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BRITAIN IN THE EUROPEAN UNION

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SUMMARY

Membership of the European Union raises a number of important issues in domestic constitutional law. In political terms, the fact that an increasing amount of legislation emanates from the European Union means that we should be concerned about the method by which this legislation is made at EU level, and the way in which it is scrutinized in Parliament. In legal terms, EU law raises issues about sovereignty and how our membership of the European Union has affected traditional conceptions of parliamentary supremacy. Treaty articles and norms made thereunder often give rise to rights which individuals can use in their own name in national courts. The EU Charter of Rights is binding and has legal implications for national law. Membership of the European Union has also had important constitutional implications for the judiciary, since national courts also function as EU courts.

INTRODUCTION

All aspects of national law have been affected to varying degrees by membership of the European Union. Constitutional law is no exception. Indeed it is arguable that the effects of EU law on constitutional law have been particularly far reaching. This chapter describes and evaluates this impact. The discussion begins by considering the effect of the European Union on the political order. There will be analysis of the

European Union's legislative process, and the ways in which the Westminster Parliament has sought to accommodate this legislation. The focus will then shift to the effect of the European Union on the constitutional legal order. There will be discussion of sovereignty, the constitutional importance of direct effect, the relevance of EU concepts of fundamental rights, and the changed role of national courts.

THE EUROPEAN UNION AND THE NATION STATE

The idea of national identity played a powerful part in forging modern nation states out of principalities in both Germany and Italy in the second half of the nineteenth century. The nation state was lauded in literature, philosophy, and music. The horrors of the Second World War were however believed by many to be the result of excessive nationalism. It was felt that the states within Europe should be organized so as to reduce the likelihood of further conflict.[1] This practical ideal lay behind the European Coal and Steel Community (ECSC) which was signed in 1951. Coal and steel were the primary materials used in warfare. If production and distribution could be controlled by a centralized authority it would be less possible for any country to develop a war machine which could be used against its neighbours. The success of the ECSC led pro-Europeanists to believe that more complete economic and political integration was feasible. Plans were drawn up for a European Defence Community (EDC). This was felt to require some form of wider European Political Community (EPC), which would coordinate foreign policy, as well as provide for economic and

[1] J. Pinder, *European Community: The Building of a Union* (3rd edn, 1998); D. Urwin, *The Community of Europe: A History of European Integration since 1945* (2nd edn, 1995); M. Holland, *European Integration from Community to Union* (1993).

political integration.[2] Germany would be allowed a limited rearmament within the framework of the EDC. These plans proved to be too ambitious. The French left and right wings both objected, albeit for different reasons, to the idea of German rearmament, even within the EDC. The collapse of the EDC led also to the abandonment of ideas for the EPC.

This setback convinced advocates of European integration that a less overtly political step would be more likely to gain agreement. This was the rationale behind the European Economic Community (EEC) in 1957, the Treaty of Rome. The focus was primarily on economic integration, bringing down trade barriers and ensuring free movement of economic factors of production. The architects of the original Treaty were however fully aware of the relationship between economics and politics. They realized that closer economic integration would bring closer coordination on social policy, as well as matters which had a more direct political impact.

There were important amendments to the Treaty of Rome. The Single European Act 1986 had the principal objective of facilitating the completion of the single market. The Treaty on European Union, the Maastricht Treaty, which entered into force in 1993, was more far-reaching. It introduced the three pillar structure. The First Pillar embraced the Community Treaties, and was supranational in nature. A number of important institutional and substantive changes were made, including an increase in the powers of the European Parliament, and the setting of a detailed timetable for economic and monetary union. The Second Pillar was concerned with Common Foreign and Security Policy, and the Third Pillar with Justice and Home

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[2] The proposal for an EDC was made by France in 1950 and the EDC Treaty was signed, but not ratified, in 1952 by the six states of the ECSC. The French National Assembly refused to ratify the EDC Treaty. Plans for both defence and political union were then shelved.

Affairs. What distinguished the Second and Third Pillars was that decision-making remained much more intergovernmental in nature, as compared to that which operates in the First Pillar. The member states dominated decision making under the Second and Third Pillars, largely to the exclusion of the Commission and the European Parliament, with the European Court of Justice excluded from the Second Pillar and given only a limited role under the Third Pillar. Notwithstanding this fact, it should not be forgotten that the Maastricht Treaty overall increased the powers of the European Union and the European Community. Decision-making under the Second and Third Pillars may well have been more intergovernmental than under the First Pillar, but the reality was nonetheless that the sphere over which the European Union had competence increased, and there was now an institutionalized forum within which to discuss important matters such as foreign policy, asylum, cross-border crime and the like. The Treaty of Amsterdam, which entered into force in 1999, brought further changes. The line between decision making within the Second and Third Pillars, and that within the First Pillar, was blurred. While the former remained intergovernmental in nature, they were infused with more supranational tenor than hitherto, and some of the subject matter previously dealt with under the Third Pillar was transferred to the First Pillar. The Treaty of Nice 2000 dealt primarily with the institutional consequences of enlargement. The Treaty provisions dealing with institutional issues had remained largely unchanged since the inception of the EEC. The expansion of the European Community to include 15 member states, with the prospect of further significant enlargement eastwards, was the catalyst for addressing some of the basic issues concerning institutional structure, such as the size of the European Parliament, the voting rules in the Council and whether each member state should continue to have one Commissioner.

The new millennium saw attempts at more comprehensive treaty reform, the origins of which are to be found in the Nice Treaty, which left open four issues for future deliberation: the 'delimitation of powers' between the European Union and the member states, the status of the Charter of Fundamental Rights, simplification of the Treaties, and the role of the national Parliaments. The Laeken European Council in 2001 issued a Declaration that considerably broadened the range of matters that should be discussed concerning the future of Europe. No longer were there four 'discrete' issues. The Laeken Declaration placed just about every issue of importance concerning the future of Europe on the agenda for discussion, including major issues concerning the inter-institutional disposition of power within the European Union. It led to the establishment of the Convention on the Future of Europe, headed by the ex-French President, Giscard d'Estaing. It was not preordained that it would produce a Constitutional Treaty, but it did so.[3] The Constitutional Treaty was, after some hesitation and amendment, accepted by the member states. It then had to be accepted by all of the member states in accord with their constitutional traditions for Treaty ratification. After the negative votes in the French and Dutch referenda the ratification process was however put on hold.

The process of treaty reform was revived in 2007, and this led to the Treaty of Lisbon,[4] which was finally ratified by all member states in 2009.[5] The Treaty of Lisbon amends the previous treaties. The European Union is henceforth to be founded on the Treaty on European Union (TEU), and the Treaty on the Functioning of the

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[3] Treaty Establishing a Constitution for Europe [2004] OJ C310/1.

[4] P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (2010).

[5] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83/1.

European Union (TFEU), and the two Treaties have the same legal value.[6] The European Union replaces and succeeds to the European Community.[7] The TEU contains some but not all of the constitutional principles that govern the European Union. The TFEU contains the provisions as amended that were previously to be found in the EC Treaty. The Treaty of Lisbon has removed the formal three pillar structure. The provisions of the Third Pillar have been incorporated into the TFEU and are subject to the ordinary Treaty regime. There are however still distinct rules relating to the Common Foreign and Security Policy that are found in the TEU. In terms of overall content the Treaty of Lisbon drew heavily on the Constitutional Treaty.

There are now seven formal EU institutions.[8] The Assembly was originally an indirectly elected body representing the people. It is now called the European Parliament and is composed of directly elected representatives from the member states. The European Council consists of the heads of state, the President of the European Council, and the President of the Commission. The Council of Ministers is composed of representatives from the member states. The members of the Commission are appointed from the states, but they are independent of their own country and represent the EU interest. The fifth official EU institution is the Court of Justice of the European Union, and the remaining two are the European Central Bank, and the Court of Auditors. The powers accorded to the different institutions, and the way in which they interact, have changed markedly over time.

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[6] TEU, Art. 1, para. 3.

[7] Ibid, Art. 1 para. 3.

[8] Ibid, Art. 13.

THE LEGISLATIVE AND DECISION-MAKING PROCESS

For the first 30 years of the Community's existence decision-making was dominated by the Council and Commission. The Assembly, had limited formal powers in the EEC Treaty. Its role in the legislative process was restricted: it only had a right to be consulted where a specific treaty article stipulated that this should be so. The confined nature of the Assembly's powers was explicable in part because few if any international organizations had any democratically elected legislature with real power at the international level. The explanation was also in part a reflection of the view of the Community held by its prime architects. Monnet, one of the principal founders, adopted a strategy of what has been termed elite-led gradualism.[9] It was hoped that popular consent would follow this lead, but the need to engage powerful business and labour organizations was accorded a much higher priority than the 'direct involvement of as yet uninformed publics'.[10] While Monnet was broadly in favour of a democratic Community 'he saw the emergence of loyalties to the Community institutions developing as a *consequence* of elite agreements for the functional organization of Europe, not as an essential *prerequisite* to that organization'.[11] Moreover, the legitimacy of the Community was to be secured through outcomes: peace and prosperity.

