The European Community after the Single European Act

This chapter traces the history of the EEC from 1986 to 2008. It begins by analysing the origins and objectives of the Single European Act. It then examines the ways in which the ECJ has developed principles to facilitate the enforcement of EC law, and considers to what extent our domestic courts have applied such ideas. After exploring the controversies engendered by the Maastricht, Amsterdam, and Lisbon Treaties, the chapter concludes by assessing in what senses, if any, continued EC membership will entail a loss of the United Kingdom's 'sovereignty' to a federal European constitution and a rebalancing of power within the constitution between Parliament and the courts.

I. **The Single European Act—the terms**

The SEA's roots lay in the Commission's perception that the Community's original objectives were being achieved at a painfully slow rate. The Treaty of Rome had envisaged that the four fundamental freedoms of movement for goods, capital, persons, and services upon which the Community was to be based would be achieved by 1970. But even by 1984, this objective remained unfulfilled: national laws still contained many barriers to the creation of a truly 'common market'. That such barriers remained in place is a cogent illustration both of the limits of the ECJ's supra-nationalist competence and the continued vitality of nationalist, protectionist sentiment in the more inter-national arena of the Community's legislative process. The Commission's response to this impasse was to seek new means to realise the Treaty's original ends.

In the 1960s and 1970s, the Commission had sought to create the 'common market' by embarking on a programme of harmonisation through detailed Community legislation. These so-called 'Euronorms' imposed a uniform regulatory structure on each of the Member States. By 1984 the 'Euronorm' approach was regarded as inappropriate for several reasons. Firstly, the Commission's small size limited the amount of legislation it could initiate. Secondly, several Member States were sceptical about the need to homogenise regulatory structures, suggesting that a 'common market' need not be a uniform market, but could accommodate appreciable geographical divergences in the substance and application of EEC law principles.[1]

[1] This is perhaps an obvious conclusion for countries where sub-central units of government have appreciable legislative competence in economic policy; a key ingredient of federal systems of government is that the constitution affords effective legal protection to such diversity.

The third reason was that it frequently proved impossible to achieve all the Member States' agreement on the intricacies of proposed Euronorm legislation.

The regenerative programme first outlined in the Commission's 1985 White Paper consequently represented a move away from what has been described as the Commission's 'almost theological dogmatism'[2] in pursuit of uniformity. The White Paper attempted to reinvigorate a stalled programme of economic integration by reforming both the methods and substance of the Community's law-making process.

The proposed new Treaty art 8A announced the intention to create an 'internal market' by 1 January 1993. The shift from an emphasis on the 'common market' to an 'internal market' was not simply a question of relabelling. The internal market proposed that the Community seek enhanced economic integration by rejecting the Euronorm's methodology, and relying instead on a process of 'mutual recognition' of acceptable standards. As Forwood and Clough note, the internal market strategy was based on a 'minimalist approach to economic regulation' in which the notion of 'equivalence' is the key.[3] Goods and services lawfully marketed in one Member State should be saleable throughout the community.

However, the White Paper's original integrationist thrust was much diluted when exposed to the nationalistically motivated scrutiny of the successive Inter-Governmental Conferences required by the Art 236 amendment process.[4] That these negotiations were protracted and keenly contested by the Member States is sometimes portrayed as a weakness in the Community's decision-making structure. But the tortuous process might equally plausibly be seen as perfectly compatible with that view of democracy which contends that alterations to a constitution's fundamental principles should not be easy to effect.

It is perhaps therefore not surprising that the amendments introduced to the original Treaty by the SEA present an even more complex balancing of inter-national and supra-national forces than provided by the

[2] Edward D (1987) 'The impact of the Single European Act on the institutions' *CML Rev* 19 at p 26.

[3] (1987) 'The Single European Act and free movement' *EL Rev* 383.

[4] Corbett R (1985) 'The 1985 intergovernmental conference and the Single European Act', in Pryce R (ed) *The dynamics of European Union*.

original Treaty.[5] In the supra-national sphere, one can point to an extension of the Community's substantive competence into the fields of environmental protection, regional development, research and technical innovation, and some aspects of social policy.[6]

In contrast, the Community's continuing inter-national dynamic was expressed by various Member States during the amendment negotiations with sufficient vigour to recast the Commission's initial internal market strategy in a more circumscribed form. Thus, for example, the Commission's original intention that art 8A should announce the 'complete removal of all physical, technical and fiscal barriers within the community' eventually emerged with the caveat that the internal market was to be pursued 'without prejudice to the other articles in the Treaty'. This is well illustrated by the progressive dilution of the mutual recognition reforms. The Commission had initially proposed simply to sweep away national powers to obstruct free movement. This step was however too radical a reform for all of the Member States to approve. The subsequent acceptance in Art 100b that the Council of Ministers should retain the power to decide the extent of equivalence required by EC law provides a graphic example of the resolution of questions of economic sovereignty by the evident subordination of supra-national legal principle to inter-national political pragmatism. Furthermore, the bulk of the internal market programme would be implemented through directives, a form of EC law which, as noted in chapter twelve, has a less obviously supra-national flavour than regulations in the light of the ECJ's judgments in *Marshall* and *Von Colson*.

But such concessions to inter-national sensitivity were in turn subject to supra-national checks and balances. A specific (albeit apparently not legally binding)[7] date (31 December 1992) was set for achievement of the internal market programme. Relatedly, the 'equivalence' standards underpinning the mutual recognition principle were to be based on 'high standards', and while the new Art 100a para 4 formally permitted Member States to derogate somewhat from the free movement principle in defence of

[5] Constraints of space permit only a very selective analysis of the SEA's provisions here. For further details see Shaw op cit pp 37–42, 78–95 and ch 15; Ehlermann C (1987) 'The internal market following the Single European Act' *CML Rev* 361.

