in connection with human rights in the Community and the de-facto application of the European Convention on Human Rights had convinced the *Bundesverfassungsgericht* that the Community offers a sufficient standard of protection.¹⁹⁹

It must be pointed out, though, that in theory the court still reserves the right to check whether Community law encroaches on inalienable principles of the German constitution.²⁰⁰

Like the *Conseil d'Etat* in France, there is one Federal Court in Germany which has displayed an alarming obstinacy in its attitudes towards Community law. The *Bundesfinanzhof* (Germany's highest fiscal court) refused to acknowledge the direct effect of the Sixth VAT Directive²⁰¹ and repeated this refusal²⁰² even after a lower Court had

¹⁹⁵ BVerfGE 37, 271 (29 May 1975).

¹⁹⁶ This judgment has become famous under the name 'Solange' ('solange' = 'so long as'). It has both been applauded and strongly criticised, see the numerous citations in Beutler/Bieber, p. 99, notes 101 and 102. In retrospective, the judgment has turned out to be less disintegrating than was initially feared.

¹⁹⁷ BVerfGE 52, 187 ('Vielleicht', 25 July 1979); BVerfGE 58, 1 ('Euro-Control I', 23 June 1981) and BVerfGE 59, 63 ('Euro-Control II', 10 November 1981).

¹⁹⁸ *Re Application of Wünsche*, [1987] 3 CMLR 225. In Germany, this judgment is known as 'Solange II'; see M. Hilf, Solange II: Wie lange noch solange?.

¹⁹⁹ *Re Application of Wünsche*, [1987] 3 CMLR 225 at 259 paragraph 36.

²⁰⁰ This test would only be an indirect one as the *Bundesverfassungsgericht* would not rule on Community law but on the constitutionality of the German law of accession.

²⁰¹ Judgment of 16 July 1981, [1982] 1 CMLR 527.

²⁰² Judgment of 25 April 1985, (1985) 20 *Europarecht*, p. 191.

made a reference under Art. 177 (2) EECT and the ECJ had re-affirmed that individuals could invoke the provisions of this Directive in national courts²⁰³.

Meanwhile the *Bundesverfassungsgericht* has ended this conflict and told the *Bundesfinanzhof* that the ECJ has not exceeded its powers by according direct effect to Directives.²⁰⁴

d) Italy

The situation in Italy resembles the one in Germany as Italy, too, adheres to the dualist view and has a constitutional court.²⁰⁵

Initially the *Corte costituzionale* had held in the case *Costa v. ENEL* that the ratification treaty concerning EEC membership only had the status of an ordinary law and consequently was subject to the *lex posterior* rule in cases of conflict.²⁰⁶ In 1973 the *Corte* adopted the theory of the Community as an autonomous legal order and declared this to be compatible with the Italian constitution.²⁰⁷ Two years later the court accepted that national legislation which conflicted with Community law was unconstitutional, even if it was later in time than the conflicting Community provision.²⁰⁸ But the *Corte* still considered itself as the only authority which could rule on the constitutionality of national law. Full compliance with the *Simmenthal* principle was accomplished in 1984, when the *Corte* recognized that lower courts were entitled to set aside national legislation on

²⁰³ Case 70/83 *Kloppenburger v. Finanzamt Leer*, [1984] ECR 1075.

²⁰⁴ *Re Application of Kloppenburg*, [1988] 3 CMLR 1.

²⁰⁵ See Everling, Zum Vorrang des Gemeinschaftsrechts vor nationalem Recht, p. 1202.

²⁰⁶ Judgment of 24 February 1964, *Foro Ital.* 1964 I, Col. 465.

²⁰⁷ Judgment of 27 December 1973 Nr. 183, (1974) *Europarecht* p. 249.

²⁰⁸ Judgment of 30 October 1973 Nr. 232, *Foro Ital.* 1975 I, 2661; (1976) *Europarecht*, p. 245.

their own.²⁰⁹

However, just like the *Bundesverfassungsgericht* the *Corte costituzionale* has hinted that the Italian law of accession is still subject to its jurisdiction as far as fundamental principles of the state order or basic human rights are concerned.

2) The New Member States

The legal situation of all the 'new' member states²¹⁰ was slightly different because the principles of direct effect and supremacy of Community law had already been established. They form part of the *acquis communautaire*, the acceptance of which by the new members was a condition of all treaties of accession.²¹¹

The Republic of Ireland and Denmark became members of the Community in 1972. In both countries international treaties are not directly applicable as a general rule.²¹² Consequently the Irish and the Danish constitution were amended in order to accommodate them to the

²⁰⁹ The Constitutional Court expressly declared that because of its autonomous character Community law renders inapplicable even subsequent national measures and that ordinary courts may establish this without referring the question to the Constitutional Court: Dec. No. 170, *SpA Granital v. Amministrazione delle Finanze dello Stato*, (1984) *Common Market Law Review*, pp. 756 et. seq. with a commentary by G. Gaja. See also Droese, Das Simmenthal II-Urteil des EuGH in der italienischen Rechtsprechung und Literatur, p. 272.

²¹⁰ The information on Spain and Portugal is still rather meagre; for Spain see I. Aurrecoechea, Some Problems Concerning the Constitutional Basis for Spains Accession to the European Communities, and, The Role of the Autonomous Communities in the Implementation of European Community Law in Spain.

For Portugal see M. E. Gonçalves, Quelques problèmes juridiques que pourra poser l'application du droit communautaire dans l'ordre juridique portugais face à la Constitution de 1976.

²¹¹ See Beutler/ Bieber, pp. 41 and 101; also P. Dagoglou, The Southern Enlargement of the European Communities.

²¹² For Ireland this is expressly said in Art. 29 (6) of the constitution.

requirements of Community law.

Denmark adopted a provision (similar to the ones in Italy and Germany) allowing for the delegation of powers to international authorities. The number of references of Danish courts to ECJ under Art. 177 EECT is strikingly low. This may be due to the fact that under the Danish rules of procedure references are only made in agreement with the parties involved.²¹³ In the cases before Danish courts there still seems to be some reluctance to fully recognise the principle of supremacy of Community law.²¹⁴

The amended Art. 29 of the Irish constitution lends strong support to Community law: "No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the state necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the state."²¹⁵

In 1982, the Irish Supreme Court acknowledged the principle of supremacy of Community law.²¹⁶

On the other hand the Supreme Court was not prepared to extend the effect of Art. 29 of the Constitution to fundamental changes of the EEC Treaty in connection of the Single European Act.²¹⁷

In Greece²¹⁸ (which acceded in 1981), the relationship of national to Community law are governed by Art. 28 (1) of the Greek constitution: "The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law."

²¹³ Beutler/ Bieber, p. 102.

²¹⁴ See H. Rasmussen, Über die Durchsetzung des Gemeinschaftsrechts in Dänemark.

²¹⁵ Third Amendment to the Irish Constitution (1972).

²¹⁶ *Campus-Oil Ltd. v. The Ministry for Industry*, [1984] CMLR 479.

²¹⁷ *Crotty v. An Taoiseach*, [1987] 2 CMLR 666.

See J. P. McCutcheon, The Irish Supreme Court, European Cooperation and the Single European Act, pp. 93 - 100.

²¹⁸ See D. Evrigenis, Legal and Constitutional Implications of Greek Accession to the European Communities.

3. Summary

It was obvious from this brief survey that for a variety of reasons there are still some reservations to accepting the dogmatic implications of the principles of direct effect and supremacy of Community Law.

However, the majority of national courts seem now prepared to accept their new functions (and powers) with respect to the enforcement of Community law even though in some cases this amounts to a departure of traditional constitutional doctrine. But what is also clear is that this has been a gradual process; a cautious step-by-step approach rather than a spontaneous and unconditional endorsement of the ECJ's case-law.

D. European Community Law in the United Kingdom

I. Introduction

Although *all* the member states are struggling to accept the legal implications of Community membership, the United Kingdom's position is special. The constitutional problems of British membership are aggravated by a number of unique circumstances. Only the Westminster Parliament is sovereign in the sense that it enjoys unlimited power of law-making. The doctrine of Parliamentary Sovereignty was found to be based on the relation between Parliament and the courts, which "owe dutiful obedience" to the will of the legislator.

But as was also shown above, the combined principles of direct effect and supremacy of Community law challenge exactly this subordination and thus apparently threaten to tear away the 'very keystone' from the edifice of the British constitution.

Unlike other member states, Britain with her unwritten constitution cannot avail herself of the possibility of a formal amendment of it. Why should it be so difficult to accomplish the supremacy of Community law if, as various Acts of Independence have proven, Parliament can transfer parts of its sovereign power to other legislative institutions, even under the orthodox doctrine?¹

Unfortunately, this mechanism is unworkable in the Community context. In all the cases cited the transfer of sovereignty was a territorial one. Parliament released only the courts in a particular territory from their obligations, but then the divorce was absolute and irrevocable. In the EC, the transfer is not defined territorially, but functionally.² It concerns not the courts in some distant former colony but in the United Kingdom. They are to enforce Community law in its own right and to obey national legislation in fields not occupied by Community law.

The problem with this functional division of powers is that, as long as the courts still recognise any Act of Parliament as the highest

¹ This question was raised by Mitchell, "What do you want to be inscrutable for, Marcia?", pp. 119/120.

² N.M. Hunnings, Constitutional Implications of Joining the Common Market, pp. 57/8, uses the terms 'vertical' and 'horizontal' loss of sovereignty. See also de Smith/ Brazier, pp. 78/79; and Rix-Mackenthun, p. 136.

form of law (as they are bound to do under the doctrine of Parliamentary Sovereignty), it is difficult to envisage a statutory construction which is in complete conformity with the case-law of the ECJ. Any legislative attempt to guarantee Community law supremacy would somehow have to sidestep the rule that no Parliament can bind its successors. Otherwise the instrument which grants 'supremacy' would always be subject to a future repeal, be it expressly or impliedly.

Under these circumstances the only realistic chance of full compliance with the requirements set up by the ECJ therefore seems to be that the British courts take the initiative and start to alter the *grundnorm* or rule of recognition which underlies the doctrine of Parliamentary Sovereignty.³

Whether there is a readiness on the side of the judges to part with the old rule depends on several conditions: First, the changes in political reality must appear so fundamental that they call for a change in legal doctrine. This reflects on the question how far (or deep) political integration in the Community has progressed. Second, the courts will also observe carefully how the bearer of legal sovereignty itself, Parliament, deals with the implications of Community membership on sovereignty. If there is a general climate of acceptance that a modification of the rule would serve British interests well, this could certainly increase the likelihood of creative judgments. On the other hand, it can hardly be expected that the judiciary attempts to swim against the general stream of political ideas.

The following analysis will therefore have three parts. First, it will be necessary to look at the European Communities Act 1972 (ECA) and in particular its sections 2(1) and 2(4) which are concerned with direct effect and supremacy of Community law. Second, the attitude of Parliament itself towards the question of sovereignty will be examined. Lastly, on the basis of the two preceding parts, a scrutiny of the leading cases before British courts will show whether there are any signs for changes to the orthodox doctrine of Parliamentary Sovereignty.

³ See Collins, p. 29 with supporting references in note 17.

II. The Incorporation of Community Law in the United Kingdom

1. Pre-Accession Ideas

The constitutional difficulties of EC membership had been clearly perceived by academics and also by politicians, although the 1967 White Paper *Legal and Constitutional Implications of United Kingdom Membership of the European Communities* devoted only two paragraphs to the issue.⁴

Before the ECA was enacted, a number of ideas emerged as to how the direct effect and supremacy of EC law should be handled.⁵ Wade urged that the courts be relieved from the possible dilemma of loyalty by employing a 'European Communities (Annual) Act' which would assert the supremacy of Community law. Alternatively he suggested that every fresh piece of legislation should contain the formula "This Act conforms to the European Communities".⁶

Martin proposed the creation of a constitutional convention to the effect that Parliament is restrained from legislating contrary to Community law.⁷ Apart from the fact that conventions are not 'created' *ad hoc* but evolve, the fact that they are not binding on the courts makes them an ineffective instrument of protecting Community law supremacy.⁸

A rather cumbersome method for avoiding the problem was proposed by Trindade. He suggested that every Bill before Parliament should be scrutinised for incompatibilities with Community law by a permanent Parliamentary Committee especially established for that purpose. Judges faced with a possible conflict between national and Community law should stay proceedings and refer the national rules to the Committee for consideration and, if necessary, amending legislation by Parliament.⁹

⁴ Cmnd. 3301, paras 22 and 23.

⁵ Most of these proposals are summarized by Rix-Mackenthun, pp. 135 et seq.; see also F.A. Trindade, Parliamentary Sovereignty and the Primacy of European Community Law, pp. 379 et seq.

⁶ H.R.W. Wade, Sovereignty and the European Communities, pp. 3 - 5.

⁷ A. Martin, The Accession of the United Kingdom to the European Communities: Jurisdictional Problems, pp. 7 et seq.

⁸ See Collins, p. 29; Rix-Mackenthun, p. 136.

⁹ Trindade, pp. 394 et seq.

In addition to the delays in judgment such a procedure would cause and its conflict with the idea of Art. 177 EECT, its failing is the assumption that legislative correction of the national provision is needed before Community law can prevail.

Some authors took the occasion of Community membership to repeat the calls for a written constitution.¹⁰

Eventually, none of the above ideas were translated into action, but they provide a background against which the technique actually opted for in the ECA can be assessed.

2. The European Communities Act 1972

The ECA was enacted mainly for two reasons. First, accession to the Community necessitated a number of immediate amendments to and corrections of national law which were made in sections 4 - 12.

Second, the United Kingdom courts act upon a dualist theory of international (treaty) law. On two different occasions preceding membership it was made clear that no exemption to the dualist approach would be made for the EC.

When the United Kingdom Government entered into negotiations of membership, Mr. Raymond Blackburn brought proceedings against the Attorney General seeking a declaration to the effect that the signing of the Treaty of Rome by Her Majesty's government would be unlawful. He argued that membership would involve the surrender of part of the sovereignty of the Queen in Parliament and that any subsequent Act of Parliament giving effect to the United Kingdom's accession would be an attempt to bind its successors.