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[9] W. Wallace and J. Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent', in J. Hayward (ed.), *The Crisis of Representation in Europe* (1995) 140.

[10] Ibid., p. 140.

[11] M. Holland, above, n. 1, p. 16. Original emphasis.

It was the Commission and the Council that dominated decision-making during this 30-year period. The Commission was given a plethora of powers of a legislative, administrative, executive, and judicial nature.[12] Its legislative powers were of particular importance. The Commission has the right of legislative initiative, which means that it has a major influence over the development of the Community's legislative agenda. This, and its other powers, served to place the Commission at the heart of the Community.

Notwithstanding this array of formal powers, the Council exerted increasing control over the Commission during this period. This was largely through institutional developments that were initially outside the strict letter of the Treaty, which increased the Council's influence over Community legislation. The Luxembourg Accords ensured that decisions that affected important interests of a particular member state would not be taken unless that state agreed, even where the Treaty stipulated that voting was to be by qualified majority. Decision-making was thus carried forward under the 'shadow of the veto' even when it was not formally invoked. The Committee of Permanent Representatives, the organ providing institutional support for the Council, developed its own working parties which enabled it to engage in a dialogue with the Commission over the details of legislative proposals. Management and regulatory committees emerged as the vehicle through which member state input could be ensured when decision-making had been delegated to the Commission. Finally, the European Council, meetings of the heads of state, became an institutionalized forum through which member states could influence the overall direction of the Community at the highest level.

[12] P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (5th edn, 2011) ch. 2.

The Assembly, formally renamed the European Parliament (EP) by the Maastricht Treaty, pressed for greater powers in the legislative process, bolstered by the fact that it had been directly elected since 1979. In the early 1980s it put forward radical proposals for a revision of the Treaty, which would have placed it in the centre of the legislative process. These proposals fell largely on stony ground. However, the Single European Act 1986 did afford the EP a real role in the legislative process for the first time. The co-operation procedure gave the EP power in the enactment of legislation, and made it necessary for the Commission, when drafting legislation, to take account of the EP's views.[13] The years since 1986 saw the powers of the EP increase still further. The Maastricht Treaty[14] introduced the co-decision procedure, which gave more power to the EP than the co-operation procedure. The Treaty of Amsterdam[15] further strengthened the EP's position under the co-decision procedure and extended its sphere of application. The Treaty of Lisbon has continued this development. The co-decision procedure has been re-labelled the ordinary legislative procedure, its sphere of application has been further extended, with the consequence that the Council and EP are said to exercise legislative functions jointly.[16]

The details of the procedure are complex.[17] A proposal is sent by the Commission to the Council and the EP. The EP can if it wishes propose amendments at its first reading of the measure. If the Council approves these then the proposed act

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[13] M. Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policy-Making Process* (1994), and *A Modern Guide to the European Parliament* (1994).

[14] The Maastricht Treaty entered into force in 1993.

[15] The Treaty entered into force in 1999.

[16] Treaty of Lisbon, TEU, Arts 14(1) and 16(1).

[17] Ibid., TFEU, Art. 294.

can be adopted at that stage. The Council may however not agree with the EP's amendments, in which case the Council adopts its position, which is communicated to the EP. The EP then has three months to respond. It can at this Second Reading of the measure agree to the Council's position, or not take a decision. The act will then be deemed to have been adopted in accordance with the Council's position. The EP may alternatively reject the Council's position in which case the act will not be adopted. It may however suggest further amendments. It is open to the Council to accept the EP's Second Reading amendments, in which case the act becomes law in the form of the Council's position as amended. If the Council does not approve of all the amendments then a meeting of the Conciliation Committee is convened. The Conciliation Committee has an equal number of representatives from the Council and the EP. Its task is to reach agreement on a joint text. If it is able to do, then this must be approved by the EP and the Council.

Although the ordinary legislative procedure is complex it accommodates the differing institutional interests of those concerned with the passage of EU legislation. The Commission will consult with the EP and the Council about the overall legislative programme for the coming year. It will also consult with the Council, or more accurately the Committee of Permanent Representatives, and the EP, or the relevant committee thereof, about a draft measure before it begins to go through the TFEU, Art. 294 procedure. The formal powers given to the EP by Art. 294 enable it to propose changes at an early stage which, if accepted by the Council, can then be embodied in the measure which becomes law at that stage. The EP is then given further power if the Council does not accept all the EP's first reading suggestions. The EP can accept, reject, or propose further amendments to the Council's position at the

Second Reading stage. The bottom line is that an act will not be passed unless both the EP and the Council agree.

THE NATURE OF THE EUROPEAN UNION

It is important not to view the European Union as if it were a nation state, nor should one necessarily expect the form of institutional ordering to conform to that commonly found at the domestic level. Conceptions of the separation of powers, which play a marked role in the allocation of functions within domestic constitutions, do not have the same centrality within the European Union. The legislative process is divided between the Council, the EP, and the Commission. This has a real impact on the relationship between the EP and the Council. The latter, for all its power, cannot dominate the former in the way that the executive dominates the legislature at Westminster. The EP will be run by the largest party, or a coalition, which will have its own agenda, albeit being mindful of what will be acceptable to the Council and the Commission. Responsibilities of an executive nature are exercised by the Commission, the Council, and the European Council. Administrative responsibility for the implementation of EU policy lies principally with the Commission, but it will often work through and with national bureaucracies. The EP does moreover have oversight powers through which it can call the Commission to account for the way in which EU policy is administered. It was the exercise of these powers that led to the appointment of the Committee of Independent Experts, whose report prompted the resignation of the Santer Commission in 1999.

Judicial power resides principally with the European Court of Justice (ECJ) and the General Court (GC), which is the new name for the Court of First Instance (CFI). The Commission also has powers of a judicial nature. It will be the body that brings member states to court under TFEU, Art. 258 if they are in breach of the Treaty. The Commission will give the initial judicial decision on important issues such as competition law and state aids. The ECJ and the GC have far-reaching powers of judicial review, which can be used to ensure that EU institutions do not exceed their power. The ECJ will adjudicate on important inter-institutional disputes between the principal EU organs. The ECJ has read into the Treaty general principles of law which are used to judge the legality of EU action. These principles include proportionality, legitimate expectations, principles of procedural legality and fundamental rights. It is the ECJ which will also adjudicate on disputes concerning subsidiarity, whereby member states will challenge the competence of the European Union to act, arguing that the subject matter should have been left for resolution at state level.[18]

The theme which appears repeatedly in papers emanating from the European Union is that of institutional balance, rather than separation of powers.[19] This refers to the desirability of preserving a proper balance of power between the Council, as representing the interests of the member states, the EP as representing the people, and the Commission as guardian of the overall aims of the treaty. While classical ideas of the separation of powers are not therefore central to the institutional ordering within the European Union, another constitutional principle, the Rule of Law, is of prime importance. TEU, Art. 2 declares that the European Union is founded on the respect for human dignity, freedom, democracy, equality, human rights and the Rule of Law.

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[18] Case C-84/94, *United Kingdom* v. *Council* [1996] ECR I-5755; Case C-233/94, *Germany* v. *European Parliament and the Council* [1997] ECR I-2405.

[19] P. Craig, 'Democracy and Rulemaking within the EC: An Empirical and Normative Assessment' (1997) 3 *ELJ* 105.

Respect for these principles is made a condition of membership of the European union.[20]

THE UK PARLIAMENT AND LEGISLATIVE SCRUTINY

EU membership has significant implications for the Westminster Parliament, and also for the Welsh Assembly and the Scottish Parliament. We shall begin by considering the machinery introduced to deal with EU legislation, and then consider the subsidiarity controls that reside with national parliaments.

In terms of machinery,[21] Committees of the House of Commons have been established to consider whether legislation is necessary to implement, for example, an EU directive, and also to scrutinize proposals that emerge from the European Union, in order to provide Parliament with information about impending European legislation. The system works in the following way. The European Scrutiny Committee examines EU documents, such as draft proposals for legislation, and reports on the 'legal and political importance' of each document. The scrutiny is conducted in the light of the Explanatory Memorandum produced by the relevant government department on the EU documents. The Committee considers approximately 1,100 documents each year, half of which are deemed to be of legal or

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[20] Treaty of Lisbon, TEU, Art. 49.