[6] See Ehlermann (1987) op cit.

[7] See Edward op cit.

major ‘needs’, their invocation of this power was subjected to close Commission control.

The SEA also enhanced the Community’s supra-national profile by extending the use of qualified majority rather than unanimous voting within the law-making process. In particular, Art 100a provided that all internal market measures could be enacted in this way. Such reforms offer an obvious antidote to the frustration of EC objectives by a single Member State. However some commentators (no doubt with the ‘Empty Chair’ crisis in mind) questioned whether imposing such legal compulsion on reluctant states was the best way forward: unanimity may be difficult to achieve, and delay the implementation of integrationist policies, but will produce substantive outcomes from which Member States will be less likely to resile.[8]

The SEA acknowledged that many areas of government activity could not sensibly be brought within the EC’s legal competence. Perhaps the best example of this is the Declaration attached to the SEA to the effect that the reforms to the Treaty should not be construed as derogating from the Member States’ powers to take such measures as they considered necessary regarding immigration control for regulating the movements of non-EC nationals, combating crime, and preventing terrorism.[9]

It is more difficult to decide whether to locate two other substantial innovations introduced by the SEA on the Community’s supra-national or inter-national basis. Title I of the SEA gave a formal legal status to the meetings of the European Council, while Title III formalised the hitherto entirely informal process of ‘European Political Co-operation’, primarily in the area of foreign policy. But while ‘recognised’ by the SEA, these two aspects of Community action were not incorporated into the body of EC law; rather they were to exist outside the Treaty in the sphere of traditional international law agreements. From a federalist perspective, their greatest significance perhaps lay in their long-term potential to ‘normalise’ joint Member State action in explicitly non-justiciable areas, and thereby pave the way at a future date for the

[8] See for example Ehlermann’s analysis (1987 op cit) of the harmonisation of indirect taxation laws within the Community.

[9] The legal status of Declarations is unclear. But as Toth points out, the more expansive scope and pro-nationalist sentiment of the SEA declaration suggests the ratifying governments of the Member States hoped that it would temper the ECJ’s integrationist inclinations: (1986) ‘The legal status of declarations attached to the SEA’ *CML Rev* 803.

Community's legal competence to extend into avowedly 'political' fields.

Reducing the democratic deficit—Treaty amendment

That the EEC had failed to produce a truly common market by 1986 is unsurprising given the cultural heterogeneity, linguistic pluralism, and economic nationalism of the various Member States. However, the difficulty might be thought to be exacerbated by the institutional balance of power in the Community legislative process. As suggested in chapter eleven, the original Treaty cast that balance firmly in favour of the inter-nationally constructed Council at the expense of the more supra-national Commission and Parliament.

An increase in the Commission's powers would have offered one route to achieving a more Communitaire balance of legislative power. But any such reform would also have intensified accusations as to the EEC's so-called 'democratic deficit'. The SEA consequently sought a modest rebalancing of the supra/inter-national axis by enhancing the legal status of the European Parliament. Such a reform could plausibly be construed as encouraging pan-European sentiment within the Community while simultaneously defusing criticism that Community decision-making processes are too far removed from electoral influence.

The SEA's amendments fell far short of the Parliament's DTEU proposals,[10] but were nevertheless an advance on the Treaty of Rome's original institutional balance.[11] The most important initiative was the creation of a parliamentary power of 'co-operation' in the legislative process in some areas of Community competence, foremost among them internal market measures per Art 100a, some aspects of free movement of workers, workplace health and safety regulation, environmental protection, and the common transport policy. The Council cannot simply ignore the Parliament's views when the co-operation procedure is being employed:[12] the initiative thus gave the Parliament an audible voice in important areas of Community activity. Its significance should not however be exaggerated. An early assessment concluded that the

[10] To the disappointment of some Member State governments. See for example the Luxembourg position in European Council (1986) *Speeches and statements made on the occasion of the signing of the Single European Act* at pp 16–18.

[11] See Boyce B (1993) 'The democratic deficit of the European Community' *Parliamentary Affairs* 458.

[12] The complexities of the procedure are helpfully explained in Shaw op cit at pp 79–82.

Parliament 'is still some way from becoming an equal chamber with the Council in a fully bi-cameral system, but some progress has been made in this direction'.[13] One might plausibly add to that statement that the progress was initially both slight and stilted.[14]

Moreover, the SEA left one of the Parliament's basic weaknesses untouched—namely its lack of a single geographical site. The Parliament has always operated partly in Luxembourg, in Strasbourg, and in Brussels. Such fragmentation undermines its efficiency, and deprives it of a coherent physical identity with which to convey its significance within the Community's structure. While the Parliament has repeatedly sought a single site,[15] the power to grant that request lies with the Council, which has thus far failed to respond.

On a more grandiose plane, the SEA's preamble announced that the Member States were:

> DETERMINED to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

Despite this statement of intent, the SEA did not introduce any substantial scheme of human rights protection into the Treaty's text, nor take the obvious step of incorporating the provisions of the European Convention on Human Rights into Community law. Nevertheless, the preamble may be seen as tacit Member State acceptance of the ECJ's by then evident fondness for concluding that the EC's constitutional order contained implied terms analogous to the ECHR's provisions.

The preamble encapsulates a recurrent feature of Community law-making; namely Member States'

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[13] Corbett R (1989) 'Testing the new procedures; the European Parliament's first experiences with its new "Single Act" powers' 7 *Journal of Common Market Studies* 362 at p 364.

[14] The increase in the EP's powers did however necessitate explicit statutory approval of the SEA Treaty in the UK in accordance with s 6 of the EPEA 1978, rather than the process of 'incorporation' via Order in Council provided for in the ECA 1972, s 1; see 'The European Communities Act 1972—the terms', ch 11, 'The reduction of the "democratic deficit" and the emergence of human rights as general principles of EEC law', fn 135, p 384.