The Master of the Rolls, Lord Denning, conceded that Mr. Blackburn might be correct, but went on to explain why the court declined to consider his objections: "Negotiations are still in progress for us to join the Common Market. No agreement has been reached. No Treaty has been signed. *Even if a Treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied by Acts of Parliament and then only to the extent that Parliament tells us.* [...] Mr. Blackburn

¹⁰ See e.g. O. Hood Phillips, Reform of the Constitution, pp. 145 et seq.

acknowledged the general principle, but he urged that this proposed treaty is in a category by itself, in that it diminishes the sovereignty of Parliament over the people of this country. I cannot accept this distinction. The general principle applies to this treaty as to any other."¹¹

On exactly the same grounds the court refused to deal with a complaint put forward by Mr. Ross McWhirter that membership of the Community would constitute a violation of the Bill of Rights 1689.¹² Thus the prevailing legal philosophy called for an Act of Parliament to incorporate the whole body of Community law.

a) Section 3

Before dealing with section 2 it is convenient to mention section 3 which provides a sort of background for the other provisions of the Act. Normally, foreign law is treated by the courts not as a question of law but as a question of fact. In contrast thereto, issues of Community law are to be treated as questions of law.

Subsections 2 - 5 explain of which sources of evidence judicial notice shall be taken. But, the most important and slightly controversial provision is contained in subsection 1: any question as to the meaning or effect of the Treaties or secondary Community legislation must be determined 'in accordance with the principles laid down by and any relevant decision of the European Court'.

As shown above, the principles of direct effect and supremacy are creatures of the case-law of the Court of Justice. If s. 3(1) imposes on the United Kingdom courts the obligation to follow this case-law, does this not mean full acceptance of these principles without any need to resort to sections 2(1) and 2(4)?¹³

I should think not. Sections 2(1) and 2(4) precede section 3. As they deal with the problems of direct effect and priority specifically, they are *leges speciales* in relation to s. 3(1). Therefore it seems that one cannot derive from s. 3(1) any conclusions that go beyond

¹¹ *Blackburn v. Attorney General*, [1971] 2 All ER 1380 at 1382 (CA).

¹² *McWhirter v. Attorney General*, [1972] CMLR 882 at 886.

¹³ Hallsbury's Laws of England, Vol. 51 Para. 3.06, states that "it would appear to produce the same practical results as section 2(1) and section 2(4)".

what is provided for by s. 2(1) and 2(4).

What section 3(1) can do is serve as an aid in the interpretation of section 2(4).¹⁴

b) Subordinate Legislation under Section 2(2)

Section 2 of the ECA distinguishes between directly applicable Community provisions and such which require implementing measures. For the larger part of the latter, s. 2(2) ECA empowers the executive to accomplish this implementation¹⁵ by passing statutory instruments¹⁶, either in the form of regulations made by a designated Minister or department or as an Order in Council.¹⁷ As subordinate legislation such provisions are subject to the doctrine of *ultra vires* and could thus be held invalid under certain circumstances. Hence the potential conflict between Community law supremacy and the Sovereignty of Parliament cannot arise if an inconsistency is discovered between Community law and subordinate legislation (which is subject to judicial review).

However, there are a number of exceptional cases in which implementation can only be effected by an Act of Parliament.¹⁸

¹⁴ See T.C. Hartley, The Foundations of European Community Law, p. 242; E.C.S. Wade/ A.W. Bradley, Constitutional and Administrative Law, p. 137.

¹⁵ As Collins, p. 113, points out, subordinate legislation under s. 2 (2) ECA may also serve to fill out or make specific provisions for those rights and obligations which are directly effective.

¹⁶ Unless a draft of the instrument has been approved of by both Houses of Parliament, it is subject to annulment by a resolution of either House, see Schedule 2 section 2 paragraph 2 (2) ECA 1972.

¹⁷ The importance of delegated legislation under s. 2(2) cannot be overestimated as by virtue of s. 2(4) it may prevail over or even repeal and amend existing Acts of Parliament; see D.N. Clarke/ B.E. Sufrin, Constitutional Conundrums: The Impact of the United Kingdom's Membership of the European Communities on Constitutional Theory, pp. 48/9.

¹⁸ See Schedule 2 section 2 paragraph 1 (1) of the ECA 1972.

c) Directly Applicable and Effective Community Law - Section 2(1)

The key provision for directly applicable Community law is s. 2(1) ECA which reads:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties¹⁹, and all such remedies and procedures from time to time provided for by or under the Treaties, 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; [...]"

Several comments may be made.

The link to the principles of direct applicability and direct effect is established by the passage "without further enactment to be given legal effect".²⁰ Nevertheless, it must not be forgotten that s. 2(1) ECA is itself an enactment. Community rules have force not because they are created by Community institutions and the United Kingdom is a member of the Community, but only because s. 2(1) ECA 1972 exists.²¹

On the other hand, the ECA does not purport to determine itself the criteria for direct applicability: this is left entirely to the Community's legal system ("in accordance with the Treaties"), thus creating an interesting interaction between national and Community constitutional law.

The Government White Paper 1967 had stressed the 'constitutional innovation' needed for "the acceptance in advance as part of the law of the United Kingdom of provisions to be made in the future by instruments issued by Community institutions - a situation for which there is no precedent in this country."²² The wording of s. 2(1) embraces existing as well as future provisions ("from time to time created") and it also covers both primary and secondary Community law

¹⁹ Section 1(2) ECA defines what the Treaties are.

²⁰ See Halsbury's Laws of England, Vol. 51 para 3.05.

²¹ See Hartley, The Foundations, pp. 236/7; G. Howe, The European Communities Act 1972, p. 1; Clarke/ Sufrin, p. 46.

²² Cmnd. 3301 para. 22.

("by or under the Treaties").²³

d) The Supremacy of Community Law – Section 2(4)

Although s. 2(4) does not contain terms like 'supremacy' or 'primacy'²⁴, it was drafted to ensure the prevalence of Community law in the United Kingdom. The key passage is to be found "oddly sandwiched in the middle"²⁵ of s. 2(4):

"any enactment passed or to be passed [...] shall be construed and have effect subject to the foregoing provisions of this section."²⁶

As one of the foregoing provisions is s. 2(1), it appears that full justice is done to the view of the ECJ because all acts are to be subordinate to directly applicable Community law, irrespective of which was first.²⁷ Alas, it is not this simple.

In the United Kingdom, under a doctrine of continuing sovereignty, the chronological order of the conflicting provisions is relevant.

One can distinguish three different constellations.

Any national rule prior to the ECA 1972 must be regarded as repealed by s. 2(4) to the extent that it is incompatible with Community law.²⁸ This is a direct consequence of the *lex posterior* principle²⁹ which forms part of the doctrine of Parliamentary Sovereignty.

A more problematic situation arises from post-accession legislation. There are two possibilities: either the directly applicable Community

²³ According to Hartley, The Foundations, p. 240, section 2(1) covers not only written Community law but also its general principles.

²⁴ According to Turpin, p. 334, it wasn't thought right at the time to make an express declaration in the Act.

²⁵ Turpin, *ibid.*

²⁶ It is generally accepted that these words are not linked to the preceding part of s. 2(4) in a sense which would confine them to delegated legislation; see Clarke/Sufrin, p. 49.

²⁷ See Hartley, The Foundations, p. 242.

²⁸ See J. Jaconelli, Constitutional Review and Sec. 2(4) of the European Communities Act 1972, pp. 69/70.

²⁹ See Turpin, p. 335.

provision precedes in time the Act of Parliament or vice versa.

Some authors³⁰ do not join in this distinction. They argue that the principle of Parliamentary Sovereignty limits the effect of s. 2(4) ECA on all Acts of Parliament passed after 1 January 1973. As Parliament cannot bind its successor and as therefore the *lex posterior* rule applies, the courts must in a case of an irreconcilable conflict accord precedence to the Act of Parliament as the latest expression of Parliament's will.

However, there are good arguments which confirm the suspicion that this indiscriminating view needlessly increases the scope of the problem.

The distinction explained above might be vindicated as follows:

First, it is useful to remember the combined effects of sections 2(1) and 2(4) ECA. Section 2(1) commands that all directly applicable Community rules which are "from time to time to be created" shall be recognized and enforced in the United Kingdom and s. 2(4) supplies that national legislation shall "have effect subject to" such provisions. So, clearly, the ECA allows Acts of Parliament to be superseded by later Community law which, if understood as a special form of delegated legislation, must itself be regarded as the most recent expression of Parliament's will. Therefore the problem of priority could only arise if the post-accession Act of Parliament had "protected" itself against this mechanism by impliedly limiting the scope of the ECA.

It is only natural that sometimes matters need regulating before decisions on the Community level are taken. If a post-accession Act of Parliament contains provisions for an area of policy which are not yet pre-occupied by Community law, there is hardly a way for Parliament to foresee inconsistencies with future Community provisions. What reason should there be to believe that its decisions are not open to subsequent alterations by Community provisions? Unless Parliament says otherwise, the political fact of Community membership is justification enough for the assumption that Parliament did not intend to entrench its Act against the effects of subsequent directly applicable Community law.

From the foregoing it follows that the problem of priority arises only if a post-accession Act of Parliament conflicts with a prior

³⁰ E.g. Hartley, The Foundations, p. 242; Turpin, p. 334.

rule of Community law. Only at this point does the continuing Sovereignty of Parliament intrude.³¹ ✕

What is the outcome if Parliament legislates contrary to earlier Community law? Is there anything in s. 2(4) which would enable the courts simply to ignore such a provision and apply the contradicting Community rule instead, as the *Simmenthal* principle would demand?

This question calls for a deeper investigation of the nature of s. 2(4) ECA. Three different understandings of the provision are conceivable and all three have been advocated.

aa) A Substantive Entrenchment?

The most extreme interpretation of s. 2(4) is that it entrenches s. 2 and 3 against any form of repeal or amendment in a later statute: "[...] where a statute of such fundamental constitutional importance provides for certain of its provisions to be alterable, it must thereby be entrenching the remainder. Section 2(4), in its last part, expressly provides that the Second Schedule may be altered by subsequent Act of Parliament, a provision which is otherwise quite unnecessary. Is this a further attempt to entrench the fundamental sections of the Act?"³²

If this were indeed entrenchment, it would mean that English law which is inconsistent with Community obligations is, without more, invalid and there would be no way to avoid this mechanism!

Such a view would be in line with the case-law of the ECJ but unfortunately it does not find sufficient justification in the facts. First of all, the feasibility of such a substantive entrenchment would be rejected both under the orthodox doctrine and under the new view.³³ But, more important, there is hardly enough indication in the wording of sec. 2(4) of an endeavour to break with traditional constitutional theory. The mention that the Second Schedule can be changed by Act of Parliament could also mean that alterations by subordinate legislation are excluded. Nothing in the parliamentary

³¹ See Jaconelli, p. 70; de Smith/ Brazier, p. 80.

³² B. Hoggett The Impact of Community Law upon the Law of the United Kingdom (II), p. 75.

³³ See *supra*, pp. 17 et seq.

discussions preceding the enactment of the ECA warrants the assumption that an entrenchment was intended. On the contrary, the historic examples of the Acts of Union with Scotland or Ireland³⁴ show that Parliament has always employed a much stronger, more direct and unambiguous language when it attempted to exempt provisions from future repeal.

bb) A Mere Rule of Interpretation?

On the other end of the scale one could understand s. 2(4) as a mere rule of construction. Its significance would be to advise the courts to choose among several possible interpretations of the words used in Acts of Parliaments that which meets the demands of Community law. To pick a Community-sociable interpretation is of course only possible "unless the contrary intention appears"³⁵.

There are two considerations which speak against such a view. The idea that s. 2(4) is, at bottom, a guideline for interpretation is based on the phrase "shall be construed". But this ignores the second part which reads "and [shall] have effect subject to". Unless this is completely empty and meaningless, it can only be understood as a second step after an unsuccessful attempt of construction: if the wording of a national law is not reconcilable with a contradicting Community rule by way of interpretation, it must give way.³⁶

Even if s. 2(4) did not expressly provide for a way to set aside national legislation, there would still be a case to argue that it is more than a rule of interpretation in cases of ambiguity. Otherwise s. 2(4) ECA would be nothing but a (superfluous) reiteration of the well-established but rebuttable presumption that Parliament will not

³⁴ See *supra*, chapter B. I. 4. d) dd).

³⁵ This is the standard formula used in the Interpretation Act 1889, which is the classic example of an interpretation device.

³⁶ See Jaconelli, p. 66. J.D.B. Mitchell/ S.A. Kuipers/ B. Gall, Constitutional Aspects of the Treaty and Legislation relating to British Membership, pp. 143-4 have suggested that although s. 2(4) does not deprive Parliament of the power to enact legislation which is in conflict with Community law, the Act of Parliament would be rendered 'inoperative' as far as there is an inconsistency.

intentionally violate the United Kingdom's obligations arising from international treaties.³⁷

cc) Protection Against Implied Repeal?

This leaves a third possible understanding of section 2(4) which lies between the two extremes. If s. 2(4) does not constitute a substantive entrenchment, itself and the remainder of the ECA 1972 can be repealed in whole or in a particular case. If an Act of Parliament expressly states that its provisions shall be applied notwithstanding conflicting Community provisions, then the judges must accept this as the latest expression of will of a continually sovereign Parliament. On the other hand, if s. 2(4) has established a stronger principle than the normal common-law presumption concerning the interpretation of international law, nothing short of an express statement will have that effect. In every other case, if the wording of a statute is capable of a construction which avoids clashes with Community law, this must be chosen, and in the remainder of cases the irreconcilable national provision must be ignored.

This third view, to put it more shortly, would protect s. 2(4) against implied repeal.³⁸

However logical this view of s. 2(4) might seem, especially if one reads s. 2(4) in conjunction with s. 3(1) and considers the alternatives, it lacks a basis under the orthodox doctrine as it is in conflict with the principles of the Ellen Street Estate Cases.³⁹

³⁷ Cf. *supra*, chapter B, I. 4. b). See also Collins, p. 36.

³⁸ See e.g. Hartley, The Foundations, p. 243; Clarke/ Sufrin, p. 53; Collins, pp. 39/40.

³⁹ See *supra*, chapter B, I. 4. d) dd). Maugham LJ had declared it "impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal.", [1934] 1 KB 590 at 597.

e) Comment

Although there is not much point in expounding further on the nature of s. 2(4) without looking at the actual cases and the attitude of the judiciary, some general observations may be made. As Collins has rightly pointed out, the technique of the Act is not revolutionary.⁴⁰ There is no sufficient evidence to suggest that Parliament intended to deprive itself of the power to pass legislation which overrides Community law. It may amend or repeal the Act, which is therefore subject to the continuing sovereignty of Parliament.