[21] T. St J. N. Bates, 'European Community Legislation before the House of Commons' (1991) 12 *Stat LR* 109; E. Denza, 'Parliamentary Scrutiny of Community Legislation' (1993) 14 *Stat LR* 56; *European Scrutiny System in the House of Commons* (2012), http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/guides/

political importance, such that the Scrutiny Committee reports substantively on them. It recommends approximately 40 such documents per year for further consideration by one of the European Standing Committees, and approximately three per year for debate on the floor of the House. The latter only occurs if the House decides that they should be considered in this way. There are three European Standing Committees[22] and the relevant committee will consider the merits of the issues. The reports of the European Scrutiny Committee are clearly and succinctly presented.[23] They show an awareness of the legal and political importance of issues that are often complex. The committee's evaluation will sometimes support that of the relevant government minister, and will sometimes take a differing line. The very fact that there is a body within the UK looking at such issues, other than the relevant department of state, is undoubtedly beneficial. The European Scrutiny committee will also liaise where necessary with departmental select committees. The new regime has undoubtedly had

[22] Committee A: Energy and Climate Change; Environment, Food and Rural Affairs; Transport; Communities and Local Government; Forestry Commission. Committee B: HM Treasury; Work and Pensions; Foreign and Commonwealth Office; International Development; Home Office; Justice; and matters not otherwise allocated. Committee C: Business, Innovation and Skills; Children Schools and Families; Innovation, Culture, Media and Sport; and Health.

[23] See e.g. Fourteenth Report of the European Union Scrutiny Committee, *Aspects of the EU's Constitutional Treaty*, HC 38-xiv-1 (2005); Fourteenth Report of the European Union Scrutiny Committee, 2008–09, *Free Movement of Workers in the EU*, HC 324 (2009); Eleventh Report of the European Scrutiny Committee, *Ukraine and Russia: EU Restrictive Measures*, HC 219-xi (2014)

a positive impact.[24] It has been enhanced by the scrutiny reserve resolution, which means that, subject to certain exceptions, a UK minister will not vote in the Council on matters that have not been cleared by the ESC.

It has in the past been hampered by the brevity of time left for discussion before the EU legislation is considered by the Council. The Treaty of Lisbon is designed to alleviate this problem. Documents such as green and white papers are sent to national Parliaments as soon as they are published, and draft legislative acts are transmitted to them at the same time as they are sent to the Council and Commission.[25] The general rule is that an eight-week period must elapse between transmission of a draft legislative act to national Parliaments, and its being placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure.[26] The national Parliaments also receive the agendas and outcomes of Council meetings at the same time as national governments.[27]

There is in addition a House of Lords' Select Committee on the European Union. It is chaired by a salaried officer of the House[28] and considers any EU proposal that it believes should be drawn to the attention of the House. The Committee functions through a number of subcommittees which are subject-matter

[24] *The European Scrutiny System in the House*, above, n. 21.

[25] TEU, Art. 12; Protocol (No. 1) On the Role of National Parliaments in the European Union, Art. 1.

[26] Protocol (No. 1), Art. 4.

[27] Ibid., Art. 5.

[28] The chairman will decide which issues are of sufficient importance to warrant scrutiny by one of the subcommittees.

based.[29] These subcommittees will co-opt other members of the House of Lords for the investigation of particular issues. The House of Lords' Select Committee is therefore different from that in the House of Commons. The latter will sift through EU legislation and refer matters on to the standing committee where this is warranted. The House of Lords' committee will produce its own valuable, detailed reports on particular issues.[30]

The role of national Parliaments in the scrutiny of draft EU legislation has been strengthened by the Treaty of Lisbon provisions on subsidiarity. The basic idea behind subsidiarity is that action should only be undertaken at EU level where because of the scale or effects of the action it can be better achieved through EU action rather than national action.[31] The detailed scheme is contained in the Protocol on the Application of the Principles of Subsidiarity and Proportionality.[32] It imposes an obligation to consult widely before proposing legislative acts.[33] The Commission must provide a detailed statement concerning proposed legislation so that compliance

[29] There are six such subcommittees which deal with: economic and financial affairs; internal market, infrastructure and employment; external affairs; agriculture, fisheries, environment and energy; justice,institutions and consumer protection; home affairs, health and education.

[30] See e.g. Third Report of the Select Committee on the European Communities, HL 23 (1999), dealing with reforms to Comitology procedures; ; Tenth Report of the European Union Committee, *The Future Regulation of Derivatives Markets: Is the EU on the Right Track?*, HL 93 (2010); Second Report of the European Union Committee, *EU Data Protection Law: 'A Right to be Forgotten?'* HL 40 (2014)

[31] TEU, Art. 5(3).

[32] Protocol (No. 2), On the Application of the Principles of Subsidiarity and Proportionality.

[33] Ibid., Art. 2.

with subsidiarity can be appraised.[34] The Commission must submit an annual report on the application of subsidiarity to the European Council, the EP, the Council, and to national Parliaments.[35] The ECJ has jurisdiction to consider infringement of subsidiarity under TFEU, Art. 263, brought by the member state, or 'notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'.[36]

The most important innovation in the Protocol on Subsidiarity is the enhanced role accorded to national Parliaments.[37] The Commission must send all legislative proposals to the national Parliaments at the same time as to the EU institutions.[38] A national Parliament or Chamber thereof, may, within eight weeks, send the Presidents of the Commission, EP, and Council a reasoned opinion as to why it considers that the proposal does not comply with subsidiarity.[39] The EP, Council and Commission must take this opinion into account.[40] Each national Parliament has two votes[41] and where

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[34] Ibid., Art. 5.

[35] Ibid., Art. 9.

[36] Ibid., Art. 8.

[37] J-V. Louis, 'National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', in I. Pernice and E. Tanchev (eds), *Ceci n'est pas une Constitution – Constitutionalization without a Constitution?* (2009) 131–54; G. Bermann, 'National Parliaments and Subsidiarity: An Outsider's View', ibid., 155–61; J. Peters, 'National Parliaments and Subsidiarity: Think Twice' (2005) *European Constitutional L Rev* 68.

[38] Subsidiarity and Proportionality, above, n. 32, Art. 4.

[39] Ibid., Art. 6.

[40] Ibid., Art. 7(1).

[41] Ibid.

non-compliance with subsidiarity is expressed by national Parliaments that represent one third of all the votes allocated to them, the Commission must review its proposal.[42] The Commission, after such review, may decide to maintain, amend or withdraw the proposal, giving reasons for the decision.[43] Where a measure is made in accord with the ordinary legislative procedure, and at least a simple majority of votes given to national parliaments signal non-compliance with subsidiarity, then the proposal must once again be reviewed and although the Commission can decide not to amend it, the Commission must provide a reasoned opinion on the matter and this can, in effect, be overridden by the EP or the Council.[44]

It is clear that there will continue to be many areas in which the comparative efficiency calculus in TFEU, Art. 5(3) favours EU action, more especially in an enlarged European Union. Much will depend on the willingness of national Parliaments to devote the requisite time and energy to the matter. The national Parliament has to submit a reasoned opinion as to why it believes that the measure infringes subsidiarity. It will have to present reasoned argument as to why the Commission's comparative efficiency calculus is defective. This may not be easy. It will be even more difficult for the requisite number of national Parliaments to present reasoned opinions in relation to the same EU measure so as to compel the

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[42] Ibid., Art. 7(2). This threshold is lowered to one quarter in certain cases concerning the area of freedom, justice and security.

[43] Subsidiarity and Proportionality, above, n. 32, Art. 7(2).

[44] Subsidiarity and Proportionality, above, n. 32, Art. 7(3).

Commission to review the proposal.[45] The Commission is nonetheless likely to take seriously any such reasoned opinion, particularly if it emanates from the Parliament of a larger member state.

SOVEREIGNTY

THE TRADITIONAL DEBATE

A detailed analysis of parliamentary sovereignty is provided by Mark Elliott in this volume.[46] The present discussion will focus on sovereignty and the European Union. It is however necessary to mention, albeit briefly, some of the background to the general sovereignty debate.

The debate over sovereignty has been characterized as a contest between the traditionalists, represented by Dicey and Wade,[47] and upholders of the New View, represented by Jennings,[48] Heuston,[49] and Marshall.[50] The form of argument used by Sir William Wade is in fact different from that advanced by Dicey, and therefore it is the views of Wade that will be considered here. No attempt will be made to consider

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[45] P. Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (2012); A Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36 *ELRev* 48

[46] Chapter 2 above.

[47] A. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, 1967); H. W. R. Wade, 'The Basis of Legal Sovereignty' [1955] *CLJ* 172..

[48] Sir I. Jennings, *The Law and the Constitution* (5th edn, 1959) ch. 4.

[49] R. F. V. Heuston, *Essays in Constitutional Law* (2nd edn, 1964) ch. 1.