[15] See *Luxembourg v European Parliament*: Case 230/81: [1983] ECR 255, ECJ.

acceptance of the abstract legitimacy of political values to which they are not prepared to give explicit legal status. For some commentators, such legal lacunae in the SEA's formal structure were a cause of regret. Ehlerman, for example, seemed to assume the necessity of an almost messianic role for formalistic legal change as a mechanism for effective Community integration in concluding that: 'the SEA not only fails to live up to the Commission's expectations, but also leaves much to be desired in its wording'.[16] In contrast, Edward advances a rather more pragmatic view, describing the SEA as a 'political manifesto . . . a moral and political commitment'.[17]

It is perhaps surprising that seasoned EC commentators should place much emphasis on the 'wording' of the SEA. For one could not accurately predict in 1986 what interpretation the ECJ would subsequently give to the amended version of the Treaty. In the first thirty years of the Community's existence, the ECJ had propounded—and (eventually) won Member State acceptance of—a series of integrationist legal principles which do not feature in the Treaty's text. It would seem entirely plausible to assume that the ECJ would subsequently bring such an ethos to bear on the SEA. But for at least one national government, the fear of the EC's 'creeping competence' was triggered not by the ECJ's jurisprudence, but by the integrationist enthusiasm of the President of the Commission.

Domestic disquiet: Margaret Thatcher's Bruges speech

The driving force behind the SEA reforms had been the Commission President, Jacques Delors, a Frenchman who had served as a Minister in Francois Mitterrand's socialist government. Delors was committed to the incrementalist ideal of furthering political union between the Member States, and suggested in a speech in 1988 that the EC would evolve into a federal government akin to that of the USA.

Such sentiments alarmed Prime Minister Margaret Thatcher, who promptly publicised her own view of the Community's future development in a speech delivered at the College of Europe, Bruges, on 20 September 1988. Thatcher premised her view of Europe's development on what she regarded as the essential issue of preserving British 'sovereignty':

Willing and active co-operation between independent sovereign states is the best way to build a

[16] (1987) op cit p 404.

[17] (1987) op cit p 20.

> successful European Community . . . It would be folly to try to fit [the Member States] into some sort of identikit European personality.[18]

It would be somewhat misleading to describe this view as defending 'national' sovereignty. Rather it entailed undiluted retention of the UK Parliament's omnicompetent legal authority so that successive Thatcher governments could continue (unhindered by either domestic or EC dissent) to impose their preferred ideological agenda on the people of the United Kingdom:

> We have not successfully rolled back the frontiers of the state in Britain only to see them re-imposed at a European level with a European superstate exercising a new dominance from Brussels. . . . The lesson of the economic history of Europe in the 1970s and 1980s is that central planning and detailed control don't work, and that personal endeavour and initiative do. . . .[19]

Given the UK's poor economic performance during the 1980s, Thatcher's lauding of Hayekian theory may seem ill-founded, especially since the economically most successful state, Germany, had a highly interventionist government and advocated still closer EC integration. But the speech's main significance was that it suggested that the Thatcher government would adopt a sceptical, obstructionist approach to all integrationist EC initiatives.

The Commission described the Bruges speech as 'unrelentingly naive'. Its contents had not been cleared with the then Foreign Secretary, Sir Geoffrey Howe, who evidently viewed its style and content with 'weary horror'.[20] The speech lent a sharper edge to the fundamental divisions over European policy which had riven the Conservative Party ever since the 1972 Accession rebellion. It was enthusiastically received in the party's Euro-sceptic wing,[21] but was met with dismay by several senior Cabinet members and a substantial number of Euro-enthusiast backbenchers.[22] As we shall see later, Thatcher's perception of both the nature and location of what we might term the 'ultimate political fact' of the UK's EC membership was eventually

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[18] The speech is thoroughly reported in *The Times*, 21 September 1988.

[19] Ibid.

[20] Young (1991) op cit p 550.

[21] Clark op cit pp 225–227.

[22] See Young op cit ch 23.

to prove seriously flawed.

In the shorter term, it had a significant effect. In 1989, eleven Member States had adopted a *Community Charter of Fundamental Social Rights of Workers*. The so-called 'Social Charter' advocated a significant extension of the Community competence in social policy matters, to encompass workers' rights to fair remuneration and adequate protection against unfair dismissal, redundancy, and unsafe working conditions. The British government opposed such measures, seeing them as a re-expansion of the 'frontiers of the state'. The Charter was merely a 'Declaration', not a binding part of EC law. Even in this form, however, it was unacceptable to the Thatcher government, which refused to sign the Declaration.[23]

II. **Normative supra-nationalism—the ECJ continues**

The SEA presented the ECJ with continuing as well as new challenges. The following section addresses two issues. The first concerns the domestic legal impact of unincorporated or incorrectly incorporated directives; the second, the nature of 'democracy' within the EC's law-making process.

The 'indirect effect' of directives—continued

Six years after *Von Colson*, in *Marleasing*, the ECJ resolved the temporal ambiguity created by *Von Colson* in concluding that existing domestic law, as well as newly introduced measures, would be subject to the *Von Colson* approach to interpretation:

> . . . in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter . . .[24]

Marleasing also intimated that the ECJ expected domestic courts to take an expansive approach to the question of their interpretive autonomy. The formula used in respect of that issue was re-cast as 'as far as possible', a phrase omitting the reference to 'discretion given by domestic law' that featured in the *Von Colson* judgment. The obvious inference was that domestic courts whose own constitutional orthodoxies limited them to literalist approaches to statutory interpretation should not regard themselves as so constrained in future.

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[23] See generally Shaw op cit ch 16.