Within these boundaries, the ECA ensures the highest possible degree of compliance with the principles of direct effect and and supremacy of Community law.⁴¹ At the very least, s. 2(4) sets up an extraordinarily strong rule of interpretation and construction. It might even be found to have effected protection against implied repeal. But it does not protect against an express repudiation of the United Kingdom's Treaty obligations. If Parliament intentionally legislated contrary to prior Community law, English courts would find no justification in the ECA to set aside such legislation. They would have to wait until Parliament itself repealed the Act. Community law could not be given full effect and there would be a breach of the Simmenthal principle.

Therefore, as had to be expected, the European Communities Act 1972 alone cannot fully resolve the potential conflict between the principle of Parliamentary sovereignty and the claim for supremacy which Community law makes.

III. Governments, Parliamentary Parties and Membership of the European Communities

It has been stated that modifications to the rule of recognition or *grundnorm* can only be expected if the general political climate is favourable to such changes in judicial thinking. Judges do not form

⁴⁰ Collins, p. 26.

⁴¹ The attempt to satisfy the Community law requirements without sacrificing the sovereignty of Parliament has been called 'a fascinating exercise in equivocation, a wilful manifestation of legislative schizophrenia' by de Smith/ Brazier, p. 82.

convictions of such fundamental nature in the seclusion of an ivory tower. They a part of a society in which they perform a certain role and which in turn contributes to the definition of that role.

It is therefore useful to take a look at the development of attitudes towards the question of Parliamentary Sovereignty of various governments, political parties, parliamentary groups⁴² and of the British people, as far as it has had the opportunity to articulate its feelings in public.

1. British EC-Politics and the Question of Sovereignty

a) The Discussions before Accession

In the 1967 White Paper on the *Legal and Constitutional Implications of Community Membership*⁴³, Parliamentary Sovereignty was but one of a number of issues and was not seen as problematic. The EC was put on the same level with organisations as GATT and the Paper was built on the assumption that "it would be necessary to pass legislation giving the force of law to those provisions of the Treaties and of Community instruments which are intended to take direct internal effect within the member states."⁴⁴ With the same ease was the problem of supremacy of Community law disposed of: since Community law would have force only through the implementing Act of Parliament, simply applying the *lex posterior* rule would suffice to ensure that the later 'Community' law prevails.⁴⁵ The 1967 White Paper proceeded from a steadfast conviction that the continuing nature of Parliamentary Sovereignty is immutable. The Lord Chancellor said in the House of Lords: "There is in theory no constitutional means available for us to make certain that no future Parliament would enact legislation in conflict with

⁴² It would of course be easier if parliament as an institution had promulgated a view, but, as the examination will show, opinion is much too diversified among the political parties (and even among politicians of the same parties) to present a homogeneous picture.

⁴³ Cmnd. 3301.

⁴⁴ Cmnd. 3301, § 22.

⁴⁵ This was before *Simmenthal II*, which postulated the primacy of Community law also over subsequent national legislation.

Community law."⁴⁶

The alleged inability of Parliament to divest itself of parts of its sovereignty was repeatedly invoked in order to assuage the concerns of MPs about the possible implications of Community membership.⁴⁷ The 1971 White Paper⁴⁸ of the Conservative government (Heath), too, assured Parliament that "there is no question of any erosion of essential national sovereignty."⁴⁹ Considering these circumstances, the clear majorities in both Houses of Parliament who voted in favour of membership in October 1971⁵⁰ cannot be taken as an indication of a willingness to let go of Parliament's omnipotence.

When Parliament debated the European Communities Bill, it was even proposed that a clause be inserted into the Bill stating: "It is hereby declared that nothing in the Treaties or in the Act shall detract from the ultimate sovereignty or supremacy of Parliament [...] and any determination of the European Court or of any of the Communities or their institutions which is inconsistent herewith shall be null and void."⁵¹

⁴⁶ As quoted by Mitchell, "What do you want to be inscrutable for, Marcia?", p. 118.

⁴⁷ See e.g. *The Times*, 6 July 1972, Reassurance for MPs on British Sovereignty, p. 1.

⁴⁸ Cmnd. 4715, *The United Kingdom and the European Communities*.

⁴⁹ Cmnd. 4715, § 29.

⁵⁰ In the Commons, MPs voted as follows: Conservatives: 282 in favour, 39 against and 2 abstained; Labour: 68 in favour, 198 against, 20 abstentions; Liberals: 5 in favour, 1 against; Others: 6 against (overall: 356 - 244 in favour). The Lords voted 451 - 58 in favour.

Whereas the outcome in the Lords had been expected (see *The Times*, 23 October 1971, Large majority for joining EEC is expected in the Lords, p. 1) the winning margin in the Commons came somewhat as a surprise, see: Parliament gives a resounding Yes to Europe with MP's majority of 112 and Jubilation at Community headquarters over clear go-ahaed, both in *The Times*, 29 October 1971, p. 1.

⁵¹ This was suggested by the Labour MP Sir Elwyn Jones and supported by his Conservative colleague Enoch Powell. See *The Times*, 6 July 1972, Labour want power in EEC Bill to withdraw from Treaty of Rome, p. 7.

b) Community Membership and the Balance of Power Between Parliament and the Executive

There is yet another facet of the problem which made MPs feel uneasy about membership. Their concern was not only directed at the fact that powers would have to be shared with institutions outside the EC, but also at the disturbance of the internal balance of power between Parliament and the Executive.⁵² The only direct influence of the UK on EC legislation would not be exerted through the House of Commons but through government representatives in the Council of Ministers. To make things worse, effective parliamentary scrutiny of ministers' behaviour in the Council is hindered by the secrecy which surrounds the voting procedures⁵³: Council sessions are neither public nor is there any official public record. Many MPs feared that the Treaty of Rome would promote and permanently establish in law the shift of power from Parliament to the Executive which had until then only been based on fact or convention.⁵⁴

Indeed, the government profited from the loss of powers of Parliament and gained (quasi-)legislative functions in areas of policy comprised by Community competences.

In order to obtain some degree of influence and control, the House of Commons reacted in two ways:

First, a special committee (the so-called *Foster Committee*) was appointed which delivered its final report in October 1973. It stated: "It seems that there is no possibility of exercising in this field anything like the same degree of control as is available to the House of Commons under the present process of enacting a statute. However, so long as the weighed majority rule in the EEC Treaty is in abeyance, and so long as the practice of unanimity is required, it should be possible to exert at least as much control over this legislation as is currently available in respect of delegated legislation in the United Kingdom."⁵⁵ Hence it recommended the establishment of a *House of Commons Select Committee on European Secondary*

⁵² See Rix-Mackenthun, pp. 145 et seq.; also Freestone/ Davidson, pp. 104 et seq.; Wade/ Bradley, p. 139.

⁵³ See Freestone/ Davidson, *ibid.*

⁵⁴ Cf. also *supra*, chapter B, II. 5. a).

⁵⁵ Foster Committee, Second Report, HC 463-I, p. xv.

*Legislation*⁵⁶ with the express purpose 'to restore to Parliament responsibilities for, and opportunities to exercise its constitutional rights' in the process of EC law making. Its main function is to scrutinize draft Commission proposals for legislation and to assess their legal and political implications.⁵⁷

The House of Lords also has a Select Committee which produces quite substantial reports on proposed Community legislation containing detailed evidence and concluding recommendations. One particular sub-committee (composed mainly of distinguished lawyers) has the task to consider whether proposed Regulations or Directives would, if adopted, impliedly repeal or amend UK legislation or necessitate any fresh legislation by Parliament.

Both Committees may liaise freely.

The second reaction was the insistence that the principle of ministerial accountability also applies to Community matters. British governments have accepted this and have accordingly undertaken to

- a) supply Parliament with important Community documents (especially draft proposals for legislation submitted by the Commission),
- b) report to the House after Council meetings and
- c) provide a six-monthly report on developments within the Community.

In addition, the Commons demanded in a Resolution that, as a rule, Ministers should not agree in the Council to measures which have been recommended for consideration in the House by the Select Committee, before such consideration has been given.⁵⁸

In spite of these efforts, it must be said that the effectiveness of Parliamentary control over the Executive is limited. The Select Committees get to see the draft proposals only at one stage: they are not supplied later amendments which were necessary to accommodate the views of the Council or the EP. Neither are Ministers willing to

⁵⁶ The word 'secondary' was dropped in 1978.

⁵⁷ For a detailed description of their functions and work see F.E.C. Gregory, Dilemmas of Government, Britain and the European Community, pp. 84 et seq., or Freestone/ Davidson, pp. 107 et seq.

⁵⁸ Resolution of 30 Oct. 1980, 991 HC Deb. Col. 838.

disclose their precise negotiating strategy before meetings, because this would weaken their position in the Council.

At the most, Parliament can urge the Government to exercise its 'veto' in Council decisions that require unanimity.

c) The National Referendum 1975

When Labour won the General Election in February and October 1974, the issue of Community membership was again put on the agenda.⁵⁹ Early opinion polls had shown EC membership to be rather unpopular in the country, mostly because the Community had been given the blame for numerous economic problems towards the end of the Heath government. The Labour government under Wilson promised to renegotiate the terms of British membership and to put them before the British people for approval.⁶⁰

Although sovereignty had little to do with the key items of renegotiation⁶¹ (and was, of course, not negotiable), anti-marketeters (who were disturbed by the results of new opinion polls which showed pro-continuation tendencies) endeavoured to reintroduce this emotional issue into the public debate. There was a deep division in the Labour Party, extending right through Cabinet.⁶² The left-wing Labour MP and then Cabinet Minister Tony Benn, e.g., in a resolution to his Bristol

⁵⁹ For background information see S. George, An Awkward Partner - Britain in the European Community, pp. 71 et seq.; F.E.C. Gregory, Dilemmas of Government - Britain in the European Community, pp. 73 et seq.

⁶⁰ Such a referendum was a constitutional innovation, but it did not in itself constitute a threat to the sovereignty of Parliament, because Parliament was technically not bound by the result, see Rix-Mackenthun, pp. 161 et seq.

George, p. 88, points out that in reality the issue was not the terms of membership, but the principal decision of whether or not the UK should stay in the Community. The referendum campaign began before the renegotiated terms were finalized!

⁶¹ The most important problem was the size of Britain's contribution to the annual budget.

⁶² See H. Wilson, Final Term: The Labour Government 1974 - 6, pp. 103 et seq.

constituency, spoke against continuation of membership because it removed sovereignty from the British Parliament.⁶³

Consequently, the questions of national and Parliamentary Sovereignty were in the centre of focus of the Official Report on Renegotiation, which the Prime Minister presented to Parliament in March 1975.⁶⁴

This report was a masterpiece of ambiguity. A number of statements seemed to indicate that the special requirements of legal structure within the EC were now seen more clearly and appreciated better than in the years before: "[M]embership of the Community involves some changes in the position of Parliament and in its relationship with the executive⁶⁵ [...] No country nowadays has unqualified freedom of action. There are restraints even on the super-powers. For other countries their freedom of action is even more limited by political, military and economic realities outside their control."⁶⁶ After stressing the interdependence of modern countries and the role of international organisations, the Report continued: "The Community has certain distinctive features which make it unique among international groupings.⁶⁷ [...] As the Community goes beyond other international groupings in the extent of its aims and common action, its institutions are correspondingly more developed and entail a greater pooling of sovereignty than other organizations. If the verdict of the referendum is, as the Government recommends, in favour of membership, then acceptance of the special institutional features of the Community is a necessary means to the achievement of effective and worthwhile co-operation and common action."⁶⁸

Then the White Paper went on to explain the fundamental importance of the principles of direct applicability and priority of Community Law. All this revealed much more insight into the true nature of the Community than did previous statements and should have satisfied even the purest Eurocrat. Then came a surprise: "Thus membership of the Community raises for us the problem of reconciling this system of directly applicable law made by the Community with our constitutional

⁶³ See T. Benn, *Against the Tide - Diaries 1973 - 76*, pp. 236 et seq.

⁶⁴ Cmnd. 6003, *Membership of the European Community - Report on Renegotiation*.

⁶⁵ *Ibid*, § 114.

⁶⁶ *Ibid*, § 115.

⁶⁷ *Ibid*, § 118.

⁶⁸ *Ibid*, § 120.

principle that Parliament is the sovereign legislator and can make or unmake any law whatsoever. *That principle remains unaltered by our membership of the Community* [emphasis supplied]: Parliament retains its ultimate right to legislate on any matter. The situation was fully analysed in the White Paper published by the Labour Government in May 1967.⁶⁹

Somehow this does not seem the compelling conclusion of the preceding passages. However, the report *does* provide clear proof of the government's uncompromising endorsement of the principle of Parliamentary Sovereignty. The positions of the political parties were expressed in a vote in Parliament on 9 April 1975. The vote went in favour of acceptance by 396 votes to 172, but the majority of Labour MPs did not support their government.⁷⁰

The referendum itself brought a clear majority for the UK's remaining in the Community.⁷¹

d) The 1978 Direct Elections to the European Parliament

To some lesser extent the familiar concerns about sovereignty were repeated in the context of the Commons debates on the first Direct Elections Bill in autumn 1977. Until then, Euro-MPs had been nominated in Westminster to serve in Strasbourg. The discussions centered on the issues of the allocation of seats, the choice of an appropriate electoral system⁷² and a suggested 'political clause' setting limits to the extension of the powers of the EP (which at the time was, not without reason, called 'Assembly' instead of Parliament).

Clearly it was felt that a directly elected EP was a challenge to national parliaments because of the 'federalist' implications. Awarding democratic legitimacy to an institution outside Britain was regarded as an issue of profound constitutional importance.⁷³ The then Foreign Secretary, David Owen, expressed the government's firm

⁶⁹ *Ibid*, § 134.

⁷⁰ Labour: 137 in favour, 145 against; Conservatives: 275 in favour; 8 against.

⁷¹ In favour: 67,2 per cent; against: 32,8 per cent.

⁷² The House of Lords Report on Direct Elections (HL 119) had favoured a system of proportional representation.

⁷³ See 934 H.C. Deb., 6.7.77, col. 1250 et seq.

belief that the powers of national governments and parliaments must not be diminished.⁷⁴

Of the parliamentary political parties, only the Liberal Democrats were truly in favour of the changes.

e) The Single European Act 1986

The next major cause for concern came in 1985, when some member states headed by France, Germany and Italy, sought to strengthen the Community's institutional framework. It was felt that due to the increasing number of member states the Community was in urgent need of more efficient decision making procedures in order to achieve its goals. Independently, the EP had come up with a Draft Treaty establishing the *European Union*⁷⁵, which would have entailed radical reforms of the existing structures.