[50] G. Marshall, *Constitutional Theory* (1971) ch. 3.

the detail of the debate between Wade and the advocates of the New View.[51] The view of sovereignty advanced by Sir William Wade is captured in the following quotation:[52]

> An orthodox English lawyer, brought up consciously or unconsciously on the doctrine of parliamentary sovereignty stated by Coke and Blackstone, and enlarged on by Dicey, could explain it in simple terms. He would say that it meant merely that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; that it was always open to the legislature, so constituted, to repeal any previous legislation whatever; that therefore no Parliament could bind its successors . . . He would probably add that it is an invariable rule that in case of conflict between two Acts of Parliament, the later repeals the earlier. If he were then asked whether it would be possible for the United Kingdom to 'entrench' legislation—for example, if it should wish to adopt a Bill of Rights which would be repealable only by some specially safeguarded process—he would answer that under English law this is a legal impossibility: it is easy enough to pass such legislation, but since that legislation, like all other legislation, would be repealable by any ordinary Act of Parliament the special safeguards would be legally futile. This is merely an illustration of the rule that one Parliament cannot bind its successors. It follows therefore that there is one, and only one, limit to Parliament's legal power: it cannot detract from its own continuing sovereignty.

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[51] P. Craig, 'Parliamentary Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 *YBEL* 221.

[52] Wade, above, n. 47, p. 174.

This thesis has been vigorously challenged by the proponents of the New View, who argued that 'manner and form' provisions enacted in a particular statute would be binding, in the sense that a later statute dealing with the same subject matter could only alter the earlier statute if passed in accordance with the provisions of that earlier statute.[53]

THE JUDICIAL RESPONSE PRIOR TO *FACTORTAME*

On the traditional view of sovereignty as represented by Sir William Wade the latest will of Parliament must predominate. If there is a clash between a later and an earlier norm, then the former impliedly repeals the latter. This view of sovereignty meant that there could be tensions between UK and EU law. The primacy of EU law over national law[54] was asserted by the ECJ early in its developing jurisprudence,[55] and extended by later case law.[56]

Prior to *Factortame* there were three differing strands within the UK jurisprudence. In some cases courts spoke in terms of the traditional orthodoxy on sovereignty.[57] The second, and dominant, line of cases sought to blunt the edge of any conflict between the two systems by using strong principles of construction: UK law

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[53] Above, nn. 48, 49 and 50.

[54] Craig and de Búrca, above, n. 12, ch. 10.

[55] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585, 593.

[56] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal Spa* [1978] ECR 629.

[57] *Felixstowe Docks Railway Co.* v. *British Transport Docks Board* [1976] 2 CMLR 655, 664.

would, whenever possible, be read so as to be compatible with EU law.[58] In the third type of case the courts accepted, in principle, the idea of purposive construction, but felt unable to read the UK legislation to be in conformity with the relevant EU norm.[59]

FACTORTAME, EOC, *THOBURN* AND *HS2*

The leading decision is now *R.* v. *Secretary of State for Transport ex parte Factortame Ltd*.[60] The applicants were companies incorporated under UK law, but the majority of the directors and shareholders were Spanish. The companies were in the business of sea fishing and their vessels were registered as British under the Merchant Shipping Act 1894. The statutory regime governing sea fishing was altered by the Merchant Shipping Act 1988. Vessels that had been registered under the 1894 Act had to register under the new legislation. Ninety-five vessels failed to meet the new criteria and the applicants argued that the relevant parts of the 1988 Act were incompatible with the EC Treaty, Arts 52, 58 and 221.[61]

Whether the 1988 statute was in breach of EC law was a contentious question, and therefore a reference was made to the ECJ under EC Treaty, Art. 177 (now TFEU, Art. 267). The issue in the first *Factortame* case concerned the status of the 1988 Act pending the ECJ's decision on the substance of the case. If the applicants could not fish in this intervening period they might well go out of business.. Their Lordships held that, as a matter of domestic law, interim relief against the Crown was

58 *Litster* v. *Forth Dry Dock* [1990] 1 AC 546.

59 *Duke* v. *GEC Reliance* [1988] AC 618.

60 [1990] 2 AC 85.

61 TFEU, Arts 49, 54 and 55, after the Treaty of Lisbon.

not available,[62] and therefore the applicants could not be given financial protection pending the outcome of the case. The House of Lords then sought a preliminary ruling as to whether the absence of any interim relief against the Crown was itself a violation of EC law.

The ECJ decided in favour of the applicants.[63] It reasoned from the *Simmenthal* case[64] where it had held that provisions of EC law rendered 'automatically inapplicable' any conflicting provision of national law. The *Simmenthal* decision gave a broad construction to the idea of a 'conflicting provision' of national law, interpreting it to cover any legislative, administrative, or judicial practice that might impair the effectiveness of EC law.[65] With this foundation the ECJ in the *Factortame* case concluded that the full effectiveness of EC law could be impaired by the absence of interim relief.[66]

The case then returned to the House of Lords to be reconsidered in the light of the preliminary ruling given by the ECJ, *R.* v. *Secretary of State for Transport ex parte Factortame Ltd (No. 2)*.[67] Their Lordships accepted that, at least in the area covered by EC law, such relief would be available against the Crown. *Factortame (No. 2)* also contains *dicta* by their Lordships on the more general issue of sovereignty. The final decision on the substance of the case involved a clash between

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62 Such relief is now available: *M* v. *Home Office* [1994] 1 AC 377.

63 Case C-213/89, *R.* v. *Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433.

64 Above, n. 56.

65 Above, n. 56, paras 22 and 23.

66 Above, n. 63, para. 21.

67 [1991] 1 AC 603.

Articles of the EC Treaty, and a later Act of the UK Parliament, the Merchant Shipping Act 1988. The traditional idea of sovereignty in the UK is, as we have seen, that if there is a clash between a later statuteand an earlier legal provision the later statute takes precedence. The ECJ has repeatedly held that EC law must take precedence in the event of a clash with national law. Moreover, the conflict in this instance was between national law and Articles of the Treaty itself. The ECJ has made it clear that in the event of such a clash EC law trumps national law. The dicta of the House of Lords in *Factortame (No. 2)* are therefore clearly of importance. Lord Bridge had this to say:[68]

> Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of the member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to

[68] Ibid., pp. 658–9.

> be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Three aspects of this reasoning should be distinguished. One was essentially *contractarian*: the UK knew when it joined the European Community that priority should be accorded to EC law, and it must be taken to have contracted on those terms. If, therefore, 'blame' was to be cast for a loss of sovereignty then this should be laid at the door of Parliament and not the courts. The second facet of Lord Bridge's reasoning was *a priori* and *functional*: it was always inherent in a regime such as the European Community that it could only function adequately if EC law could take precedence in the event of a clash with domestic legal norms. The third factor at play was the existence of the European Communities Act 1972 (ECA 1972), which was said to impose a duty on national courts to override national law in the event of a clash with directly enforceable EC law.

The impact of *Factortame* was made clear in the *Equal Opportunities Commission* case,[69] which was concerned with the compatibility of UK legislation on

[69] *R.* v. *Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1.

unfair dismissal and redundancy pay with EC law. Under UK law[70] entitlement to these protections and benefits operated differentially depending upon whether the person was in full-time or part-time employment. Full-time workers were eligible after two years; part-time workers only after five. The majority of part-time workers were women and the Equal Opportunities Commission (EOC) took the view that the legislation discriminated against them, contrary to Art. 119.[71] The EOC sought a declaration that the relevant provisions of the UK legislation were in breach of EC law. The House of Lords held that the national legislation was in breach of Art. 119 and the directives. The *Factortame* case was regarded as authority for the proposition that it was open to a national court to declare provisions of a primary statute to be incompatible with norms of EC law.[72] The House of Lords also made it clear that this power to review primary legislation resided in all national *courts*, not just the UK's top court.

The impact of the European Union on traditional concepts of sovereignty was also considered in *Thoburn*.[73] Certain street traders were prosecuted for continuing to use imperial measures, rather than metric, when selling their goods. The obligation to use metric measures as the primary form of measurement derived from EC directives, and the UK government had complied with this obligation through the enactment of a series of regulations, some of which were based on ECA 1972, s. 2(2). The defendants argued that in this context the power to make such regulations through s. 2(2) had been impliedly repealed by provisions contained in the Weights and Measures Act

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[70] Employment Protection (Consolidation) Act 1978.

[71] Now TFEU Art. 157.

[72] [1995] 1 AC 1, 27.

[73] *Thoburn* v. *Sunderland City Council* [2003] QB 151.