[24] Case C–106/89: [1990] ECR I–4135 at para 8.

We will shortly consider the impact of both cases in the UK's domestic law. Firstly, however, we turn to ECJ innovations in the regulation of the Community's own law-making process.

Reducing the democratic deficit: judicial initiatives

The Treaty has always required that EC institutions identify the 'legal base' of their legislative actions. This would seem a logical demand in respect of any legislative body which has only limited competence. Prior to 1986, the ECJ was called upon on several occasions via Art 173 proceedings to decide if the acts of a particular institution had any defensible legal base at all within the Treaty.[25]

However, the super-imposition of new Community competences in the SEA on to the existing Treaty raised the prospect that it would theoretically be possible for the Community to achieve particular objectives through more than one type of law-making process. In such circumstances, the Treaty itself did not specify which process was to be accorded priority. The question was not simply an abstract one; it had substantial implications for both the 'institutional balance' and the supra/inter-national balance within the Community's legislative machinery. It was clear, for example, that the Parliament's relative importance vis-à-vis the Council would be enhanced if an Act's legal base required the co-operation procedure rather than the consultation process. Similarly, supra-national forces would enjoy greater influence at the expense of inter-national sentiment if legislation could be adopted via qualified majority or simple majority voting rather than unanimity. In either case, the legal base chosen would be likely to influence the substantive content of the legislation enacted. One might plausibly assume that the enacting institutions should opt for whichever base was most likely to facilitate achievement of Community objectives. However the SEA offered no precise criteria against which to assess that question. This was a legal lacuna which the ECJ rapidly took the opportunity to fill.

The issue in *EC Commission v EC Council (Generalised Tariff Preferences)*[26] concerned the legal basis of

[25] *Stölting*: Case 138/78: [1979] ECR 713, ECJ; *France, Italy and United Kingdom v EC Commission*: Case 188–190/80: [1982] ECR 2545, ECJ; *Germany v EC Commission*: Case 281/85, 283–285/85, 287/85: [1987] ECR 3203, ECJ. See generally Biebr R (1984) 'The settlement of institutional conflicts on the basis of Article 4 of the Treaty' *CML Rev* 505.

[26] Case 45/86: [1987] ECR 1493, [1988] 2 CMLR 131, ECJ.

a Council regulation fixing the tariff regime for certain imported goods. The Council adopted the measure via Art 235, which required unanimous voting and consultation of the Parliament. The Commission maintained that the measure should have been adopted via Art 113, which demanded qualified majority voting (but no role for the Parliament). In upholding the Commission's claim, the ECJ offered a broad statement of principle concerning legal base questions:

> . . . [I]n the context of the organisation of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.[27]

What was meant by 'objective factors' was unclear. In subsequent litigation,[28] the ECJ conflated this notion of 'objectivity' with the requirement that the Community must always choose the most 'democratic' and integrationist legislative method when a choice is available. Thus a simple majority vote is to be preferred to qualified majority procedures, which are themselves preferable to unanimity. Similarly, processes which demand the co-operation of the Parliament are preferable to those requiring merely consultation.

To label such criteria 'objective' is something of a judicial sleight of hand; it assumes that supra-nationalism and minimising the democratic deficit are 'natural' or uncontested values.[29] In the context of the ECJ's jurisprudential tradition, those assumptions are readily understandable, but that is to ignore questions

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[27] Ibid, at para 11. Readers seeking a domestic analogy might refer to the *De Keyser Royal Hotel* case ('The superiority of statute over prerogative: *A-G v De Keyser's Royal Hotel Ltd* (1920)', ch 4, pp 95–98).

[28] *EC Commission v EC Council*: Case C–300/89 *Titanium dioxide* [1991] ECR I–2867, ECJ; *European Parliament v EC Council*: Case C–295/90 *Student residence rights* [1992] ECR I–4193, ECJ. For an overview see Bradley K (1987) 'Maintaining the balance: the role of the Court of Justice in defining the institutional position of the European Parliament' *CML Rev* 41; Crosby S (1991) 'The single market and the rule of law' *EL Rev* 451.

[29] The ECJ's predisposition to enhance the Parliament's status within the Community's institutional balance was displayed in decisions which, in apparent contradiction of the terms of the Treaty, afforded the Parliament the capacity to challenge the legality of acts of the Commission and Council before the Court. See *European Parliament v EC Council*: Case C–70/88 (*Chernobyl*): [1991] ECR I–4529, ECJ.

as to the legitimacy of the tradition itself. As we have repeatedly seen, that larger question remains distinctly controversial in the eyes of some domestic political and judicial audiences. We return to the issues of institutional balance and democratic deficit in considering the terms of the Maastricht Treaty. Before doing so however, we address the reception afforded by the UK courts to the principles espoused by the ECJ in *Von Colson* and *Marleasing*.

III. EC law, parliamentary sovereignty and the UK courts: phase two

Chapter eleven recorded that the British judiciary took some time to come to terms with the constitutional implications of the precedence and direct effect principles. *Von Colson* and *Marleasing* presented a rather different challenge, since they required national courts to adopt avowedly teleological or purposive interpretive techniques in respect of domestic legislation, and, in so far as 'national law' was a concept broadly construed, to create new common law principles to give practical effect to EC directives. British courts could plausibly point to the ECA 1972 s 2 as a parliamentary command for them to accept the supremacy and direct effect principles. However the literal interpretation of s 2 was that it reached only directly effective EC law; it would thus not apply to any attempt to enforce the provisions of a directive against a non-governmental body. Consequently, if British courts felt that they required a domestic, statutory basis for applying the *Von Colson* and *Marleasing* principles, they would have to turn to the ECA 1972 s 3. Alternatively, British courts might simply amend common law principles of statutory interpretation to achieve the same end. Both techniques would have unorthodox constitutional connotations. But after a hesitant start, the House of Lords responded enthusiastically to the challenge.