A committee was set up (the *Dooge Committee*) which produced a number of proposals, two of which were particularly controversial and met with stiff resistance by Denmark, the UK and Greece:

The majority of the Committee recommended a return to the original Treaty provisions on majority voting in the Council. Against this, the British, Danes and Greek argued that the Luxemburg Compromise of 1966 was understood as part of their terms of membership.

The other proposal advocated an enhancement of the EP's role in the decision making process. For the opposed countries, this seemed an unacceptable erosion of national sovereignty.

Part of the British defence was once more the principle of Parliamentary Sovereignty.⁷⁶ Considering the fact that Westminster is not directly involved in EC legislation, it is justified to say that the British Government had primarily the preservation of its own freedom of action in mind. In D. Judge's words, "the British government's 'principled' defence of British Parliamentary Sovereignty curtails the democratization of the EC decision-making process and so ensures that British ministers effectively escape both national and suprana-

⁷⁴ See 940 H.C. Deb, 1.12.77, col. 752 et seq. (esp. col. 794).

⁷⁵ See F. Capotorti/ M. Hilf/ F.G. Jacobs/ J.-P. Jaqué, The European Union Treaty.

⁷⁶ See D. Judge, The British Government, European Union and EC Constitutional Reform, pp. 323 et seq.

tional democratic control."⁷⁷

In the end, all proposals were put before an Intergovernmental Conference, which was summoned in spite of fierce criticism by Mrs. Thatcher.

Britain and her allies negotiated their position well. In exchange for an express commitment to European Union as the ultimate destination of the Community and a mention of the European Monetary System, the Luxemburg Compromise was kept largely intact and the increases of power of the EP were only marginal.⁷⁸ Thus Mrs. Thatcher was able to report to the House of Commons that the "United Kingdom's position and the position of Parliament are [...] properly protected."⁷⁹

f) Mrs. Thatcher and the Bruges Group

It is no secret that the former Prime Minister Mrs. Margaret Thatcher often had differences with other Heads of State about where the Community should be going. Above all, she did not get on well with the President of the Commission, Mr. Jaques Delors. She strongly resented ideas about a new 'social dimension' to the Community and about EMU.

When Delors addressed the European Parliament in July 1988 he said that most member states had not yet fully understood the extent to which the completion of the internal market in 1992 would entail a transfer of sovereignty to the Community.⁸⁰ In September he presented the Commission's views to the annual TUC conference in Bournemouth, which brought him a standing ovation from the delegates as well as the wrath of Mrs. Thatcher. The Prime Minister took the opportunity a few days later to condemn Mr. Delors and the Commission in a now famous speech to the students of the College of Europe in Bruges.⁸¹

⁷⁷ Judge, p. 326.

⁷⁸ *The Guardian* hailed Mrs. Thatcher as the "victor" of Luxembourg for her "insistence that European integration should remain subordinate to national interest", 5 December 1985, p. 1.

⁷⁹ 5 December 1985, 88 HC Deb., col. 429.

⁸⁰ OJ 1988-9, Annex, Debates of the European Parliament, no. 2-367/140.

⁸¹ The speech was entitled 'Britain and Europe' (published by the Conservative Political Centre in October 1988).

She outlined her vision of a Community of independent sovereign states in which national traditions and parliamentary powers would be preserved.

A number of British MPs were so delighted that they spontaneously formed the so-called Bruges Group, which describes its own function as an independent "forum for informed discussion about European affairs."⁸² The Group is well organised and eminently productive, having delivered over a dozen 'Occasional Papers' and some additional Study Papers. Its main concern is the protection of national sovereignty as may be illustrated by some quotes. Occasional Paper No. 6 (Feb. 90) asks: 'Is national sovereignty a big bad wolf?' and P. Felter writes in the introduction: "It is [...] a contradiction in terms to talk about a transfer of sovereignty, for instance, to an international organ. The sovereign state may delegate, temporarily, its inherent power of consent as agreed by it. In 1923 for instance, the Permanent Court of International Justice rejected the notion that a state abandoned any sovereignty through the conclusion of any Treaty by which the state undertook to perform or refrain from performing a particular act." The former Labour MP Eric Deakins concludes the Paper by saying "The rallying cry of those who wish to preserve the powers of the British Parliament and People must surely be: 'Twelve free nations in one free market' - thus far and not further!"

The Bruges Group has even enlisted the ageing Lord Denning who laments that "the European Court of Justice has taken away our sovereignty" and points out the appropriate remedy: "Just as Parliament in 1972 took us into the European Community, so also it can take us out again. It can repeal or amend the 1972 Act so as to make the decisions of the European Court of Justice not binding unless approved by our own House of Lords; and to make directives not binding unless approved by the Secretary of State. That modest amendment would enable us to retain our sovereignty as we were promised."⁸³

⁸² See Bruges Group Occasional Paper 1, p. 9.

⁸³ Introduction to Occasional Paper 6.

Without disrespect to the distinguished Lord Denning, it would seem that this 'modest amendment' would fatally undermine the Community's foundations.

g) A Gloomy Picture?

Most of the above seems to assemble to a rather gloomy picture as far as the prospects of changes to the rule of recognition are concerned. It is probably fair to say that at the present time most MPs would maintain that the legal sovereignty of Westminster is (in theory) still fully intact and that no concessions should be made to the EC. Yet, there are also a few signs for a more open approach to the matter.

The Liberal Democrats, who have been rather successful in recent elections, are fully committed to European integration. They back the 'sovereignty-sensitive' idea of a single currency, as does Labour and as does the House of Lords.⁸⁴

There are also prominent pro-European voices among Conservatives. Sir Geoffrey Howe has written a deep and remarkable article entitled 'Sovereignty and interdependence: Britain's place in the world'.⁸⁵ He analyses the different meanings of sovereignty and points out that Dicey's concept of Parliamentary Sovereignty "is an idealized notion [...] which is only partly useful in explaining what occurs in the real world of British politics."⁸⁶ Instead one should understand sovereignty in today's internationalized and interdependent world as "a nation's practical capacity to maximize its influence in the world."⁸⁷ Emphasising the pragmatic tradition of constitutional change in Britain he says that "theory is adjusted to meet the facts. There is a constant dialogue between theory and fact, with most attempts to elevate any one theory into an eternal verity likely to be disproved by events. Because of this, the sort of absolutist definition of sovereignty advocated, for example, by Enoch Powell or Peter Shore when we debated membership of the European Community and after, has a strangely un-British ring about it. *It is not really our way to posit an immovable set of constitutional arrangements or principles*

⁸⁴ *The Daily Telegraph*, 18 October 1990, Liberals urge single Euro currency; *Financial Times*, 29 November 1990, Labour backing for EMU; *Financial Times*, 10 November 1990, All-party peers support EMU and single European currency.

⁸⁵ (1990) 66 *International Affairs*, pp. 675 - 695.

⁸⁶ *Ibid*, p. 677.

⁸⁷ *Ibid*, p. 678.

(whether sovereignty of parliament, royal prerogative or integrity of empire) and defend them uncompromisingly. It is much more characteristic to let them evolve spontaneously in response to changing needs and conditions (italics supplied)."⁸⁸

Sir Geoffrey's attitude towards Europe brought him into conflict with Mrs. Thatcher and caused his resignation from the Cabinet the late summer of 1990, just as Nigel Lawson had to quit as Chancellor of the Exchequer after rows over British membership of the Exchange Rate Mechanism.

But eventually the Prime Minister's inflexibility and 'non-diplomacy' in Community matters gave rise to fears of growing British isolation in Europe⁸⁹ and was one of the reasons for her own demise a short time later. The new Prime Minister John Major has adopted a much more conciliatory style which earned him a warm welcome by the other Heads of State in the current Intergovernmental Conferences.⁹⁰ Whether these changes in style are followed by great changes in substance remains to be seen but they are certainly more likely under his leadership than under Mrs. Thatcher's.⁹¹

The very fact that Mrs. Thatcher's position in her own party weakened so quickly and surprisingly could be an indication that MPs are not willing to defend principles at the cost of being excluded from the process of European integration.⁹²

At any rate, the signals being sent by the government in the current

⁸⁸ *Ibid*, pp. 679 - 680.

⁸⁹ See e.g. *The Times*, 31 October 1990, Thatcher bars further surrender to Europe.

⁹⁰ See *Financial Times*, 15/16 December 1990, UK changes tone over EC political union talks.

⁹¹ Although Mr. Major insists that he will not tolerate the 'imposition' of a single currency, his underlying tone is much more pro-European than that of Mrs. Thatcher. He defended his Euro policy (see *The Independent*, 15 June 1991, Major attacks EC 'faint-hearts') after a leaked memo by the Bruges Group had accused him of being afraid to use his 'veto' against a single currency (see *Financial Times*, 12 June 1991, p. 1).

⁹² Labour had already claimed to be the true party of Europe, criticizing Mrs. Thatcher for her obstructive behaviour at the Rome summit, *The Times*, 4 October 1990, Delegates look to full unity.

IGCs will be carefully observed by jurists and the courts in this country.

2. The Practical Approach

In the light some of the statements quoted above one might wonder if the ECJ spends half of his time with cases against the United Kingdom. But in practical terms, Britain is as committed a member of the Community as any other country. Her record on implementation of Community law (once agreed upon), is very good, perhaps with the exception of sex equality matters.

There is also no questioning of decisions of the ECJ. When for example the President of the ECJ ordered the UK to suspend provisions of the Merchant Shipping Act 1988⁹³ pending final judgment in the *Factortame* case, this was promptly done by an Order of Her Majesty in Council⁹⁴ on 1 November 1989, with the express approval of Parliament. There are even British proposals for a strengthening of the ECJ's means of enforcing its judgments.

So far, the UK Parliament has refrained from exercising its sovereign right intentionally to 'overrule' Community legislation and has thus avoided a damaging conflict. This does not mean that the potential conflict between British Parliamentary Sovereignty and EC supremacy could not materialize on some future occasion. Under a doctrine of continuing sovereignty, there is no legal safeguard to prevent this from happening. There is only the self-discipline of the legislature inherent in the British political system to avoid a clash.

⁹³ Case 246/89R, Order of the President of 10 October 1989.

⁹⁴ Merchant Shipping Act 1988 (Amendment) Order 1989.

IV. Community Law Supremacy in the British Courts

Finally, we can turn to the actual cases in which the problem of priority between Community law and Acts of Parliament arose or was addressed *obiter*. As was said before, it is in the judgment of the courts that possible constitutional changes must manifest themselves, because the doctrine of Parliamentary Sovereignty is primarily a description of the relationship between the legislature and the judicature.⁹⁵

The question before us is this: Do the judges in the United Kingdom today still act upon a rule of recognition which says '*Every Act of Parliament must be obeyed. There is absolutely no authority to set aside or override an Act of Parliament as it is the highest conceivable form of law*' ?

Or does the present rule read: '*We will obey every Act of Parliament unless it cannot be reconciled with the Treaty of Rome or secondary legislation lawfully enacted under the Treaty.*' ?

Or does the truth lie in between those two?

The question could be formulated in a different way which takes us back to Kelsen's *grundnorm*: What is the reason for the validity of the norms the court is about to apply? And, closely tied to this is the question as to the function of a court in a member state of the Community: are national courts always and exclusively organs of the national legal system or do they become (in cases involving Community matters) an organ of a comprehensive new legal order which was established by the Treaty of Rome?⁹⁶

Making such decisions is a process through which jurists go all the time, be it consciously or (mostly) unconsciously.⁹⁷ At this stage, judges do not really act in their capacity as judges but rather as jurists. They do not (yet) apply the law, but they ask what enables them to apply a given rule as a valid norm (i.e. what is the basis of

⁹⁵ *Supra*, p. 8; See also Halsbury's Laws of England, Vol. 8, No. 811, p. 534 note 5: "[...] the doctrine of parliamentary sovereignty represents nothing more or less than a series of predictions of how the courts would decide certain issues if properly brought before them".

⁹⁶ This corresponds to the rule of recognition introduced above.

⁹⁷ See Kelsen, General Theory, p. 116.

the legal system they are part of).

Unfortunately, judges will seldom make their assumptions explicit as long as there is no compelling reason to do so.

The ultimate proof of a new grundnorm would be, of course, if the British courts ignored a deliberate attempt by the Westminster Parliament to legislate contrary to the Treaty.⁹⁸ So far, Parliament has never tried to test its power in this way and it is most unlikely that it will do so in the future. In the absence of such a real judgment, the next best thing are predictions (made *obiter*) of the anticipated behaviour of judges in cases of an intentional conflict.

Any other signs could only be indirect ones, which need to be weighed and interpreted within their context. Which sorts of clues would indicate a renunciation of the established view which underlies the orthodox doctrine of Parliamentary Sovereignty?

Proceeding from the analysis of the case-law of the ECJ and the developments in other member states in chapter C and of the ECA 1972 in this chapter, the following details in British judgments must be scrutinized:

In cases of conflict, on what authority is supremacy accorded to Community law? Is municipal legislation actually set aside or do the courts seek to avoid this by giving adventurous interpretations to otherwise inconsistent Acts?

Is the ECA 1972 given as the exclusive reason for the effectiveness and the priority of Community law? Which of the three possible interpretations of s. 2(4) ECA⁹⁹ is favoured by the courts?

If no degree of entrenchment is accorded to this section, then enforcement of Community law in the national courts is ultimately dependent on its continued recognition by Parliament. This could be withdrawn at any time in which case British courts would have to ignore 'unwanted' Community law.

If, on the other hand, the courts went beyond the ECA by basing their judgments on an endorsement of the relevant case-law of the ECJ, this would be a different matter altogether. References to the 'special nature' of Community law might indicate that the courts are prepared to dissociate themselves from the traditional dualist view of international law as far as the Community is concerned. There is also a

⁹⁸ See Thelen, pp. 243/4.

⁹⁹ See *supra*, II. 2. d).

subtle difference between a reference to the European Communities Act and a reference to the fact of British membership of the EC, the latter possibly pointing in a monist direction.

The first part of the following analysis will show what impact membership of the Community has had so far on the doctrine of Parliamentary Sovereignty and what must be regarded as well established and unquestionable.