1985. Laws LJ held that there was no inconsistency between ECA 1972, s. 2(2) and the Weights and Measures Act 1985, and therefore that no issue of implied repeal arose in the case. He held more generally that the constitutional relationship between the UK and the European Union was not to be decided by the ECJ's jurisprudence: that case law could not itself entrench EU law within national law.[74] The constitutional relationship between the European Union and the UK, including the impact of membership of the European Union on sovereignty, was to be decided by the common law in the light of any statutes that Parliament had enacted.[75] The common law had, said Laws LJ, modified the traditional concept of sovereignty, in the sense that it had created exceptions to the doctrine of implied repeal. Ordinary statutes were subject to the doctrine of implied repeal. What Laws LJ referred to as 'constitutional statutes', which conditioned the legal relationship between citizen and state in some overarching manner, or which dealt with fundamental constitutional rights, were not subject to the doctrine of implied repeal.[76] The repeal of such a statute, or its disapplication in a particular instance, could only occur if there were some 'express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible'.[77] The ECA 1972 was regarded as just such a constitutional statute. It contained provisions that ensured the supremacy of substantive EU law in the event of a clash with national law, and was not subject to implied repeal.

[74] Ibid., paras 57–8.

[75] Ibid., para. 59.

[76] Ibid., para. 62.

[77] Ibid., para. 63.

The reasoning in *Thoburn* has been endorsed by the Supreme Court in the HS2 case.[78] The case is important in two respects. First the Supreme Court affirmed that the constitutional relationship between the UK and EU was to be decided by the UK courts in accord with UK constitutional principle. Thus Lord Reed made it clear that the supremacy of EU law only took effect within the UK through the European Communities Act 1972, and that any conflict between EU law and UK law would be resolved by UK courts as a matter of UK constitutional law.[79] Secondly, the Supreme Court reaffirmed the idea that there was a separate category of constitutional statutes in the UK constitutional order, with the consequence in this context that it could not be assumed that when Parliament enacted the ECA 1972 that it impliedly authorized the limitation or abrogation of such principles by EU law. In the instant case the relevant principle was derived from Article 9 of the Bill of Rights 1689, which precluded the impeaching or questioning in any court of debates or proceedings in Parliament. Lord Mance and Lord Neuberger put the matter as follows:[80]

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional

[78] *R (HS2 Action Alliance Ltd)* v. *Secretary of State for Transport* [2014] UKSC 3; P. Craig, 'Constitutionalizing Constitutional Law: HS2' [2014] *PL* 373.

[79] Ibid., para. 79. The superior courts of most Member States adopt the same conceptual approach in this respect, as exemplified by the case law of the German Federal Constitutional Court.

[80] Ibid., at para. 207.

Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.

SUPREMACY AFTER *FACTORTAME, EOC*, *THOBURN* AND *HS2*: THE SUBSTANTIVE IMPACT OF THE DECISIONS

The decisions considered above generated much academic comment.[81] Space precludes a detailed analysis of the differing views. It is nonetheless clear that there are two issues of central importance: the substantive impact of these decisions on the previous orthodoxy concerning sovereignty; and the best way of conceptualizing what has occurred. The former will be considered here, the latter in the section that follows. The substantive impact of the cases set out above may be described as follows.

First, the relationship between EU law and national law in terms of supremacy is to be decided by the UK courts as a matter of UK constitutional law, taking account of any statutes enacted by Parliament.

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[81] Craig, above, n. 51; Sir William Wade, 'Sovereignty – Revolution or Evolution?' (1996) 112 *LQR* 568; T. R. S. Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 *LQR* 443.

Secondly, in doctrinal terms the effect of the case law is that the concept of *implied repeal*, or *implied disapplication*, under which inconsistencies between later and earlier norms were resolved in favour of the later norms, will, subject to what is said below, no longer apply to clashes concerning EU and national law. This proposition is sound in terms of principle, whether viewed simply in terms of membership of the European Union, or as part of a broader category of constitutional statutes that are not subject to implied repeal. There are good normative arguments for requiring the legislature to state expressly its intent to repeal or derogate from statutes of constitutional importance,[82] and this is so notwithstanding the fact that there may be room for disagreement as to which statutes come within this category.

Thirdly, if Parliament ever does wish to derogate from its EU obligations then it will have to do so *expressly and unequivocally*. The reaction of our national courts to such an unlikely eventuality remains to be seen. In principle, two options would be open to the national judiciary. Either they could follow the latest will of Parliament, thereby preserving some remnant of traditional orthodoxy on sovereignty. Or they could argue that it is not open to our legislature to pick and choose which obligations to subscribe to while still remaining within the European Union. Which of these options our courts would choose will be dependent, in part, on the issues addressed in the next section.

Fourthly, the supremacy of EU law over national law *operates in areas where EU law is applicable*, as is made clear from the dictum of Lord Bridge set out above. This may well be a statement of the obvious, but the point is more complex than

[82] Craig, above, n. 78.

might initially have been thought.[83] The problem addressed here is often referred to as *Kompetenz-Kompetenz*: who has the ultimate authority to decide whether a matter is within the competence of the European Union? The ECJ may well believe that it is the ultimate decider of this issue. However, national courts may not always be content with this arrogation of authority. This is particularly so given that the ECJ has, as is well known, often reasoned 'teleologically'[84] and expanded the boundaries of EU competence in a manner which has caused disquiet in some national legal systems. The German Federal Constitutional Court held that it will not inevitably accept EU decisions, including those of the ECJ, which it regards as crossing the line between legitimate Treaty interpretation and de facto Treaty amendment.[85] The general tenor of Laws LJ's judgment in *Thoburn* is also inclined to the conclusion that the ultimate competence to decide on the scope of EU competence resides with the national court. This is reinforced by his statement that if the European Union were to enact a measure repugnant to a constitutional right guaranteed by UK law, it would be for the national courts to decide whether the general words of the ECA 1972 were sufficient to give it

[83] P. Craig, 'Report on the United Kingdom', in A.-M. Slaughter, A. Stone Sweet and J. Weiler (eds), *The European Courts and National Courts, Doctrine and Jurisprudence* (1998) ch. 7.

[84] Teleological judicial reasoning connotes the idea that a court will reason in order to attain the end which it believes that the particular Treaty article was intended to serve.

[85] *Brunner* v. *The European Union Treaty* [1994] 1 CMLR 57, paras 49 and 99; *Treaty of Lisbon Constitutionality Case*, BVerfG, 2 BvE 2/08, 30 June 2009, available at www.bverfg.de/entscheidungen/es20090630_2bve000208.html; English translation available at www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

overriding effect in domestic law.[86] It is moreover clear from the *HS2* decision that it will not be assumed that the EU has authority to limit or abrogate UK constitutional statutes or principles.[87]

SUPREMACY *AFTER FACTORTAME, EOC*, *THOBURN* AND *HS2*: THE CONCEPTUAL BASIS OF THE DECISIONS

Commentators have been divided as to how best to conceptualize the impact of the courts' jurisprudence.[88] The issues here are complex, but the main features of the debate can be presented as follows.

The Construction Approach

It is possible to rationalize what the courts have done as a species of *statutory construction*. If a statute can be reconciled with an EU norm through construing the statutory words without unduly distorting them then this should be done, more especially when the statute was passed to effectuate a directive. However the species of statutory construction being considered here is more far-reaching. On this view accommodation between national law and EU law is attained through a rule of construction to the effect that inconsistencies *will* be resolved in favour of EU law *unless* Parliament has indicated clearly and unambiguously that it intends to derogate from EU law. The degree of linguistic inconsistency between the statute and the EU norm is not the essential point of the inquiry. Provided that there is no unequivocal

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[86] *Thoburn*, above, n. 73, para. 69.

[87] *HS2*, above, n. 78, para. 207.

[88] Limits of space preclude coverage of all views on this issue. The sophisticated argument presented by Neil MacCormick can be found in *Questioning Sovereignty, Law, State and Nation in the European Commonwealth* (1999) ch. 6.

derogation from EU law then it will apply, rather than any conflicting domestic statute.

Counsel for the applicants framed their argument in this manner in the first *Factortame* case.[89] This view was posited by Lord Bridge in the same case where he stated that the effect of ECA 1972, s. 2(4) was that the Merchant Shipping Act 1988 should take effect as if a section were incorporated that its provisions would be without prejudice to directly enforceable Community rights.[90] We have already seen that Lord Bridge relied on ECA 1972 in his argument in the second *Factortame* case.[91] A similar argument has been made judicially by Laws LJ in *Thoburn*.[92] Laws LJ voiced the same views extra-judicially,[93] as did Lord Hoffmann.[94]

The construction view is said to leave the essential core of the traditional view of legal sovereignty intact, in the sense that it is always open to a later Parliament to make it unequivocally clear that it wishes to derogate from EU law. In the absence of such an explicit derogation, s. 2(4) serves to render EU law dominant in the event of a conflict with national law. The attractions of this approach are self-evident. Clashes between EU law and national law can be reconciled while preserving the formal veneer of legal sovereignty. There are nonetheless two points to note about the construction approach:

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89 [1990] 2 AC 85, 96.

90 Ibid., 140.

91 [1991] 1 AC 603, 658–9.

92 Above, n. 73.

93 'Law and Democracy' [1995] *Public Law* 72, 89.