Duke v GEC Reliance Ltd

Like Mrs Marshall, Mrs Duke worked for an employer who required women to retire at 60, but permitted men to work until 65. Such discrimination, Mrs Duke assumed, contravened the Equal Treatment Directive. In *Marshall*, the ECJ held that Directive 76/207 (and indeed all other directives) did not have horizontal direct effect. Mrs Marshall could rely on the directive because the area health authority was a government body; but since GEC was a private company, Mrs Duke could not do so. She was forced instead to rely on either the *Von Colson* principle—namely that Art 5 of the Treaty required UK courts to interpret the Sex Discrimination Act 'in so far as it is given discretion to do so under national law' to give effect to the

directive's intentions—and/or that the ECA 1972 directed the courts to interpret the SDA 1975 in this way.

The House of Lords rejected both arguments.[30] Section 2(4) could only have the effect Mrs Duke wished in respect of directly effective EC provisions. As noted earlier, that conclusion is unavoidable if s 2 is interpreted in a literalist fashion. However, the Court also declined to apply *Von Colson*, not because it considered the ECJ's principle unsound, but because the principle was not relevant to Mrs Duke's factual situation. *Von Colson*, Lord Templeman concluded, did not require national courts to invent new domestic laws empowering them to 'distort' domestic statues in order to give effect to all non-directly effective EC directives. Such 'distortion' would be permissible only in respect of domestic legislation passed to give effect to pre-existing EC law. In respect of UK statutes pre-dating the rele-vant EC directive, the court could only invoke the traditional interpretive theory applied to international law obligations; namely that an ambiguous statutory term should be given whichever meaning best satisfied the UK's international obligations. Unfortunately for Mrs Duke, Lord Templeman considered that the SDA 1975 s 6(4) unambiguously permitted discriminatory retirement ages; it could not be interpreted in any other way.

The difference between 'interpretation' (which Lord Templeman thought acceptable) and 'distortion' (which he considered illegitimate) may be elusive. Critics of *Duke* suggested that it would have been possible for the House of Lords to have found for the plaintiff.[31] Indeed, its failure to do so created several anomalies, both between the UK and those Member States where the directive was fully implemented, and within the UK between women working for public and private sector companies. Nevertheless, *Duke* did indicate that domestic legislation introduced in order to implement a directive would be open to judicial 'distortion' to produce a result consistent with EC law.

Pickstone v Freemans

The plaintiff in *Pickstone v Freemans plc*[32] contended that she and other women colleagues working as

[30] [1988] AC 618, [1988] 1 All ER 626, HL.

[31] Fitzpatrick B (1989) 'The significance of EEC Directives in UK sex discrimination law' *Oxford Journal of Legal Studies* 336–355: Szyszczak E (1990) 'Sovereignty: crisis, compliance, confusion, complacency' *EL Rev* 480–488.

[32] [1989] AC 66, HL.

'warehouse operatives' were paid less than male 'warehouse checker oper-atives' whose work was of equal value to their own. The SDA 1975 had initially provided that comparative studies of the 'value' of different jobs could be conducted only with the employer's consent: an obstructive employer could therefore prevent women employees establishing that discrimination had occurred. The Commission regarded this 'employer's veto' as in breach of EC law, in so far as it prevented individuals enforcing their EC entitlements. In a subsequent Art 169 action, the ECJ upheld the Commission's claim, holding that EC law required that employers could not be permitted to deny employees access to job evaluation mechanisms.[33]

The UK government (acting per ECA 1972 s 2(2)) subsequently introduced regulations which, according to the speech of the sponsoring Minister in the Commons, were intended to implement the ECJ's judgment. This was done by empowering industrial tribunals to order job evaluation studies in certain circumstances. However, *Pickstone* revealed a flaw in the regulations' text. On their face, they seemed to preclude an action before a tribunal when a man was employed in exactly the same job at the same pay as the woman complainant. If this was correct, an employer could evade evaluation of different jobs by employing one 'token' male among a predominantly female workforce (as Freemans had allegedly done). The UK would therefore have failed to comply with its EC obligations.

A unanimous House of Lords refused to reach this conclusion. Lord Keith felt that 'Parliament cannot possibly have intended such a failure'.[34] Consequently he thought it appropriate to go beyond the bare words of the regulation, and to construe it 'purpos-ively' by examining *Hansard* to confirm that 'Parliament's' intention was to comply with the directive. Thus construed, the regulation was consistent with EC law. This technique was in itself a quite radical innovation.[35] But Lord Templeman went a step further. His examination of *Hansard* led him to conclude that: 'In my opinion there must be implied in paragraph (c) . . . the words "as between the woman and the man with whom she claims equality"'.[36]

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[33] *EC Commission v United Kingdom*: Case 61/81 [1982] ICR 578, ECJ.

[34] [1989] AC 66 at 112, HL.

[35] This case pre-dated *Pepper v Hart*, and provided part of the justification for overturning the traditional rule in the latter case. We will return to the inter-relationship of the two cases later.

[36] [1989] AC 66 at 120, HL.

Litster v Forth Dry Dock and Engineering Co Ltd

Litster raised a dispute over Directive 77/187, which the EC enacted to 'provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded'. Article 4(1) specifically provided that: 'The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee'. The rationale behind the directive was to ensure that employers could not evade unfair dismissal or redundancy payment legislation through the simple expedient of transferring their business to someone else.

The UK tried to incorporate Directive 77/187 through the Transfer of Undertakings (Protection of Employment) Regulations 1981. Regulation 5(1) provided that any transfer did not extinguish the employee's contractual rights, but made them enforceable against the new employer. The problem in *Litster* arose because reg 5(3) then provided that reg 5(1) applied only to employees employed by the transferor 'immediately' before the transfer. The employees in *Litster* were sacked at 3.30pm on the day of the transfer. The transfer happened at 4.30pm. The new company claimed that this one-hour gap meant that the workers were not employed by the transferor 'immediately' before the transfer, and so could not enforce their contractual rights against the new owner.