But after this I would like to focus attention on some more recent and very interesting cases which seem to indicate that there is an increasing readiness in British courts to take another major step forward.

1. The Constitutional Position at Present

a) Conflicts Between Community Law and Prior National Law

Conflicts of directly applicable Community law with earlier¹⁰⁰ English law are easily resolved under s. 2 of the ECA 1972. Any pre-accession legislation which is inconsistent with Community law is seen as repealed by the ECA itself. In *Polydor Ltd. v. Harlequin Record Shops Ltd.*¹⁰¹ the Court of Appeal had to decide a case in which the importers of records from Portugal contested an interlocutory injunction which was granted to the UK copyright holders by a lower court. Ormrod LJ, with reference to s. 2(1) ECA, found that s. 16(2) Copyright Act 1956 is applicable "unless the domestic laws give way to a contrary provision of Community law."¹⁰² The National Insurance Commissioner¹⁰³ has held in a number of decisions that European law is to prevail

¹⁰⁰ In this context it must be remembered that from a British viewpoint, no Community law dates back further than 1 January 1973 as it is effective only by virtue of s. 2 of the ECA 1972.

¹⁰¹ [1980] 2 CMLR 413.

¹⁰² *Ibid.*, at p. 415. In the event, the section was found to be inconsistent with a directly applicable provision of a Trade Agreement between the EC and Portugal (provisions of international treaties to which the EC is a party can also have direct effect, see Collins, pp. 68/69).

¹⁰³ Now Social Security Commissioner.

over provisions of the National Insurance Act 1965.¹⁰⁴

In *Director of Public Prosecutions v. Henn and Darby*¹⁰⁵ and in *R. v. Goldstein*¹⁰⁶ the accused were convicted because they had illegally imported goods. Their defence had relied on the argument that the (pre-accession) English law which prohibited the import was in breach of Art. 30 EECT and thus invalid. The court found that the national rule was justified under Art. 36 EECT (which makes a number of exemptions from Art. 30), but conceded that otherwise it would indeed have squashed the convictions as a result of Art. 30 EECT and the ECA.

As this particular aspect of the supremacy of Community law does not require a break with orthodox constitutional doctrine, it is uncontroversial. In fact, the mechanism seems so self-evident that nowadays courts often no longer care to give an explanation why Community law prevails over national law. This is illustrated by some recent High Court judgments like *Council of Kirklees v. Wickes Building Supplies Ltd.*¹⁰⁷ or *Council of the City of Stoke-on-Trent v. B & Q plc*¹⁰⁸, where the courts had to consider the effect of Art. 30 EECT on s. 47 Shops Act 1950, which largely prohibits Sunday trading.

There are also no problems if a post-accession national law conflicts with a Community Directive or Regulation which is enacted subsequently.¹⁰⁹ In *Marshall v. Southampton Health Authority*¹¹⁰ an Industrial Tribunal had to decide the case of a female employee who was (unlike her male colleagues) forced to retire at the age of 62.

Miss Marshall's claim for damages exceeded the statutory limit under s. 65 of the Sex Discrimination Act 1975, but the Tribunal went on to consider the effect of Art. 6 of the (later) Council Directive 76/207. Having looked at the ECJ's interpretation of the Directive in

¹⁰⁴ See e.g. *Brack v. Insurance Officer*, [1977] 1 CMLR 277.

¹⁰⁵ [1980] 2 CMLR 229 (HL).

¹⁰⁶ [1982] 2 CMLR 181 (CA, Criminal Division) and [1983] 1 All ER 434 (HL).

¹⁰⁷ [1990] 2 CMLR 501.

¹⁰⁸ [1990] 2 CMLR 377; also *Mendip District Council v. B & Q plc*, [1991] 1 CMLR 113.

¹⁰⁹ See Collins, p. 39.

¹¹⁰ [1988] 3 CMLR 389.

*von Colson and Kamann v. Land Nordrhein-Westfalen*¹¹¹ the Tribunal said: "what we have here, in our view, is a direct conflict"¹¹² and held that the remedy under the Sex Discrimination Act was inadequate. Consequently, it ignored s. 65 of the Act and awarded Miss Marshall damages far beyond the fixed limit.¹¹³

The conclusion from these cases is that priority over national legislation will be given to subsequent Community law if a conflict cannot be reconciled otherwise. As long as the chronological order is (1) national rule - (2) Community rule, a displacement of the former can easily be accommodated within the orthodox doctrine. It does not amount to a challenge of Parliamentary Sovereignty.

b) Conflicts Between Community Law and Subsequent National Law

The real problem under a doctrine of continuing sovereignty is the claim of Community law that it must prevail also over later Acts of Parliament. The possible interpretations of the relevant section 2 of the ECA 1972 have already been looked at and it is now time to analyse the views and solutions adopted by the courts over the years. Some of the following cases are not primarily concerned with a conflict between national and European law but they contain instructive statements as to the status of Community law under the 1972 Act.

aa) The Early Cases

One of the first cases in this country involving Community law was *Esso Petroleum v. Kingswood Motors*¹¹⁴. The court was faced with the question if a pre-Community solus tie agreement between two private

¹¹¹ Case 14/83 [1986] 2 CMLR 430.

¹¹² [1988] 3 CMLR 389 at 400.

¹¹³ The Court of Appeal later overruled the Industrial Tribunal's decision (see *Marshall v. Southampton Health Authority*, [1990] 3 CMLR 425, esp. Butler-Sloss LJ at 439).

Relying on the *Duke* case (see *infra*, 1. c)), it argued that Art. 6 of the Directive was not sufficiently clear and precise to be directly effective and that s. 65(2) was not intended to implement the Directive.

¹¹⁴ [1974] 1 QB 142.

parties could be void because it was in breach of Art. 85 EEC. Considering the effect of the new body of law, Bridge J observed¹¹⁵: "By the European Communities Act 1972, the provisions of the EEC Treaty [...] became part of our domestic law in this country on January 1, 1973, and where there is a conflict with our domestic law the effect of the Act of 1972 is to require that the Community law shall prevail."

He did not go into further detail or mention s. 2(4), but the above statement has proved typical for future judgments in one respect which is important for the question of supremacy: the view of Community law is almost without exception dualist. It has effect and takes priority only as a result of the ECA.¹¹⁶

It also coined the formula that Community law was made 'part of our domestic law' by the ECA¹¹⁷ which has since been reiterated on many occasions by the Court of Appeal¹¹⁸ and the House of Lords¹¹⁹.

In some of the early judgments the endeavours to fit Community law into the familiar categories of English law occasionally overshot the mark. In *Application des Gaz S.A. v. Falks Veritas Ltd.* Lord Denning

¹¹⁵ *Ibid*, at p. 151.

¹¹⁶ See inter alia *Application de Gaz S.A. v. Falks Veritas Ltd.*, [1974] 1 Ch 381 at 391; *Shields v. Coomes Ltd.*, [1978] ICR 1159 at 1164; *Macarthys Ltd. v. Smith*, [1979] ICR 785 at 789 and 796; *Garland v. British Rail Engeneering Ltd.*, [1982] 2 WLR 918 at 935; *Garden Cottage Foods Ltd. v. Milk Marketing Board*, [1984] 1 AC 130 at 141; *Duke v. GEC Reliance*, [1988] 1 All ER 626 at 629.

¹¹⁷ This stands in striking contrast to Turpin's view, p. 333: "It will be noticed that the law made applicable by section 2(1) keeps its separate identity as Community law: it is not made part of English (or Scottish) law but is to be enforced together with that law in the courts of the United Kingdom."

¹¹⁸ See *Application des Gaz S.A. v. Falks Veritas Ltd.*, [1974] 1 Ch. 381 at 393; *Bulmer Ltd. v. Bolinger S.A.*, [1974] 1 Ch. 401 at 418; *Shields v. Coomes (Holdings) Ltd.*, [1978] ICR 1159 at 1164; *Macarthys Ltd. v. Smith*, [1981] QB 199 at 200; *Marshall v. Southampton Health Authority*, [1990] 3 CMLR 425 at 435.

¹¹⁹ See e.g. *Pickstone v. Freemans plc*, [1988] 2 All ER 803 at 817 (per Lord Oliver).

described the Treaty as being "equal in force to any statute"¹²⁰ and Stamp LJ remarked that Articles 85 and 86 EEC were to be treated "precisely as if the terms of the Treaty were contained in an enactment of the Parliament of the United Kingdom".¹²¹

A rather practical approach towards the resolution of conflicts between Community law and subsequent national law was demonstrated by the National Insurance Commissioner in a number of cases involving the Social Security Act 1975 and EEC Council Regulation 1408/71. In *Re Medical Expenses Incurred in France*¹²² it was decided that a British national was to be qualified as 'worker' under Regulation 1408/71 and was therefore entitled to a benefit under the U.K. Act. As a result of s. 2(1) ECA a disqualifying provision of the Social Security Act could not be applied.¹²³

There was no explanation as to how a provision of a 1972 Act managed to restrict the applicability of a subsequent Act of Parliament. In *Re An Absence in Ireland*¹²⁴ and also in *Re Residence Conditions*¹²⁵ and *Kenny v. Insurance Officer*¹²⁶ the Commissioner simply held that Articles of Regulation 1408/71 prevailed over provisions of the Social Security Act 1975 without any reference the ECA at all.

The first time that the potential problem under national constitutional law was openly addressed was in *Felixstowe Dock and Railway Company v. British Transport Docks Board*¹²⁷. A private Bill, which was contemplated at the time, planned for a takeover of the port of Felixstowe by the Docks Board. The applicants argued that such a takeover would constitute the abuse of a dominant position contrary to Art. 86 EEC.

¹²⁰ [1974] 1 Ch. 381 at 393; repeated in *Bulmer v. Bollinger*, [1974] 1 Ch. 401 at 418.

¹²¹ *Ibid*, p. 399.

¹²² [1977] 2 CMLR 317.

¹²³ *Ibid*, p. 327.

¹²⁴ [1977] 1 CMLR 5; held that Art. 38 and 39 of Regulation 1408/71 override s. 82(5)(a) Social Security Act 1975.

¹²⁵ [1978] 2 CMLR 287.

¹²⁶ [1979] 1 CMLR 433; held that s. 49 (1)(b) Social Security Act 1975 yields to either Art. 19 or 22 of Regulation 1408/71.

¹²⁷ [1976] 2 CMLR 655.

Speaking of the proposed Bill¹²⁸, Lord Denning MR remarked obiter: "I would add only this. It seems to me that once the Bill is passed by Parliament and becomes a statute, that will dispose of all the discussion about the Treaty. The courts will then have to abide by the statute without regard to the Treaty at all."¹²⁹ It is quite obvious that at the time Lord Denning did not consider the ECA to have fettered the sovereignty of Parliament.

Almost two years later, Lord Denning again had to deal with the question of Community law supremacy and this time he seemed much more favourable to the notion. In *Shields v. Coomes (Holdings) Ltd.*¹³⁰ a female employee of a Betting Shop brought an action because she received a lower salary than her male counterparts. The shop owner reasoned that his male employees served an extra function as deterrents against robberies. The Court of Appeal was faced with the task of determining the effect of Art. 119 EECT.

Having established that Art. 119 EECT is directly applicable because of s. 2(1) ECA 1972 and that British courts are bound by the judgments of the ECJ in *Costa v. ENEL* and *Simmenthal* by virtue of s. 3(1) ECA,¹³¹ Lord Denning went on to say: "Suppose that the Parliament of the United Kingdom were to pass a statute inconsistent with Art. 119, as, for instance, if the English Equal Pay Act 1970 gave the right to equal pay only to unmarried women. I should have thought that a married woman could bring an action in the High Court to enforce the right to equal pay given to her by Art. 119. I may add that I should have thought that she could bring a claim before the Industrial Tribunal also. It seems to me when the Parliament of the United Kingdom sets up a tribunal to carry out its Treaty obligations, the tribunal has jurisdiction to apply Community law, and should apply it, *in the confident expectation that this is what*

¹²⁸ Which was not passed in the event.

¹²⁹ *Ibid*, p. 664/5. It has to be admitted, though, that when *Felixstowe* was decided, the ECJ had not yet delivered its *Simmenthal* judgment which clarified that it did not matter whether the national law was prior or subsequent to the Community provision.

¹³⁰ [1978] ICR 1159.

¹³¹ *Ibid*, pp. 1164 et seq.

Parliament intended ¹³². If such a tribunal should find any ambiguity of any inconsistency with Community law, then it should resolve it by giving primacy to Community law."

There had so far been no authoritative statement on the matter by the House of Lords, except for a dictum by Lord Hailsham in *The Siskina*¹³³, a case which was only marginally concerned with European law. His Lordship had remarked: "It is the duty of the courts here and in other member states to give effect to [directly applicable] Community law as they interpret it in preference to the municipal law of their own country over which *ex hypothesi* Community law prevails."¹³⁴ The formulation seems to suggest that the reason for Community law supremacy must be the same in all countries including the United Kingdom¹³⁵ but this interpretation might already be overburdening this short and isolated passage.

Summing up, the first years after accession showed an evolving unanimity within the judiciary that the combined effects of s. 2(1), 2(4) and 3(1) of the European Communities Act 1972 must extend also to later Acts of Parliament which are inconsistent with Community law. Insofar, the British courts very pragmatically acted in a way which supported the legal structure of the Community and which at the same time they knew to be the intention of their Parliament and government to fulfil the UK's obligations under the Treaty.

There was, however, no clear idea of how the mechanism worked that allowed the ECA to stand against later expressions of Parliament's sovereign will. What was missing was a sound theoretical foundation for the already established practice.

¹³² Emphasis added. It seems that the Master of the Rolls was already subtly preparing the ground for subsequent statements in *Macarthys*.

¹³³ [1978] 1 CMLR 190.

¹³⁴ *Ibid*, p. 224. Turpin, p. 336, wonders what is to be made of the words 'as they interpret it'.

¹³⁵ A *hypothesis* applying to every member state can hardly be derived from the British European Communities Act.

bb) Lord Denning's Solution

Such a theoretical basis was finally offered by Lord Denning MR in *Macarthys Ltd. v. Smith*¹³⁶. The salient facts of this sex-discrimination case can quickly be summed up. Mrs. Smith was employed as manageress of a warehouse by Marcarthys Ltd. Her male predecessor in the job had received higher remuneration although his duties had not differed substantially from hers. Under the Equal Pay Act 1970 (as amended by the Sex Discrimination Act 1975) Mrs. Smith clearly would have been entitled to equal pay if she had been employed *contemporaneously* with a higher paid colleague.