94 Lord Hoffmann, 'Europe and the Question of Sovereignty', the Second Lord Neill Lecture, 15 October 1999.

First, the wording of s. 2(4) is notoriously difficult to disentangle. The section is framed in terms of 'any enactment passed or to be passed . . . shall be construed and have effect' subject to Community rights. The very word 'construed' conveys the sense that the later statute must be capable of being read so as to be compatible with EU law without thereby unduly distorting its meaning or rewriting it. This may well not be possible. A statute might be seriously at odds with EU law, even where Parliament has not, through any express wording, manifested its intent to derogate from the EU norm. It is doubtful whether s. 2(4) was intended to cure all such absences of fit.

Secondly, Sir William Wade has argued forcefully that Lord Bridge's reasoning entails more than an exercise of construction as we normally understand that phrase. He contends that putatively incorporating s. 2(4) of the 1972 Act into a later statute, such as that of 1988, 'is merely another way of saying that the Parliament of 1972 has imposed a restriction upon the Parliament of 1988', which is what 'the classical doctrine of sovereignty will not permit'.[95] Nor can this be countered simply by saying that the later Parliament could defeat the exercise of construction by expressly providing that the later statute is to prevail over any conflicting EU law. It is by no means clear that an express provision of the kind being postulated here would work, *given* the very reasoning of Lord Bridge. Such a statutory provision would itself be held to be contrary to EU law by the ECJ. This holding would be part of the 'Community law to which by the Act of 1972 the Act of 1988 is held to be subject'.[96] In order to overcome this argument the later statute would have to contain an express provision that it was to prevail over any conflicting EU law and also a provision

[95] Wade, above, n. 81, p. 570.

[96] Wade, above, n. 81.

rendering the relevant provisions of the ECA 1972 inapplicable to the subject matter covered by the later statute.

Technical Legal Revolution

A second way to conceptualize what the courts have done is to regard it as a *technical legal revolution*. This is the preferred explanation of Sir William Wade who sees the courts' decisions as modifying the ultimate legal principle or rule of recognition on which the legal system is based.[97] On this view the 'rule of recognition is itself a political fact which the judges themselves are able to change when they are confronted with a new situation which so demands'.[98] Such choices are made by the judiciary at the point where the law 'stops'.[99]

Principled Legal Evolution

There is however a third way in which to regard the courts' jurisprudence. This is to regard decisions about supremacy as being based on *arguments of legal principle the content of which can and will vary across time*. This is my own preferred view[100] and a similar argument has been advanced by Allan.[101] On this view there is no *a priori* inexorable reason why Parliament, merely because of its very existence, must be regarded as legally omnipotent. The existence of such power, like all power, must be justified by arguments of principle that are normatively convincing. Possible constraints on Parliamentary omnipotence must similarly be reasoned through and

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[97] H. L. A. Hart, *The Concept of Law* (1961) ch. 6.

[98] Wade, above, n. 81, p. 574.

[99] Wade, above, n. 47, pp. 191–2.

[100] Craig, above, nn. 51 and 83, and P. Craig, 'Public Law, Political Theory and Legal Theory' [2000] *Public Law* 211.

[101] Allan, above, n. 81.

defended on normative grounds. This approach fits with the reasoning of Lord Bridge in the second *Factortame* case. His Lordship did not approach the matter as if the courts were making an unconstrained political choice at the point where the law stopped. His reasoning is more accurately represented as being based on *principle*, in the sense of working through the principled consequences of the UK's membership of the European Union. The contractarian and functional arguments used by Lord Bridge exemplify this style of judicial discourse. They provide sound normative arguments as to why the UK should be bound by EU law while it remains within the European Union. These arguments would moreover be convincing and have force even if s. 2(4) had never been included in the 1972 Act.

SUPREMACY AFTER THE TREATY OF LISBON

The Constitutional Treaty contained a supremacy clause in Art. I-6, which provided that the 'Constitution, and law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the member states'. There were, however, problems surrounding the interpretation of this provision. It was, for example, unclear whether it was intended to assert the supremacy of EU law over all national law, including national constitutions. If this was indeed the case then it was doubtful whether it would have proven to be constitutionally acceptable to the member states.[102] The Treaty of Lisbon dropped the primacy clause, and replaced it with Declaration 17 which states that the 'Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'. This

[102] Craig, above, n. 4, ch. 4.

Declaration suffers from the same ambiguity as the primacy clause in the Constitutional Treaty, and it is very unlikely that national courts will be persuaded to forget their previous concerns, and accept that EU law prevails over national constitutions, based on a Declaration appended to the Treaties.[103]

SUPREMACY AND THE EUROPEAN UNION ACT 2011

The discussion thus far has focused on the impact of EU membership on traditional concepts of UK sovereignty as determined by the case law of the UK courts and the ECJ. The UK legislature has however also made an important contribution in this respect through the enactment of the European Union Act 2011.[104] The statute is complex, and imposes a regime of parliamentary and referendum "locks" on Treaty amendments and a range of other EU decisions.

Prior to the 2011 Act the general position under UK law was that any amendment to the EC Treaty required ratification by the UK through an Act of Parliament. This was the standard approach for ratification of any Treaty by the UK. The 2011 Act now requires that there must also, subject to limited exceptions, be a positive vote in a referendum, whenever new competence is to be granted to the EU, when an existing competence is to be extended, or when certain powers are to be accorded to the EU. The 2011 Act is not entrenched, and thus Parliament could choose to disapply it, but subject to this the obligation to secure a positive vote in a referendum as well as in Parliament is binding.

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[103] See the *Treaty of Lisbon Constiutionality Case*, above, n. 85.

[104] P. Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) 48 *CMLRev* 1881,

DIRECT EFFECT

The doctrine of the supremacy of EU law has been a cornerstone in the building of an EU legal order. The ECJ's other principal contribution has been the doctrine of direct effect. Detailed analysis can be found elsewhere.[105] It is nonetheless important to understand the basic tenets of direct effect in order that its constitutional significance can be appreciated.

DIRECT EFFECT: AN OUTLINE

The meaning of direct effect is not free from ambiguity. It most commonly connotes the idea that individuals can bring actions in national courts in order to vindicate rights secured to them by the Treaty, or legislation made thereunder. It is in this sense a species of private enforcement of EU law. The Treaty makes explicit provision for public enforcement of EU law in TFEU, Art. 258: the Commission can bring an action before the ECJ if member states fail to comply with the Treaty or EU legislation.[106] Whether the framers of the original Treaty intended for there to be direct effect is doubtful. It is, however, clear that private enforcement through direct effect provided a welcome supplement to public enforcement through the Commission, enabling EU law to be applied on a scale and in a manner that would not otherwise have been possible.[107] Moreover, the fact that individuals were given rights

[105] Craig and de Búrca, above, n. 12, ch. 7.

[106] It is also possible for a member state to initiate an action against another member state under TFEU, Art. 259, but this rarely happens.

[107] J. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *YBEL* 267; P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 *OJLS* 453.

that they could enforce in their own name transformed the very nature of the Treaty. It could no longer be viewed solely as the business of nation states in the manner of many other international Treaties. It was to be a form of social ordering in which individuals were involved in their own capacity. They were no longer to be passive receptors, who had to await action taken on their behalf by others. They were now accorded rights that they could enforce in their own name.

The seminal case in the development of direct effect was *Van Gend en Loos*.[108] Dutch importers challenged the rate of duty imposed on a chemical imported from Germany. They argued that a reclassification of the product under a different heading of the Dutch tariff legislation had led to an increase in the duty and that this was prohibited under EEC Treaty, Art. 12 (now TFEU, Art. 30), which prohibits the imposition of any new customs duties on imports and also precludes any increase in existing rates. The Dutch court asked the ECJ whether Art. 12 gave rise to rights that could be invoked by individuals before their national courts. The member states argued that the Treaty was simply a compact between states, to be policed in the manner dictated by the Treaty, through public enforcement at the hands of the Commission. They believed that direct effect would alter the nature of the obligations accepted by the signatories.

The ECJ disagreed. It held that the EEC Treaty was not simply to be viewed as a compact between nations. The 'interested parties' included the people. This was affirmed by the preamble and by the existence of institutions charged with the duty of making provisions for those individuals. It was this crucial conceptual starting point which laid the foundation for the now famous passage from the judgment, depicting

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

the European Community as a new legal order for the benefit of which states have limited their sovereign rights, with the consequence that individuals have rights and can be regarded as subjects of the Community. The ECJ emphasized that Art. 12 was a natural candidate for enforcement by individuals through national courts. It stressed the negative nature of the obligation, the fact that it was unconditional, and that its implementation was not dependent on any further measures before being effective under national law.