The ECJ had recently held that workers should be regarded as still employed by the transferor if the only reason for their dismissal was the projected transfer.[37] This was indeed the reason for the dismissal in *Litster*, but the employer argued that the British courts were bound to apply the UK legislation in its literal sense; literally construed, a gap of one hour could not amount to immediacy.

The House of Lords accepted that a literal interpretation of 'immediately' supported the transferee's argument.[38] A unanimous house nevertheless found in the employees' favour. Lord Templeman accepted that *Von Colson* required domestic courts to adopt a purposive approach to domestic law 'issued for the purpose of complying with directives'.[39] However, in contrast to his decision in *Duke*, he saw no need to

[37] *P Bork International A/S v Foreningen af Arbejdsledere i Danmark*: Case 101/87: [1989] IRLR 41, ECJ.

[38] [1990] 1 AC 546, [1989] 1 All ER 1134, HL.

[39] Ibid, at 558.

read words into the domestic legislation. Rather, he preferred to construe reg 5(3):

> . . . on the footing that it applies to a person employed immediately before the transfer or who would have been so employed if he had not been unfairly dismissed before the transfer for a reason connected with the transfer.[40]

Lord Oliver referred back to *Pickstone* to justify purposive construction of domestic law introduced to give effect to EEC law 'even though it may involve some departure from the strict and literal application of the words which the legislature has elected to use'.[41] He regarded the employer's strategy as a transparent device to evade the spirit of the regulations. Lord Oliver considered the courts had to counter such evasion by implying words into the domestic legislation:

> In effect this involves reading reg. 5(3) as if there were inserted after the words 'immediately before the transfer' the words 'or would have been so employed if he had not been unfairly dismissed in the circumstances described in reg 8(1)'.[42]

***Pickstone and Litster*—usurping the legislative function?**

By adding words to legislation, Lord Templeman in *Pickstone* and Lord Oliver in *Litster* seemed to embrace the position adopted forty years earlier by Lord Denning in *Magor*,[43] a position promptly then dismissed by Lord Simonds as a 'naked usurpation of the legislative function'. There would seem to be two possible ways to explain this development. Both imply there is something 'special' in the constitutional sense about EC membership, but neither presents a direct threat to orthodox theories of parliamentary sovereignty.

Firstly, Lords Templeman and Oliver might argue that ECA 1972 s 3 orders the UK courts to adopt whichever interpretive technique the ECJ currently required of them. The ECA 1972 would thus be unorthodox (indeed perhaps even 'unconstitutional') from a conventional perspective, in so far as it seeks to give the courts pervasive commands about interpretive techniques, a matter traditionally regarded as a question of common law. Such an Act (while obviously not 'illegal') could plausibly be seen as

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[40] Ibid.

[41] Ibid, at 559.

[42] Ibid, at 577.

[43] See 'Purposive (or "teleological") interpretation', ch 3, pp 68–69.

incompatible with traditional understandings of the rule of law and the separation of powers.

The second explanation is less radical, amounting to no more than a judicial recognition that EC membership has triggered such a profound change in social and economic conditions that it is time for the common law to recognise the legitimacy of a new interpretive strategy in order to protect EC law entitlements. That conclusion need have no root in the ECA 1972, nor indeed in any other statute. And until such time as the courts' new presumption is negated or amended by statute, it presents no theoretical threat to Parliament's sovereignty.

Yet while *Litster* and *Pickstone* can be reconciled with Diceyan orthodoxies, they did not meet the ECJ's requirements in *Marleasing*.[44] The reasoning deployed by the House of Lords in *Litster* gives full effect to the narrow interpretation of *Von Colson*. The house appeared to say that it was 'given discretion under national law' (per *Von Colson*) to invent a new common law rule of statutory interpretation in respect of legislation passed specifically to implement pre-existing EC law (or to find such a command in the ECA 1972), but such 'discretion' did not extend (as required by *Marleasing* or the broad interpretation of *Von Colson*) to applying similar rules to domestic legislation pre-dating the relevant EC measure. It is difficult to discern any logical basis in domestic legal theory for such a distinction.[45] Stripped to its bones, the judicial methodology employed in *Duke* and *Litster* is to ask: 'What would Parliament have done if it had realised that the literal meaning of the words it wished to use was incompatible with a new EC law?'. The answer, of course, is that 'Parliament would have used the words which we are now implying into the Act'. The methodology required by *Marleasing* is just the same—namely to ask 'What would Parliament have done if it had realised that it needed to alter the literal meaning of the words in an existing statute in order to avoid incompatibility with a new EC law?'. The answer, of course, is that 'Parliament would have enacted amending legislation containing the words which we are now implying into the original Act'. In both circumstances, the court is putting words into Parliament's mouth. It is no less a radical innovation for a

[44] See also *Finnegan v Clowney Youth Training Programme Ltd* [1990] 2 AC 407, [1990] 2 All ER 546, HL.

[45] See the critical comment by Szyszczak (1990) op cit. For an attempt to do so see Steiner J (1990) 'Coming to terms with EC directives' 106 *LQR* 144.

court to do so when Parliament has spoken in error than when it has, again in error, failed to speak at all. The House of Lords appeared to recognise this illogicality shortly afterwards, and in *Webb v EMO Air Cargo*[46] it adopted the temporal aspect of *Marleasing*.