However, Lawton and Cumming-Bruce LJJ did not think that the Act extended also to cases where a woman succeeded a man in a job, whereas Lord Denning thought it did. In its narrow interpretation there was a possible conflict between the Act and Art. 119 EECT¹³⁷. Hence the Court of Appeal referred a question as to the interpretation of the relevant Community provisions to the ECJ but at the same time Lord Denning contemplated on the position that would arise if the Equal Pay Act was actually found to be inconsistent with Community law¹³⁸: "Under section 2(1) and (4) of the European Communities Act 1972 the principles laid down in the Treaty are 'without further enactment' to be given legal effect in the United Kingdom: and have priority over 'any enactment passed or to be passed' by our Parliament. So we are entitled - and I think bound - to look at Art. 119 of the Treaty because it is directly applicable here [...] We should, I think, look to see what those provisions require about equal pay for men and women. Then we should look at our own legislation on the point - giving it, of course, full faith and credit - assuming that it does fully comply with the obligations under the Treaty. In construing our statute, we are entitled to look at the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient - or it is inconsistent with Community law - by some oversight of our draftsmen - then it is our bounden duty to give priority to Community law. Such is the

¹³⁶ [1979] ICR 785.

¹³⁷ This is denied by Collins, p. 32, but for our present purposes it doesn't actually matter whether the conflict was real.

¹³⁸ *Ibid*, p. 789.

result of section 2(1) and (4) of the European Communities Act 1972. I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when Parliament deliberately passes an Act - with the intention of repudiating the Treaty or any provision in it - or intentionally of acting inconsistently with it - *and says so in express terms* [emphasis added] - then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. [...] Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority under the Treaty."

These last few sentences are quite extraordinary if one considers the orthodox doctrine of Parliamentary Sovereignty. At a first glance, they seem to confirm Parliament's power to legislate contrary to Community law whenever it wishes to do so. The snag, however, is that Parliament has to use a *certain form* of legislation in order to exercise this power. It has to state expressly in the letters of the law that it wishes to repudiate the Treaty. What this means has been accurately pointed out by T.R.S. Allen¹³⁹: Parliament in 1972 has actually succeeded in binding its successors by imposing a form requirement in order for certain fresh pieces of legislation to be effective. Or, to make use of the possible interpretations of s. 2 ECA introduced at the beginning of this chapter, the relevant provisions of the ECA are effectively protected against any form of implied repeal.¹⁴⁰

If Lord Denning's view of the law is correct, then the strictly orthodox perception of Parliamentary Sovereignty is no longer valid with respect to the UK's membership of the Community. There is a definite break with the *Ellen Street Estate* cases, according to which entrenchment against implied repeal was impossible.

Such a form requirement still falls short of what the ECJ proclaims in *Simmenthal*, but it provides a quite reliable guarantee that Community law will be respected in the UK. As long as Britain stays in the Community, Parliament is unlikely to resort to open rebellion against EC rules.

¹³⁹ T.R.S. Allen, Parliamentary Sovereignty: Lord Denning's Dexterous Revolution, p. 25.

¹⁴⁰ See Clarke/ Sufrin, pp. 62/3; Turpin, p. 346.

In *Worringham v. Lloyds Bank Ltd.*¹⁴¹ Lord Denning built on his own judgment in *Macarthy's* and his lead was also gratefully taken up by lower courts.¹⁴²

The House of Lords was more cautious in its initial reactions. In *Garland v. British Rail Engineering Ltd.* Lord Diplock refused to commit himself as to whether an express statement by Parliament was needed to override Community law¹⁴³.

Over the years, however, it seems that Lord Denning's novel approach has been ingrained in the minds of the judges and recently it has also received 'official' approval by the House of Lords in *Factortame v. Secretary of State for Transport*¹⁴⁴. Analysing the effect of s. 2(1) and (4) ECA on the Merchant Shipping Act 1988 Lord Bridge set out: "This has precisely the same effect as if a section were incorporated in Pt II of the 1988 Act which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC."¹⁴⁵

Although the formulation is different from Lord Denning's, it boils down to the same thing: unless Parliament states expressly that its own legislation shall prevail, it must give way to directly effective Community law.¹⁴⁶

c) Preference for Interpretation

The frequency of conflicts between national law and European law is closely related to the way national law is interpreted. The traditio-

¹⁴¹ [1982] ICR 299 at 303. The Court of Appeal held that Art. 119 EEC took priority over s. 6 (1A) (b) Equal Pay Act 1970 which tolerated the exclusion of female clerks under the age of 25 from the defendant bank's pension scheme.

¹⁴² See e.g. *Jenkins v. Kingsgate Ltd.*, [1981] ICR 715 at 721 (Employment Appeal Tribunal).

¹⁴³ [1982] 2 WLR 918 at 935.

¹⁴⁴ [1989] 2 All ER 692 at 701. For the background see chapter C, II. 6. a).

¹⁴⁵ This reminds very much of Wade's pre-accession proposal!

¹⁴⁶ See the comment by C. Greenwood, All ER Annual Review 1989, p. 125 at 129.

nal English methods of interpretation of statute law are rather rigid compared to most continental legal systems. Without going into any detail, there are three main approaches at the disposal of English courts.

The oldest and probably most dominating rule is called the *literal rule*. It says that "if the language of a statute is clear all that is necessary is to expound on the words in their natural and ordinary sense."¹⁴⁷ The *golden rule* entitles the court to choose a meaning consonant with common sense if the words are equivocal and the *mischief rule* is a rudimentary equivalent to the teleological approach of the ECJ. According to the *mischief rule*, the court may take into account the underlying legislative intent but it is limited in respect of the material it may use in the course of its investigation.¹⁴⁸ English courts do also not assume the power to fill gaps in the law by way of analogies.

As far as Community law itself was concerned, British courts quickly adopted the 'European' style of interpretation. Lord Denning said in *Bulmer v. Bollinger*: "All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulation or directives. It is the European way. [...] Seeing these differences, what are the English courts to do when faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent." ¹⁴⁹

When a counsel in *Polydor v. Harlequin* based his entire argument on the alleged difference between the words 'prohibited' and 'abolished' in a Community Treaty, Templeman LJ rejected this "old-fashioned English method of interpreting Community law" by saying: "it seems to me that it will be perverse to put on nineteenth century blinkers and

¹⁴⁷ See *Vestry of St. John, Hampstead v. Cotton*, [1887] 12 AC 1.

¹⁴⁸ See Bredimas, p. 158.

¹⁴⁹ [1974] 2 CMLR 91 at 119; see also Lord Denning in *The Siskina*, [1978] 1 CMLR 190 at 202 (CA): "It is our duty to apply the Treaty according to the spirit and not the letter". For a practical example see *MacMahon v. Dept. of Education and Science*, [1982] 3 CMLR 91 at 98.

to say there is a real distinction".¹⁵⁰

The House of Lords warned judges in *DPP v. Henn and Darby*¹⁵¹ that when faced with Community law, interpretation may be needed even if the English text may seem perfectly clear.

But, what about the interpretation of national law?

Evidently, if English courts were obliged to stick to the letter of the law very strictly, they would find themselves more often in a situation where the literal meaning of a statute cannot be reconciled with Community law. A more liberal approach to interpretation, on the other hand, might avoid the question of supremacy in the majority of cases. The following cases illustrate how far the courts are prepared to go in order to uphold parliamentary enactments.

Again the immensely instructive case *Macarthy v. Smith* may serve as starting point. Lord Denning thought that the Court was entitled "to look at the Treaty as an aid to its [the Act's] construction".¹⁵²

Cumming-Bruce LJ disagreed: "I do not think that it is permissible, as an aid to construction, to look at the terms of the Treaty. If the terms of the Treaty are adjudged in Luxembourg to be inconsistent with the provisions of the Equal Pay Act 1970, European law will prevail over that municipal legislation. But such a judgment in Luxembourg cannot affect the meaning of an English statute".¹⁵³ Confronted with academic scolding¹⁵⁴, however, he admitted¹⁵⁵: "Perhaps I expressed myself a little too widely there" and explained that his previous statement had been based on the view that the Act was unambiguous. If there was an ambiguity, it would be appropriate to look at the Treaty in order to resolve it.¹⁵⁶

At the time, this was exactly the position as with every ordinary

¹⁵⁰ [1980] 2 CMLR 413 at 423/4.

¹⁵¹ [1980] 2 CMLR 229 at 234 per Lord Diplock.

¹⁵² [1979] ICR 785 at 789.

¹⁵³ *Ibid*, at 798.

¹⁵⁴ See O. Hood Phillips, High Tide in the Strand? Post - 1972 Acts and Community Law, p. 34.

¹⁵⁵ See *Macarthy Ltd v. Smith*, [1981] QB 199 at 201/2.

¹⁵⁶ See also *Jenkins v. Kingsgate Ltd.*, [1981] ICR 715 at 721.

international treaty.¹⁵⁷

In *Garland v. British Rail Engineering Ltd.*¹⁵⁸ the House of Lords went one step further. Instead of insisting on an 'ambiguity test', Lord Diplock said a statute giving effect to international treaties should always be construed consistent with the obligation, if the words of the statute are "reasonably capable of bearing such a meaning" and that this was *a fortiori* the case where EC obligations are concerned. More recently, there have been two decisions by the House of Lords¹⁵⁹ which make it increasingly difficult to uphold the once clear conceptual distinction between interpretation and judicial law-making.

As a result of a judgment by the European Court¹⁶⁰ that the UK had failed adequately to implement the Council Directive 75/117 ('Equal Pay Directive'), the Equal Pay Act 1970 was amended by statutory instrument¹⁶¹. In *Pickstone v. Freemans plc* the female applicants sought to invoke the new provisions in order to claim equal pay with a male colleague. The Court of Appeal held¹⁶² that the new section could not be given the interpretation for which the applicants contended, but, as there was still a conflict between the Equal Pay Act and Community law, directly applied Community law to grant the application. The House of Lords upheld this decision, though on completely different grounds. Their Lordships argued that since the 1983 Regulations had been specifically adopted in order to give effect to the decision of the ECJ, they must be interpreted in the light of Art. 119 EEC, the Equal Pay Directive and the ECJ's decision in Case 61/81: "[...] a construction which permits the section to operate as a proper fulfilment of the United Kingdom's obligation under the Treaty involves not so much doing violence to the language of the section as *filling a gap by an implication*

¹⁵⁷ *The Eschersheim*, [1976] 1 All ER 920 at 924 per Lord Diplock; or *Maclaine Watson v. Department of Trade and Industry*, [1989] 3 All ER 523 at 545 per Lord Oliver.

¹⁵⁸ [1982] 2 All ER 402 at 415.

¹⁵⁹ Both cases were concerned with *statutory instruments*, but the principles are equally valid for primary legislation.

¹⁶⁰ Case 61/81 *Commission v. UK*, [1982] ECR 2601.

¹⁶¹ Equal Pay (Amendment) Regulations 1983, SI 1983/1794, made under s. 2(2) ECA 1972.

¹⁶² [1987] 3 All ER 756.

[emphasis added] which arises, not from the words used, but from the manifest purpose of the Act and the mischief it was intended to remedy".¹⁶³

This approach was confirmed in *Litster v. Forth Dry Dock and Engeneering Co Ltd*.¹⁶⁴: "[...] the greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom's Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations [emphasis added]."

In both cases the court 'rescued' national legislation from being set aside by reading into it words or passages which *should* have been included by the legislator in the first place.

Is this still interpretation or are the judges creating new law? This question must be left open here¹⁶⁵, but in any case *Pickstone* and *Litster* show how far English courts today are prepared to go in order to avoid the 'hard option' of disapplying national law.

Having said that, there are two important restrictions on this novel approach to interpretation.

First, it cannot be applied to ordinary international treaties. Lord Oliver expressly stated in *Pickstone* that it has "to be recognized that a statute which is passed in order to give effect to the United Kingdom's obligations under the EEC-Treaty falls into a special category and it does so because, unlike other treaty obligations, those obligations have, in effect, been incorporated into English law by the European Communities Act 1972." ¹⁶⁶

The second limitation was established by the House of Lords in *Duke v. GEC Reliance* ¹⁶⁷. In the cases considered above, the UK legislation had been passed in order to carry out Community obligations.

The question in *Duke* was whether s. 6(4) of the Sex Discrimination Act 1975, which allowed discrimination against the applicant with

¹⁶³ [1988] 2 All ER 803 at 817 per Lord Oliver.

¹⁶⁴ [1989] 1 All ER 1134 at 1153 per Lord Oliver.

¹⁶⁵ For some instructive reflections see Allen, The Limits of Parliamentary Sovereignty, pp. 617/8.

¹⁶⁶ [1988] 2 All ER 803 at 817.

¹⁶⁷ [1988] 1 All ER 626.

respect to her retirement age, had to be interpreted in the light of the later Council Directive 76/207 ('Equal Treatment Directive'). Lord Templeman, speaking for a unanimous House of Lords, rejected this argument.

He insisted that the language of an Act of Parliament had to be "considered in the light of the circumstances prevailing at the date of the enactment."¹⁶⁸ The plain meaning of a statute which was not enacted for the purpose of implementing Community obligations could not be distorted as to comply with Community law which is not directly applicable (thus not falling within the scope of s. 2(4) of the ECA 1972).¹⁶⁹

Despite academic criticism¹⁷⁰, the principle was affirmed in the House of Lords in *Finnegan v. Clowney Youth Training Programme Ltd.*¹⁷¹

d) Summary

Summing up, it is submitted that the following represents the consolidated position of British courts today:

- Community law is directly applicable/effective because of the European Communities Act 1972. This contrasts with the monist view of the relationship between Community law and national law held by the European Court of Justice.
- The courts will generally act on a presumption that national legislation is consistent with the United Kingdom's obligations under international treaties. Any ambiguities will be resolved in favour of the obligations undertaken.

¹⁶⁸ *Ibid*, at p. 635.

¹⁶⁹ The court relied on a principle established by the ECJ in Case 14/83 *von Colson*, [1984] ECR 1891 at 1909 paragraph 28: "It is for the national court to interpret and apply *the legislation adopted for the implementation of the directive* [emphasis added] in conformity with the requirements of Community law".

¹⁷⁰ See e.g. A. Arnall, The Duke Case: An Unreliable Precedent, p. 313; N. Foster, The Effect of the European Communities Act, s. 2(4), p. 775.