The years immediately following *Van Gend en Loos* witnessed the application of the concept to a growing range of Treaty articles. The Court was keen to expand the concept given the advantages it possessed. In applying direct effect to other treaty articles the ECJ relaxed the conditions for its application. Direct effect was applied in circumstances where it could not be said that the treaty article in question created a negative obligation which was legally perfect, in the sense that no further action was required by the Community or the member states, and no real residue of discretion existed. The concept was applied to articles of the Treaty dealing with broad areas of regulatory policy, which were as much social as economic.[109] The general test now is that a Treaty article will have direct effect provided that it is intended to confer rights on individuals and that it is sufficiently clear, precise and unconditional.

It was inevitable that the ECJ should be asked whether EC legislation passed pursuant to the Treaty could also have direct effect. There are various types of such legislation. Regulations are defined in TFEU, Art. 288 as having general application. They are binding in their entirety and directly applicable in all member states. The ECJ had no reluctance in concluding that regulations were capable of having direct

[109] Case 2/74, *Reyners* v. *Belgian State* [1974] ECR 631; Case 43/75, *Defrenne* v. *Sabena* [1976] ECR 455.

effect, provided that they were sufficiently certain and precise, which was normally the case.[110]

There has been more difficulty over directives. These are, according to TFEU, Art 288, binding as to the result to be achieved while leaving the choice of form and methods to the states to which they are addressed. Moreover, while regulations are binding on all states, directives are only binding on the specific states to which they are addressed. Directives have proved to be a particularly useful device for legislating in an enlarged European Union. Many areas of EU policy concern complex topics ranging from product liability to the environment, and from the harmonization of company law to the free movement of capital. If legislation could only be enacted in the form of regulations then it might be difficult to draft a measure with sufficient precision that it could be immediately applicable within the territories of all the member states. The directive enables the European Union to specify the ends to be attained, often in great detail, while leaving a choice of form and methods of implementation to the individual member states.

However, the very nature of directives seemed to indicate that they could not have direct effect: they clearly require further action on the part of the member states, and they leave them with discretion as to methods of implementation. The ECJ nonetheless concluded that directives are capable of having direct effect. It held that it would be inconsistent with the binding effect of directives to exclude the possibility that they can confer rights.[111] The ECJ also drew on TFEU, Art. 267, which allows questions concerning the interpretation and validity of EU law to be referred by

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[110] Case 93/71, *Leonosio* v. *Italian Ministry of Agriculture and Forestry* [1973] CMLR 343; Case 50/76, *Amsterdam Bulb* v. *Produktschap voor Siergewassen* [1977] ECR 137.

[111] Case 41/74, *Van Duyn* v. *Home Office* [1974] ECR 1337, para. 12.

national courts to the ECJ. From the generality of this provision the Court concluded that questions relating to directives can be raised by individuals before national courts.[112] A further reason for according direct effect to directives is the estoppel argument: a member state that has not implemented the directive 'may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.[113] Provided, therefore, that the directive is sufficiently precise, that the basic obligation is unconditional, and that the period for implementation has passed, an individual can derive enforceable rights from a directive.

While the ECJ has been willing to give direct effect to directives it has, however, also held that they only have vertical as opposed to horizontal direct effect. Treaty articles and regulations give individuals rights that can be used both against the state, vertical direct effect, and against private parties, horizontal direct effect. Directives only have vertical direct effect. Thus, in the *Marshall* case[114] the ECJ held that Directive (EEC) 76/207 on equal treatment could not impose obligations on individuals, but only on the state, either *qua* state or *qua* employer. The reason proffered by the court for this limitation was the wording of Art. 288: the binding nature of the directive existed only in relation to 'each Member State to which it is addressed'. The correctness of this ruling and the rationale for this limitation of direct

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[112] Ibid., para. 12.

[113] Case 148/78, *Pubblico Ministero* v. *Ratti* [1979] ECR 1629, para. 22.

[114] Case 152/84, *Marshall* v. *Southampton & South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case C-91/92, *Faccini Dori* v. *Recreb Srl* [1994] ECR I-3325.

effect are by no means self-evident.[115] The existence of this limitation has however generated a very complex case law.

This is in part because the ruling that directives only have vertical and not horizontal direct effect requires some definition of the state for these purposes.[116] The complexity of the case law in this area is in part the result of the doctrine of indirect effect. The doctrine is associated with the decision in *Von Colson*.[117] The applicants relied upon the provision of a directive in order to argue that the quantum of relief provided by German law in cases of discrimination was too small. The ECJ held that the provisions were not sufficiently precise to have direct effect. It held, however, that national courts had an obligation to interpret national law to be in conformity with the directive. The purpose of the directive was to provide an effective remedy in cases of discrimination, and if states chose to fulfil this aim through the provision of compensation then this should be adequate in relation to the damage suffered. National courts should, therefore, construe their own national law with this in mind. In *Marleasing*[118] the ECJ held that in applying national law, whether passed before or

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[115] W. van Gerven, 'The Horizontal Direct Effect of Directive Provisions Revisited: The Reality of Catchwords', in T. Heukels and D. Curtin (eds), *Institutional Dynamics of European Integration, Liber Amicorum for Henry Schermers* (1994); P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *ELR* 349.

[116] Case C-188/89, *Foster* v. *British Gas* [1990] ECR I-3133; D. Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 *ELR* 195.

[117] Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891.

[118] Case C-106/89, *Marleasing SA* v. *La Commercial International De Alimentacion SA* [1990] ECR 4135.

after the directive, a national court was required to interpret national law in every way possible so as to be in conformity with the directive.

While therefore an individual cannot, in a literal sense, derive rights from a directive in an action against another individual, it is possible to plead the directive in such an action. Once the directive has been placed before the national court, then the obligation to interpret national law in conformity with the directive where possible comes into operation. Where the directive encapsulates precise obligations, and where the national court is minded to interpret national law in the required fashion, this 'indirect' species of enforcement of a directive as between individuals will have much the same results as if the directive had been accorded horizontal direct effect.

The interpretative obligation does however create problems for courts and litigants alike.[119] It places national courts in some difficulty in deciding how far they can go in reconciling national legislation with directives while still remaining within the realm of interpreting, as opposed to rewriting or overruling, national norms. It places litigants in a difficult position since they will have to guess how far their national courts might feel able to go in reconciling national law with differently worded EU legislation. If directives had horizontal direct effect then at least the individual would know that in the event of any inconsistency between the two norms EU law would trump national law.

The jurisprudence in this area has become even more complex as a result of case law in which the ECJ has been willing to accord some measure of 'incidental horizontal direct effect' to a directive in actions between private individuals,[120] and

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119 G. de Búrca, 'Giving Effect to European Community Directives' (1992) 55 *MLR* 215.

120 Case C-194/94, *CIA Security International SA* v. *Signalson SA and Securitel SPRL* [1996] ECR I-2201; Case C-129/94, *Criminal Proceedings against Rafael Ruiz Bernaldez* [1996]

because the ECJ has held that general principles of EU law can have horizontal direct effect, even where they cover the same terrain as a directive which would not have such effect between private parties.[121]

DIRECT EFFECT: CONSTITUTIONAL IMPLICATIONS

There are two ways in which direct effect is of constitutional relevance, one of which is obvious, the other less so.

First, direct effect enables individuals to derive rights that are enforceable in their own national courts from an international treaty and legislation made thereunder. The general position in public international law is that individuals do not derive such rights, and this is so even where they are the beneficiaries of the norms laid down in an international treaty.[122] There are instances where individuals have been held to have such rights, but they are exceptional and there has been nothing on the scale of the direct effect doctrine as developed by the ECJ. Indeed this was one of the reasons why the ECJ sought to distance EC law from general public international law in the *Van Gend* case. It wished to buttress the argument that because the EEC Treaty was distinct from other international treaties, therefore it should not be thought strange that an individual derived rights from the former, even though he normally did not do

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ECR I-1829; Case C-441/93, *Panagis Pafitis* v. *Trapeza Kentrikis Ellados AE* [1996] ECR I-1347; Case C-443/98, *Unilever Italia SpA* v. *Central Foods SpA* [2000] ECR I-7535. For discussion, J. Coppel, 'Horizontal Direct Effect of Directives' (1997) 28 *ILJ* 69; S. Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *ELRev* 177; M. Dougan, 'The Disguised Vertical Direct effect of Directives' [2000] *CLJ* 586; Craig, above, n. 111.

[121] Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

[122] I. Brownlie, *Principles of Public International Law* (5th edn, 1998) ch. 24.

so from the latter. There was clearly an element of circularity in this argument. The very decision as to whether direct effect did or did not exist was of crucial importance in deciding whether the EEC Treaty really could be regarded as distinct from other international treaties. Major constitutional developments are not infrequently characterized by such reasoning. Be that as it may, direct effect is a central feature of EU law, and recognized as such by all the member states. In terms of national constitutional significance this means that law derived from sources other than Parliament and the common law will avail individuals before their own national courts in a way which has not been so on this scale hitherto.