IV. The end of parliamentary sovereignty? Or its reappearance?

Despite their radical practical implications, *Duke* and *Litster* could be portrayed in theory simply as a new innovation in judicial interpretation of statutes. They did not involve a blunt challenge to legislation which could be reconciled with EC law only by affording the concept of 'interpretation' a meaning that paid no heed at all to linguistic limitations and encompassed the presumably distinct concept of defiance. That challenge, however, was not long in coming.

The demise of the legal doctrine? *Factortame*

The *Factortame* litigation arose from a dispute over fishing rights in British waters. The Merchant Shipping Act 1894 had allowed foreign owned vessels to register as 'British', and thereby gain the right to fish in British waters. By the late 1980s, some ninety-five boats owned by Spanish companies had done so. The British government, alarmed by the impact this 'foreign' fleet was having on fishing stocks, asked Parliament to enact the Merchant Shipping Act 1988 (MSA 1988). The 1988 Act altered the registration rules to require a far higher level of 'Britishness' in a ship's owners or managers.[47] None of the ninety-five Spanish ships could meet this test. Factortame, one of the affected companies, subsequently launched an action in the British courts claiming that the MSA 1988 was substantively incompatible with EC law.

The High Court referred the substantive question to the ECJ. It was likely that eighteen to twenty months would elapse before the ECJ issued its judgment. The High Court therefore granted Factortame an interim injunction 'disapplying' the Act and ordering the Secretary of State not to enforce it against any ship that

[46] [1992] 4 All ER 929, [1993] 1 WLR 49. For comment see Szyszczak E (1993) 'Interpretation of Community law in the courts' *EL Rev* 214.

[47] Including, inter alia, requirements that individual owners had to be British citizens or residents, and that corporate owners had to be incorporated in Britain, with 75% of their shares owned by British citizens/residents.

met the previous registration criteria.[48] The Court of Appeal set aside the order for an interim injunction, on which point Factortame appealed to the House of Lords.[49]

Lord Bridge gave the sole judgment. He accepted that not issuing an interim injunction would cause irreparable damage, perhaps even bankruptcy to Factortame, since the company had no immediate prospect of using its boats elsewhere. He also accepted that the House of Lords would accord precedence to EC law if the ECJ eventually ruled that the MSA 1988 breached EC law. This apparently clear acceptance of the precedence doctrine goes considerably further than the formulae advanced in *Macarthys* or *Garland*. Lord Bridge suggested that the 1972 Parliament had passed legislation in the form of the ECA 1972 s 2 which in some mysterious manner was incorporated into every subsequent UK Act which affects a directly effective EC right. The inference thus appeared to be that the courts would no longer obey an Act of Parliament which breached directly effective EC law even if the Act expressly stated it was intended to achieve that result.

But that conclusion was not germane to the present appeal, the nub of which was that a British court should refuse to allow the government to apply an Act of Parliament because of the possibility the Act might subsequently prove incompatible with EC law. Lord Bridge could not find any domestic authority for such a radical proposition. Nor was he ultimately persuaded that there was an overriding principle of Community law requiring the House of Lords to issue the interim injunction. However, Lord Bridge finally concluded that any such duty on the domestic courts arose only in respect of substantive rights already clearly established under EC law. The 'rights' claimed by Factortame had yet to be pronounced upon by the ECJ. Consequently, the House of Lords referred its own question to the ECJ, asking if it should disapply domestic law in order to safeguard as yet unproven EC law rights.

The litigation before the ECJ

Shortly thereafter, the ECJ heard an Art 169 action against the UK which claimed that the MSA 1988 Act breached the UK's Treaty obligations. In *EC Commission v United Kingdom*,[50] the Commission asked the

[48] See Gravells N (1989) 'Disapplying an Act of Parliament pending a preliminary ruling: constitutional enormity or common law right' *Public Law* 568.

[49] *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85.

[50] *EC Commission v United Kingdom*: Case C–246/89R: [1989] ECR 3125, ECJ.

ECJ to make an interim order per Art 186 ordering the British government not to enforce the 1988 Act. The ECJ saw some merit in the UK's position, since the 1988 Act might prove a defensible means to pursue the EC's own objective of conserving long-term fish stocks. However the Act's overt discrimination against non-British EC nationals seriously undermined the UK's case. Moreover, there was no doubt that enforcement of the Act would inflict extremely heavy losses on the Spanish shipowners. In those circumstances, the ECJ granted an interim order requiring the UK to 'suspend' the 1988 legislation.

The ECJ subsequently gave judgment on the question referred to it by the House of Lords, in *R v Secretary of State for Transport, ex p Factortame (No 2).*[51] After referring explicitly to the *Simmenthal* principle of immediate supremacy, the Court observed that national courts were obliged by the 'principle of co-operation laid down in Article 5' to ensure that domestic legal systems give practical legal effect to directly effective EC rights. Any provision within the national legal system which impairs this effect contravenes EC law. This principle applied as readily to questions of interim as final relief. Consequently, if the sole obstacle to interim relief is 'a rule of national law', the national court must set aside that rule.

Back in the House of Lords . . .

The House of Lords announced that it had held in Factortame's favour, and would disapply the MSA 1988, in June 1990. Its reasons would be given at a later date. The announcement provoked apocalyptic denunciations from Prime Minister Thatcher about losses of national sovereignty to the Commission. The leading judgment in *R v Secretary of State for Transport, ex p Factortame (No 2)*[52] was given by Lord Goff. However Lord Bridge took the opportunity to comment on claims (whose source he diplomatically chose not to name) that the decision 'was a novel and dangerous invasion by a community institution of the sovereignty of the UK Parliament'.[53] Such criticism was misconceived. Parliament had been quite aware of the precedence doctrine in 1972, so any 'limitation' of sovereignty that EC membership entailed was 'voluntary'. The ECA 1972 had ordered domestic courts to respect that 'voluntary limitation', so there was

[51] Case C–213/89: [1990] ECR I–2433.