¹⁷¹ [1990] 2 CMLR 859. For another example see *Organon Laboratories Ltd. v. Dept. of Health*, [1990] 2 CMLR 49 at 69/70, (CA).

If national legislation is intended to carry out directly applicable Community law, courts are entitled to depart from the strict and literal application of the words in order to avoid conflicts. They may even close gaps in the legislation by implying words or whole provisions.

This technique must not be applied to legislation which was not passed to give effect to Community obligations.

- Directly applicable Community law prevails over inconsistent prior Acts of Parliament by virtue of s. 2 ECA 1972.
- Directly applicable Community law also prevails over subsequent Acts of Parliament if the inconsistency cannot be removed by way of interpretation. This is unless Parliament expressly declares in the Act that it intends to breach the UK's obligations under the Treaty. Parliament in 1972 has succeeded to entrench s. 2 ECA and thus the entire body of directly applicable Community law against any form of implied repeal.

Although the protection against implied repeal seems a reliable safeguard, British courts have not gone quite as far as the courts in other member states. The ultimate authority for the effectiveness of Community law in this country is not the fact of membership, but an Act of the Westminster Parliament. As Lawton LJ pointed out in *Macarthy's Ltd. v. Smith*¹⁷²: "Parliament's recognition of EC law and of the jurisdiction of the European Court of Justice by one enactment can be withdrawn by another".

There can be not full endorsement of the principles in *Simmenthal* as long as the understanding of the relationship between the two legal systems is dualist.

However, there has been some development in the rule of recognition. Under the orthodox Diceyan doctrine it would have been impossible for the Parliament in 1972 to impose a form requirement on future Parliaments which in effect entrenches s. 2 ECA 1972 against implied repeal.

¹⁷² [1979] ICR 785 at 796.

2. New Developments and Trends

In January 1979, the Armagh Magistrate's Court delivered the first judgment of a Northern Irish court in a case involving Community law.¹⁷³ The issue was the compulsory national marketing system for pigmeat, which had previously been found by the ECJ to be incompatible with EC law.¹⁷⁴ Being familiar with this decision, the judge asked himself: "What is the origin and nature of the authority which compels this court to disregard that legislation?" His subsequent approach to this problem was unorthodox, to say the least. He recognized the "conflict between the rule of parliamentary supremacy and the United Kingdom's Community obligations"¹⁷⁵, but instead of applying s. 2(1) and (4) of the ECA 1972, he directly referred to the ECJ's statements in *Simmenthal* and added that "however intellectually stimulating and politically and academically interesting speculation about the loss of sovereignty or otherwise may be, the reality is that the European Communities Act affirms *the existence of an ultimate rule of recognition for the EEC* [emphasis added] and at the end of the day the real test of this is the attitude of the courts, officials and private persons in the United Kingdom."¹⁷⁶

Although the line of reasoning is dubious (the ECA is hardly evidence of a changed rule of recognition), at least one judge in the UK thought that the duty of obeying Acts of Parliament ended where it conflicted with the loyalty towards the new legal system, basing this conviction on a full endorsement of the relevant case law of the ECJ. However, the *Pigs Marketing Board* case did not find any followers and went by largely unnoticed.

Only within the last two years have there again been judgments which indicate that the changes to the rule of recognition have not come to an end with the reaffirmation and consolidation of the position first articulated by Lord Denning in *Macarthys*.

¹⁷³ *Pigs Marketing Board (Northern Ireland) v. Raymond Redmond*, [1979] 3 CMLR 118.

¹⁷⁴ See Cases 31/77 and 53/77, [1977] 2 CMLR 359.

¹⁷⁵ [1979] 3 CMLR 118 at 121.

¹⁷⁶ *Ibid.*

a) The Factortame Judgments

Among all the recent cases involving Community law, *Factortame* has caused the most excitement and received a great deal of academic attention.¹⁷⁷

The ECJ had decreed in its preliminary ruling that there must not be any obstacles in principle which prevent courts from granting interim protection against national legislation. What it had not done was to lay down substantive conditions for the grant of interim relief or to specify the measures at the courts' disposal.

Hence, the final decision lay again with the House of Lords. In their judgment of 11 October 1990¹⁷⁸ their Lordships found that the Spanish applicants met the conditions for interim relief because the irreparable damage the applicants could suffer pending the ECJ's ruling on the substantive issue outweighed the detriment to the public interest resulting from the possibility that the British fishing quota was illegally exploited. This was the more so as even if the applicants were to establish their Community right before the ECJ, they would have had no remedy in damages for losses.¹⁷⁹

In effect, this restored the position that had existed after the Divisional Court's original judgment. The difference is that the House of Lords granted interim relief as a matter of Community law, whereas Neill LJ and Hodgson J in the Divisional Court had thought that interim relief against the Crown was available under English law (relying on the authority of *Herbage*¹⁸⁰ and *Smith Kline & French*¹⁸¹).

¹⁷⁷ See e.g. P. Allott, Parliamentary Sovereignty - From Austin to Hart; Barav, Enforcement of Community Rights in the National Courts; Gravelles, Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?; E. Szyszczak, Sovereignty: Crisis, Compliance, Confusion, Complacency?; H.R.W. Wade, What has happened to the Sovereignty of Parliament?.

¹⁷⁸ [1990] 3 CMLR 375.

¹⁷⁹ See *Bourgoin SA v Ministry of Agriculture, Fisheries and Food*, [1986] QB 716; [1985] 3 All ER 585.

¹⁸⁰ *R. v. Secretary of State for the Home Department, ex parte Herbage*, [1987] 1 QB 872.

¹⁸¹ *R. v. Licensing Authority established Under Medicines Act 1968, ex parte Smith Kline & French Laboratories (No. 2)* [1989] WLR 378.

In the initial proceedings before the Divisional Court, the Solicitor General had also drawn attention to a decision by the House of Lords in *Hoffman-La Roche v. Secretary of State for Trade and Industry*¹⁸². There it had been said that a statutory instrument is effective and has the full force of law unless and until it is declared to be invalid. This presumption, the Solicitor General argued, must apply *a fortiori* to Acts of Parliament.

Although Neill LJ found this "a very formidable submission"¹⁸³, he demonstrated from *Simmenthal* and an analysis of s. 2 ECA that the presumption of validity did not take sufficient account of the new situation created by EC membership and thus could not stand in the way of interim relief.

The Divisional Court was overruled both in the Court of Appeal and in the House of Lords.

Concerning the availability of interim protection against the Crown in principle, Lord Bridge analysed the relevant statutory provisions¹⁸⁴ and the common law position and concluded that the views expressed in *Herbage* and *Smith Kline & French* were erroneous. Their Lordships also affirmed the Court of Appeal's understanding that the presumption of validity must be applied, because neither court could detect anything in the Treaty, or in the jurisprudence of the ECJ or in the ECA 1972 which would empower a municipal court to override national law in favour of an *alleged* or *putative* right under Community law.

Thus there were two jurisdictional obstacles to granting interim relief as a matter of English law. The effect of the preliminary ruling of the ECJ was to remove these obstacles, thereby securing the principle of effective protection of Community rights by national courts. From the ECJ's point of view, this was only a logical continuation of its previous judgments and could hardly surprise anyone familiar with *Simmenthal*.

¹⁸² [1975] AC 295.

¹⁸³ [1989] 2 CMLR 353 at 373.

¹⁸⁴ Crown Proceedings Act 1947, ss. 21, 23(2)(b), 38(2); Supreme Court Act 1981, s. 31; R.S.C., Ord. 53, r. 3(10)(b).

Yet, the decision provoked a considerable amount of excitement. The constitutional implications of this judgment seemed so outrageous to some Members of Parliament that they demanded an immediate emergency debate on the matter.¹⁸⁵ The Conservative MP for Aldridge-Brownhill, Richard Shepard, expressed his concern that "this ruling of the European Court has set aside the British constitution as we have understood it for several hundred years". Teddy Taylor MP claimed that "until yesterday, no court has ever told this Parliament to suspend or nullify the law. The seriousness of this situation is abundantly clear. It means that any law which we enacted last week [...] can be repealed in a flash by judges in Luxembourg".

On the other hand, several people with a deeper understanding of the legal issues involved dismissed the public outrage as unjustified. In a letter to the editor of *The Times*, Prof. D. Lasok QC said: "Indeed our legislators would spend their time more profitably by directing their minds to the law in question instead of blowing emotional bubbles."¹⁸⁶

At the very least it is certain that MPs got excited for the wrong reasons. The ECJ has no power to repeal national laws and it has made no such claims in its preliminary ruling. It merely told UK that there must be no obstacles to granting interim relief against national legislation if the effective protection of Community rights so requires.

Nor was there anything new to the idea that the Merchant's Shipping Act 1988 would have to give way to a contrary Community right of the Spanish fishermen, if such a right were found to exist. This was always clear from the way British courts have interpreted and applied s. 2 of the ECA 1972.¹⁸⁷

The genuine constitutional novelty has occurred on a different level which is linked to a peculiarity in the nature of interim protection. As long as the ECJ has not clarified the meaning of the relevant Community provisions, the national judges cannot know which law they

¹⁸⁵ See *Financial Times*, 21 June 1990, Emergency debate call refused; The Times, 21 June 1990, Speaker refuses emergency debate on supremacy of Parliament.

¹⁸⁶ *The Times*, June 25 1990, Letters to the Editor, p. 13.

¹⁸⁷ This was also expressly conceded by the Court of Appeal, [1989] 2 CMLR 353 at 403 per Bingham LJ.

ought to apply. Since it is not evident whether the national rule must yield to Community law, they are faced with a choice of two putative rights, each of which can claim the benefit of the presumption of validity. However, since the ECJ does not create the law but only pronounces on its true meaning, the outcome is predetermined.

If a UK court disapplies an Act of Parliament in the way of interim protection and the ECJ finds that the statute was indeed conflicting with directly effective Community law, the measure was obviously fully justified *ex post facto* by s. 2(1) and (4) ECA. This is how Parliament intended to protect directly effective Community rights. But where is the justification if the Community rights did not exist?

Lord Bridge pointed out in the first judgment that any order restraining the Secretary of State from enforcing the contended provisions of the Merchant Shipping Act 1988 "would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the [ECJ] has been given. If the applicants fail to establish the rights they claim before the [ECJ], the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will."¹⁸⁸

Both the Court of Appeal and the House of Lords had agreed that the authority under the ECA to set aside legislation did not extend to this constellation. Instead, their Lordships enquired about the existence of "an overriding principle of Community law"¹⁸⁹. What they received from the ECJ was not much more than a reminder of the duty of national courts to do whatever is necessary to guarantee an effective protection of Community rights.

Thus it is not surprising that Lord Bridge, on return of the ruling

¹⁸⁸ [1989] 2 WLR 997 at 1014.

H.R.W. Wade has remarked that "this simplistic stance is no longer adequate, for in the context of Community law Parliament's will is no longer sovereign", What has happened to the Sovereignty of Parliament?, p. 2.

I disagree and submit that the following is correct: As long as there is no collision with Community law, Parliament remains fully sovereign. It can enact any law it likes.

¹⁸⁹ [1989] 2 WLR 997 at 1014 per Lord Bridge.

of the ECJ, used rather evasive language when it came to pinpoint the exact source of the Court's authority to grant interim relief¹⁹⁰: "[W]hatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act was entirely voluntary. [...] There is nothing in any way novel in according supremacy to rules of Community law in those areas in which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

Logical it may be, but it lacks a proper foundation under the ECA. The ECJ treats the whole problem of interim protection not as a question of a directly effective individual right, but (in the tradition of *Simmenthal*) as a result of the national courts' general obligation to uphold Community law. This construction renders s. 2(1) and (4) useless as a juridical basis for intervention by British courts.

Even if it was argued that there is a directly enforceable individual "right" to interim protection in appropriate cases, this is not what Parliament had in mind when it created s. 2(1) and (4) ECA 1972.

A "right" to interim protection (if one insisted on this expression) would be fundamentally different in nature from directly effective rights in the established terminology of the ECJ. It has no existence of its own and no fixed point of reference in the Treaty. It can only be a procedural reflexion, an annex to a sufficiently probable directly effective ('primary') right.

If we take *Factortame*, e.g., a "right" of the Spanish fishermen to interim protection is only the consequence of their plausible claim to primary rights under Art. 7, 52, 58 and 221 EECT.

S. 2(1) and (4) was aimed only at such primary Treaty rights which satisfy the ECJ's criteria for direct effect. It was not meant to extend to a (new) secondary "right" to interim protection. This was made clear both by the arguments of the British Government before the ECJ and by the statements in the House of Lords and the Court of Appeal.

The only remaining conventional attempt of an explanation is that the ECJ has established a precedent which the British courts are bound to observe by virtue of s. 3(1) ECA. However, when read in context, s. 3

¹⁹⁰ [1990] 3 CMLR 375 at 380.

does not convey the impression that it was intended as a gateway to judicial powers over Parliament's sovereign will which go beyond the concessions in s. 2(1) and (4).

The more convincing conclusion from *Factortame* is that the UK courts are prepared to assume *on their own motion* the powers which are necessary to fulfil their function within the Community¹⁹¹, thereby leaving the tested grounds of constitutional orthodoxy.

Strangely, this view can be best supported by an analysis of the judgments in the Court of Appeal¹⁹² which reveals some instructive details! Bingham LJ addressed the constitutional issue of the supremacy of Community law in some length.¹⁹³

After recalling the historical roots of Parliamentary Sovereignty he said that Dicey's definition that there can be no authority with the right to nullify or treat as void an Act of Parliament had been invalidated as a result of s. 2 ECA 1972.¹⁹⁴

This remained the only time s. 2 ECA was mentioned. The emphasis of the following argument rests entirely on extensive citations of the ECJ in *Van Gend* and *Simmenthal*. What is so unusual about this is that Bingham LJ not only supported the conclusions, but also fully endorsed the ECJ's reasoning why Community law should prevail over national law.

For the first time, a judge in a higher English court took up the notion of the Community as 'a new legal order of international law'¹⁹⁵

Why then did the Court of Appeal overrule the Divisional Court's decision to grant the applicants interlocutory relief against the crown? The only reason was that the judges could not see a basis for such a remedy in Community law. Lord Donaldson MR said: "The ultimate

¹⁹¹ See also Allott, p. 377.

¹⁹² [1989] 2 CMLR 392.