The second reason why direct effect is of constitutional significance resides in the connection between this concept and the supremacy of EU law. The essence of this connection is that direct effect allows the supremacy doctrine to be applied at national level, and thereby makes it far more potent than it would otherwise have been. It would in theory be perfectly possible for the ECJ to have developed its supremacy doctrine even if it had never created direct effect. EU law would have been held to be supreme, and judicially enforceable through actions brought by the Commission under Art. 258. The supremacy doctrine applies to such actions. Direct effect however enables the supremacy of EU law to be enforced by individuals through their own national courts. This renders such supremacy more effective for a number of reasons. Member states might be more inclined to listen to their own national courts than to the ECJ. The national courts become EU courts in their own right, being able to pass judgment on national primary legislation in the context of an action brought by an individual. Direct effect spreads the workload of enforcing EU law, and its supremacy, across all the individuals and the national courts of the European Union.

FUNDAMENTAL RIGHTS

There is little doubt that most claims to protect rights will now be brought under the Human Rights Act 1998 (HRA 1998).[123] It is however open to claimants to use rights-based arguments derived from EU law.

The European Union promulgated a Charter of Fundamental Rights in 2000. The ECJ had, however, developed a fundamental rights' jurisprudence prior to this. The original EEC Treaty contained no list of traditional fundamental rights. The catalyst for the creation of such rights was the threat of revolt by some national courts. Individuals who were dissatisfied with an EC regulation argued before their national court that it was inconsistent with rights in their national constitutions. The ECJ denied that EC norms could be challenged in this manner. However, in order to stem any national rebellion it also declared that fundamental rights were part of the general principles of EC law, and that the compatibility of an EC norm with such rights would be tested by the ECJ.[124] It became clear that national norms could also be challenged for compliance with fundamental rights. This was so where member states were applying provisions of EC law based on the protection of human rights;[125] where they were enforcing EC rules on behalf of the European Community or interpreting EC rules;[126] or where member states were seeking to derogate from a requirement of EC

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[123] See Chapter 3 above.

[124] Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134.

[125] Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

[126] Case 5/88, *Wachauf* v. *Germany* [1989] ECR 2609; Case 63/83, *R.* v. *Kent Kirk* [1984] ECR 2689.

law.[127] The supremacy doctrine applied with the consequence that national norms, including primary legislation, which were inconsistent with EC law could be declared inapplicable in the instant case. This is by way of contrast with the HRA 1998 where the courts are limited, in cases involving primary legislation, to making a declaration of incompatibility under s. 4.

The European Union Charter of Fundamental Rights of the European Union was promulgated in 2000.[128] The direct catalyst for this development came from the European Council. In June 1999 the Cologne European Council[129] decided that there should be a Charter of Fundamental Rights to consolidate the fundamental rights applicable at EU level and to make their importance and relevance more visible to the citizens of the European Union. It was made clear that the document should include economic and social rights, as well as traditional civil and political rights. A Convention was established to produce the Charter, which consisted of representatives of the member states, a member of the Commission, members of the EP, and representatives from national Parliaments. The Charter was accepted by the member states, but its legal status was left undecided by the Nice Treaty.

This issue has now been addressed by the Treaty of Lisbon. The Charter is legally binding and has the same legal value as the TEU and the TFEU.[130] The Charter itself is not therefore incorporated in the Treaty of Lisbon, but it is accorded

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[127] Case C-260/89, *Elliniki Radiophonia Tileorassi AE* v. *Dimotki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925; Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd* v. *Grogan* [1991] ECR I-4685.

[128] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

[129] 3–4 June 1999.

[130] TEU, Art. 6(1).

the same legal value as the Treaties. The Treaty of Lisbon is premised on the version of the Charter as amended in 2004, and this version has been reissued in the *Official Journal*.[131] The Treaty of Lisbon also stipulates that the European Union shall accede to the European Convention on Human Rights.[132] The Member States are bound by the Charter only when they are implementing EU law.[133] This has been interpreted by the ECJ to mean that they are bound whenever they act within the scope of EU law, which coheres with the interpretation in the explanatory memorandum that accompanied the Charter,[134] , which must be given due regard when interpreting Charter rights.[135] The UK and Poland negotiated a Protocol designed to limit the application of the Charter in certain respects.[136] Space precludes detailed interpretation of this Protocol here. Suffice it to say for the present that it does not wholly exclude the application of the Charter in the UK, but merely limits the application of certain Charter provisions.[137]

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[131] Charter of Fundamental Rights of the European Union [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17. The Charter has been reissued with the Treaty of Lisbon [2010] OJ C83/2.

[132] TEU Art. 6(2).

[133] Charter, Art. 51(1).

[134] Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, 26 February 2013

[135] TEU, Art. 6(1).

[136] Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

[137] Cases C-411 and 493/10 *NS v Secretary of State*, 21 December 2011.

NATIONAL COURTS AS EU COURTS

Those who are not familiar with EU law are accustomed to think that there are only two EU courts: the ECJ and the GC. This belies reality. National courts have general jurisdiction over matters of EU law. This is a matter worthy of constitutional note. The explanation for this role played by national courts is to be found in a conjunction of two factors.

The first is the very concept of direct effect considered above. The fact that individuals are able to enforce their EU rights through national courts means that it will be the national judiciaries that frequently apply EU law doctrine.

This first factor has been reinforced by a second. The ECJ made it clear that national courts should apply existing case law of the ECJ and the GC. They should therefore only refer a case to the ECJ pursuant to TFEU, Art. 267 where the question before the national court had not already been adequately answered in a previous ruling given by the ECJ. This became clear from the seminal decision in the *Da Costa* case.[138] The facts in the case were materially identical to those in *Van Gend en Loos*,[139] as were the questions posed by the national court. The ECJ acknowledged that a national court of final resort was bound to refer a question to the ECJ, but then qualified this by stating that 'the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance'.[140] This would especially be the case where the question raised was 'materially identical with a question which has already been the subject of a

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[138] Cases 28–30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV* v. *Nederlandse Belastingadministratie* [1963] ECR 31.

[139] Above, n. 108.

[140] Above, n. 138, p. 38.

preliminary ruling in a similar case'.[141] The ECJ made it clear that the national court could refer the issue again if it had new questions to ask. It made it equally clear that if this was not so, then it would simply repeat the ruling given in the original case from which the legal point arose. The *Da Costa* case, therefore, initiated what is in effect a system of precedent, whereby national courts would apply the prior rulings of the ECJ.

The ECJ extended this idea in *CILFIT*[142] where it held that the obligation to refer contained in Art. 267(3) could also be qualified 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'. Provided that the point of law had already been determined by the ECJ, this should be relied on by a national court in a later case, thereby obviating the need for a reference. The application of precedent by national courts has enhanced the enforcement of EU law, and eased the workload on the ECJ and the GC. The EU system of adjudication could not have functioned as it has if the national courts had not been accorded this role.

The *Equal Opportunities Commission* case[143] considered earlier provides a good example of this process at work. Not only did the House of Lords make a declaration that provisions of a statute were incompatible with EU law, but it did so without making a reference to the ECJ, having satisfied itself that the existing ECJ precedents meant that the national statute was indirectly discriminatory.

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[141] Above, n. 138.

[142] Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health* [1982] ECR 3415, para. 14.

[143] Above, n. 69.

CONCLUSION

The EEC has, since its inception, had an impact on national constitutional law. The significance of this impact has become greater over time, in part through the ECJ's jurisprudence and in part through subsequent Treaty amendments. The Treaty of Lisbon has brought further changes that are relevant legally and politically in the ways explicated in this chapter. It should moreover be recognized that the impact of the EU over national law, including constitutional law, can be affected by major economic 'shocks' such as the financial crisis, which has led to increased centralization of control over national budgetary decisions.

FURTHER READING

ANTHONY, G., *UK Public Law & European Law, The Dynamics of Legal Integration* (2002). BIRKINSHAW, P., *European Public Law* (2003).

CRAIG, P., *The Lisbon Treaty, Law, Politics and Treaty Reform* (2010).

CRAIG, P. and DE BÚRCA, G., *EU Law, Text, Cases and Materials* (5th edn, 2011).

LADEUR, K.-H. (ed.), *Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (2001).

MACCORMICK, N., *Questioning Sovereignty* (1999).

NICOL, D., *EC Membership and the Judicialization of British Politics* (2001).

PINDER, J., *The Building of the European Union* (3rd edn, 1998).

SLAUGHTER, A.-M., STONE SWEET, A. and WEILER, J. H. H. (eds), *The European Court of Justice and National Courts: Doctrine and Jurisprudence* (1998).

URWIN, D., *The Community of Europe: A History of European Integration since 1945* (2nd edn, 1995).

DE WITTE, B., 'Direct Effect, Primacy and the Nature of the Legal Order', in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law* (2nd edn, 2011) ch. 12.

USEFUL WEBSITE

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