¹⁹³ *Ibid*, at 400 et seq.

¹⁹⁴ This corresponds to statements like Hodgson J's in the Divisional Court who, referring to a decision of the House of Lords, said: "It was decided at a time when it was unthinkable that there should be in an English court a higher authority than an Act of Parliament: but there is now in English law such a higher authority.", [1989] 2 CMLR 353 at 380.

¹⁹⁵ *Ibid*, at 401.

question is thus whether the courts of this country have any power to interfere with the operation of the 1988 Act itself, either by modifying its operation or striking it down, and of doing so not on a permanent basis founded upon Community law or the British European Communities Act 1972 but on a temporary basis pending a ruling by the European Court of Justice. The answer to this question, I have no doubt, is in the negative, whether we base ourselves on national or on Community law or on both. [...] Accordingly, albeit with some reluctance, I have come to the conclusion that in the circumstances of this case there is no juridical basis upon which interim relief can be granted by the British courts."¹⁹⁶ Bingham LJ added: "If, of course, the European Court of Justice were to rule, as a matter of Community law, that the law obliged or entitled national courts to override national laws, whether statutory or otherwise, where to do so was necessary or desirable for the protection of claimed but unestablished Community rights, the situation would be quite different."¹⁹⁷

b) Two Sunday Trading Cases

Another case which illustrates the shift of emphasis away from the provisions of the ECA and towards the case law of the European Court is *W.H. Smith Do-It-All Ltd. v. Peterborough City Council*¹⁹⁸. This was one of a number of cases in which the High Court had to deal with the effect of Art. 30 (and 36) EEC on s. 47 of the Shops Act 1950 which regulates Sunday trading.

Mustill LJ explained what entitled him to check on the validity of this Act¹⁹⁹: "The United Kingdom has no constitutional courts in the same sense as in other countries. True, the exercise of the Royal prerogative and of delegated legislation is now theoretically capable of being called into question. But it is axiomatic that the courts have no supervisory or revising powers in relation to primary legislation. If Parliament speaks, the courts must obey. This is still the fundamental principle of our constitutional law, but it has

¹⁹⁶ *Ibid*, at 397/8.

¹⁹⁷ *Ibid*, at 403.

¹⁹⁸ [1990] 2 CMLR 577.

¹⁹⁹ *Ibid*, at 580.

more recently been overlaid with qualifications of increasing importance to daily life *stemming from the accession of the United Kingdom to the European Communities* [emphasis added]. [...] one thing may be taken as clear for the purposes of the present case; that if there is a collision [...] between section 47 of the 1950 Act and Art. 30 EEC Treaty, the former must yield."

Neither this nor the following judgment by Schiemann J. contained any reference to s. 2 ECA²⁰⁰! Instead, the restriction of the axiomatic (!) sovereignty of Westminster was derived from the fact of membership, an approach which has a distinctly monist ring.

The court also seems to accept that membership of the Community may limit the areas in which national legislatures can enact valid new legislation. This follows as *argumentum e contrario* from the following statement²⁰¹: "Pending the achievement of a homogeneous society by force of law, the European institutions recognise that there are fields in which national legislation and courts can legitimately apply their own norms."

The boldest dictum yet to be made by an English court can be found in *Stoke-on-Trent City Council v. B & Q plc*²⁰², another Sunday trading case. When reading the following it should be kept in mind that the case only involved pre-accession legislation (s. 47 Shops Act 1950). The conflict could have easily been handled by simply applying s. 2 ECA in the most orthodox of manners. As it is, the ECA was not even mentioned. Instead Hoffmann J made the following remarkable statement²⁰³: "The Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the Community meant that (subject to our undoubted right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which it regulated. The entry into the Community was in itself a high act of social and economic policy, by which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership."

²⁰⁰ This was certainly not for a lack of opportunity, as Mustill LJ delivered a detailed analysis of the effects of Art. 30 EECT.

²⁰¹ *Op. cit.*, note 198, p. 585.

²⁰² [1990] 3 CMLR 31, High Court (Chancery Division).

²⁰³ *Ibid*, at 34.

This goes way beyond *Macarthys* in more than one respect. The limitation of Parliament's powers is not seen as a result of the ECA, but as a necessary consequence (and precondition) of membership. This is no longer an adaptation of the traditional dualist view of international law; this position is clearly monist. If Hoffmann J is serious about this, then he would not even give effect to an Act of Parliament which *intentionally and expressly* repudiated the Treaty.²⁰⁴ The only step that could reverse this surrender of power would be if the UK *left* the Community, which is something completely different from the form requirement for inconsistent legislation in *Macarthys*. Hoffmann J thinks that As long as the UK remains a member of the EC, the courts are in a similar position to courts in countries with a written constitution²⁰⁵: "The power to review Acts of Parliament is new to the courts of this country but familiar in any country, like the United States, Canada and Australia, which has a constitution containing limitations on the powers of an otherwise sovereign legislation."

Lord Denning has once remarked that "legal theory does not always march alongside political reality."²⁰⁶ But it is also true that "legal theorists have no option but to accommodate their concepts to the facts of political life."²⁰⁷

Apparently, this is what Hoffmann J attempted to do, thus drawing the consequences from the fact that the traditional view of Parliamentary Sovereignty has become increasingly detached from political reality.

It may be objected that all this is overinterpreting the dicta; that too much significance is accorded to minor details. After all, these are but a few cases and the majority of judgments still favours an approach which is firmly based on s. 2 ECA and its interpretation in

²⁰⁴ This coincides with an interesting new trend which can be observed both in the Court of Appeal's and in the Divisional Court's judgments in *Factortame* ([1989] 2 CMLR 392 at 374 (Div. Court) and 401, CA): often when Lord Denning's statement in *Macarthys* is quoted, the passage about the possibility of an intentional repudiation of Community obligations is omitted.

²⁰⁵ *Ibid.*, at 49.

²⁰⁶ *Blackburn v. Attorney General*, [1971] 1 WLR 1037 at 1040.

²⁰⁷ See de Smith/ Brazier, p. 68. See also Winterton, p. 617.

Macarthys.

There is, admittedly, a danger involved in trying to detect trends and tendencies which could in time lead to a major development in constitutional law. Perhaps the new tones will find no echo and share the fate of the *Pigs Marketing Board* case.

On the other hand, a number of writers have observed that British constitutional development represents a triumph of gradualism²⁰⁸ which often happens in "quantum-jump discontinuities occurring within convenient patches of intellectual fog."²⁰⁹ If the novel approach demonstrated especially in the High Court but also in the Court of Appeal is continued and is found to be convincing by more judges (preferably in the House of Lords) then this could in retrospect well have been the beginning of a significant change of the rule of recognition and thus of the doctrine of Parliamentary Sovereignty.

²⁰⁸ See R. Brazier, The Machinery of British Constitutional Reform, at p. 234; see also Howe, Sovereignty and Interdependence: Britains Place in the World, p. 680.

²⁰⁹ Allott, p. 379.

E. Summary and Outlook

I. Summary

This paper has analysed the impact membership of the European Communities has on the British doctrine of Parliamentary Sovereignty. In the course of the examination, four main questions arose which had to be answered:

- What is the nature of Parliamentary Sovereignty?
- How does the doctrine of Parliamentary Sovereignty adapt to changing historic conditions?
- In what ways is European Community law different from traditional international law and why does membership of the European Community collide with Parliamentary Sovereignty?
- What concrete proof is there of changes to the doctrine since the United Kingdom entered the Community in 1973?

The following represents, in simplified form, the findings of this thesis.

- (1) The doctrine of Parliamentary Sovereignty is a legal concept which describes the legislative powers of the United Kingdom Parliament and its relation to the judicature. It is not identical with the sovereignty of the United Kingdom as a state, nor does it always coincide with the seat of effective political power.
- (2) Under the doctrine, the Queen-in-Parliament has unlimited power to make or unmake any law whatsoever. The courts of the UK are under a legal duty to apply every enactment which is identified as an Act of Parliament. There is no rival legislative authority, nor a body or person with the right to set aside the legislation of Parliament.
Acts of Parliament as the highest form of law prevail over international law and natural law. Their subject-matter is not confined to the people or the territory of the United Kingdom.
- (3) Opinion as to whether Parliament can limit its own power or bind its successors is divided. One view is that Parliament can establish new requirements for the manner and form of future

legislation. However, the prevailing view (and the one with better support from constitutional practice before Britain's accession to the European Communities) is that Parliament is unable to impose limitations, be it on the substance or the form of future legislation. According to this orthodox view of Parliamentary Sovereignty, which is based mainly on the works of the Victorian constitutional lawyer Albert Venn Dicey, every Parliament enjoys the same powers as its predecessor and can expressly or impliedly repeal any prior enactment.

- (4) The doctrine of Parliamentary Sovereignty cannot be explained fully as a product of the common law although it is there that we find evidence of its existence.

The principle that every Act of Parliament has the force of law cannot derive its validity from a still higher norm. It is a *presupposed* norm which forms the basis of the whole legal system. Therefore it does not have a legal foundation of its own. As long as this (particular) *grundnorm* (Kelsen) or *rule of recognition* (Hart) is assumed to be valid, the concept of Parliamentary Sovereignty remains intact.

- (5) The special legal quality of the doctrine illustrates why it cannot be altered by statute. However, the *rule of recognition* behind it is not immutable. History shows that the seat of supreme legislative power (and, accordingly, the underlying *rule of recognition*) has changed several times.

The present *rule of recognition* could be modified if jurists (and especially judges) feel that it adequately fails to reflect political reality. Even without taking into account membership of the Community, there is a striking discrepancy between the theoretical legal omnipotence of Parliament and the actual practical limitations of the late 20th century under which it has to operate.

- (6) The best indicator for any changes to the *rule of recognition* are judgments of the UK courts.

- (7) The European Community stands out from other international organizations in the (still increasing) broadness and depth of its objectives and in the autonomy of its institutions. It already has some elements commonly found in federal systems.

- (8) The challenge to the legal sovereignty of Westminster comes from the principles of direct effect and supremacy of Community law. Both concepts are seen by the European Court of Justice as indispensable elements of a functioning Community.
- (9) The principle of direct effect means that appropriate provisions of Community law can create rights which become part of the domestic legal systems of the member states without transformation by the national legislature and which must be enforced by the courts. National courts are thus made the primary instrument in the protection and enforcement of Community law. They have to recognize the Community as an independent source of law. This notion of the penetration of Community law into the national legal systems can more easily be accepted by member states with a monist view of international law. The principle of direct effect conflicts with the (dualist) rule under Parliamentary Sovereignty which forbids UK courts to recognize a legislative authority other than Parliament.
- (10) The principle of supremacy of Community law concerns all forms of national law, even the most fundamental constitutional rules. The *lex posterior* rule does not apply: Community law prevails over prior and subsequent national law. National courts are expected to set aside national legislation in the case of an irreconcilable conflict, even if such a power is not provided for under their domestic legal system.
- (11) In effect, this requires a new *rule of recognition* or *grundnorm* in favour of the Community, as far as Community matters are concerned (and as long as membership lasts).
- (12) Community law is incorporated into the British legal system by the European Communities Act 1972. From a traditional point of view, Community law would cease to be binding if Parliament chose to repeal the 1972 Act, which can therefore not be seen as an attempt to surrender legal sovereignty to the Community. Section 2(4) appears to recognize the principle of supremacy of Community law. However, the effectiveness of this provision is limited under the orthodox doctrine of Parliamentary Sovereignty. An Act of Parliament which is inconsistent with prior

Community law would have to be regarded as an implied repeal of s. 2 because it is the latest expression of Parliament's sovereign will. It would therefore override the conflicting Community provision.

- (13) The majority of judgments in the UK has so far affirmed that Parliament is the supreme legislative authority. Community law is not effective of its own right, but because of the European Communities Act 1972. If Parliament wishes to override Community law, it has the authority to do so.

However, the courts will only recognize such a repudiation of the Treaty of Rome if Parliament says expressly in its Act that it is to be applied notwithstanding Community law. This is the effect of s. 2(1) and (4) ECA 1972. One could say that Parliament in 1972 has impliedly bound its successors by imposing a form requirement for certain legislation, but it could only accomplish this because the courts have slightly modified the old *rule of recognition*.

- (14) The theoretical concessions and adjustments in the UK on the way to a full endorsement of the views of the ECJ have not gone as far as in some other member states. The reason for this is that on the political level, the UK Parliament has always strongly defended its extraordinary powers.

- (15) However, a number of judgments in recent years suggest that British courts might be prepared to take a substantial step forward. There are indications that Community law is accepted as binding not solely because of the ECA 1972, but because of UK membership of the Community. In cases of conflict, references to s. 2 ECA are becoming fleeting and noticeably less frequent. The arguments are rather based on the analysis of the relevant case law of the European Court. For the first time, the 'special nature' of the Community has been acknowledged. Generally, the language used signals an increasing willingness to accept the Community's view of itself and of the function of national courts in the European legal system. This would mean a new *rule of recognition* which points at Community institutions as the supreme legislative authority in all Community matters.

Should these trends continue, the consequences for the doctrine of Parliamentary Sovereignty will be profound. The Westminster Parliament (like all the other national parliaments) has already given up a substantial share of political power to the Community. If the British courts are going to adjust constitutional theory to these facts, Parliament would lose its theoretical legal omnipotence as well.

II. Outlook

As we have seen, membership of the Community in its present form has already made a deep impression on a principle of British constitutional law which is older than many democracies in continental Europe. At the moment, the governments of the twelve member states are discussing proposals on the future of the European Community which are of the greatest importance for all member states.

This is not the place to discuss whether a federal Europe (whatever that means precisely), a common defense policy or a single currency are good ideas or not. It is for the national governments to decide whether the political advantages of pooling sovereignty even further make up for the losses of power and control of the national parliaments.

What would it mean for the legal sovereignty of Parliament if the UK decided to go along with all or some of these proposals? Many regard these plans as a direct threat to the sovereignty of Westminster. They are certainly right in a political sense. Important areas of policy which are at the moment under national control would probably be governed by centralized institutions.

On the other hand, as far as legal sovereignty is concerned, there will be no direct challenge other than the one already posed by the principles of direct effect and supremacy of Community law. Whatever the future brings, the central question will still be: what is the *rule of recognition* that is applied by the courts?

The principles of constitutional change remain the same, regardless of the decisions that will be taken in the Intergovernmental Conferences.

However, if the negotiations result in a commitment to even closer integration, the judges in this country will take notice.

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