[52] [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70.

[53] [1991] 1 AC 603, at 658.

nothing novel in this judgment.[54]

As Lord Goff made clear, the ECJ's decision in *Factortame* did not determine the outcome of the domestic litigation. Rather it required the British courts to reject those principles of domestic law (the non-availability of interim injunctions against the Crown and the courts' incapacity to disapply clearly worded statutes) which presented an absolute bar to Factortame's claims. Lord Goff made only a passing reference to the ECJ's decision, apparently seeing no need to justify or explain it, but accepting it as an uncontentious (if brand new) principle of national law to be integrated into the existing common law rules governing the availability of interim injunctions.

Those rules suggested that interim relief was only available if there was no possibility of the plaintiff eventually gaining damages to cover any loss suffered pending resolution of the main question. No such damages could (at that time)[55] be recovered from the government. The Court had then to ask itself if there was a 'strong prima facie case' indicating that the plaintiff would ultimately be successful. Lord Goff considered that the *EC Commission v United Kingdom* decision suggested that the ECJ would answer the substantive issue in Factortame's favour, which would in itself predispose the Court to grant interim relief. However, he also implied that he doubted that the plaintiff needed to show such a high probability of eventual success in this case.

The EC Treaties as 'higher law'

Radical though the 'disapplication' doctrine laid out in *Factortame* undoubtedly was, it might initially have been thought to be a principle of limited application. Was the power to be exercised, for example, only by the House of Lords; or did it extend to all national courts and tribunals? Relatedly, was the power triggered only after a reference to the ECJ via Art 177, or might it be applied whenever a national court considered a statutory provision to be inconsistent with EC law?

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[54] Lord Bridge perhaps oversimplified the issue. As ch 11 suggested, British judges and British governments displayed confusion in the late 1960s and early 1970s as to the nature and implications of *Costa* and *Van Gend*. Moreover, many innovative aspects of the ECJ's own constitutional jurisprudence had appeared after the UK's accession.

[55] But see now the discussion of *Francovich* and *Brasserie de Pecheur* later in the chapter.

Simmenthal—to which *Factortame* might be seen as a belated response—would suggest that the power lay with any court, and it arose irrespective of whether any reference to the ECJ was made. The House of Lords subsequently endorsed this position in *R v Secretary of State for Employment, ex p Equal Opportunities Commission*.[56] In the immediate aftermath of this case it became clear that even employment tribunals, which occupy a lowly position within the United Kingdom's constitutional hierarchy, considered themselves competent to apply the *Factortame* doctrine.[57] In practical terms, the *Factortame* rationale rapidly became—as far as all courts were concerned—an obviously comfortable part of the constitutional furniture.

In a more abstract vein, the unfortunate jurisprudential and political lacuna left unfilled by the *Factortame* litigation is that the House of Lords did not grapple with the fundamental question of just how it was that in 1972 the UK Parliament managed to do something that had always been beyond its predecessors' grasp—namely 'voluntarily' to limit its sovereignty? As H R W Wade has pointed out, Lord Bridge's reasoning makes very little sense, whether as an excursion in legal theory or as a recipe for practical politics.[58] The obvious problem is that if Parliament managed in 1972 to entrench the ECA, on what basis can one sensibly maintain that it could not now or in the future entrench other legislation as well? It might be argued that the EC is 'unique' in this respect, because, perhaps, of the political significance of its powers and/or its elaborate institutional structure. But that is merely an assertion. It is no less plausible to say that other important moral or political factors could acquire a similar constitutional status, with the result that, as Wade puts it 'the new doctrine makes sovereignty a freely adjustable commodity whenever Parliament chooses to accept some limitation'.[59]

This is perhaps not as alarming a spectre as it may appear. *Factortame* entrenchment is—it seems—of an extremely weak procedural kind. It does not take the form of requiring super-majorities within Parliament, nor that there be resort to any extra-parliamentary device such as a referendum; it merely requires that a bare

[56] [1994] ICR 317, HL.

[57] See Nicol D (1996) 'Disapplying with relish? The Industrial Tribunals and Acts of Parliament' *Public Law* 579.

[58] (1996) 'Sovereignty—revolution or evolution?' *LQR* 568.

[59] (1996) op cit p 573.

parliamentary majority expresses itself in unusually blunt language. A new Merchant Shipping Act which said in s 1 that it was intended to repudiate the UK's obligations under the Common Fisheries Policy would presumably have been applied by Lord Bridge and his colleagues. It is doubtful that it could have been disapplied through the judicial techniques ostensibly used in *Factortame* (*No 2*).

Factortame need not therefore be read as suggesting that Parliament can grant itself a power equivalent to that given to colonial legislatures in s 5 of the Colonial Laws Validity Act 1865 to entrench any political values it chooses by altering the legislative 'manner and form' required to change them.[60] An entrenchment mechanism of this sort is a dangerous device, as it would enable a bare legislative majority enjoying only minority electoral support to set such high thresholds for the repeal of its preferred laws that they could never be altered. But if Parliament was able to create even a very weak form of entrenchment in 1972, might it not be able to create much stronger entrenchment devices in future?

Wade's conclusion that *Factortame* amounts to a 'judicial revolution' is initially enticing. It maintains in essence that it was not Parliament through the ECA 1972 but the judges themselves who have altered the constitution's rule of recognition. In other words, the old orthodoxy was correct, but it was within the power of the courts to change it at any time. This argument displaces rather than solves the problems posed by Lord Bridge's analysis. The obvious difficulty is that if the courts have managed in 1990 to entrench the European Communities Act, on what basis can one sensibly maintain that they could not now or in the future entrench other legislation as well? Wade's doctrine 'makes sovereignty a freely adjustable commodity whenever the courts choose to impose some limitation'.

Allan's analysis of *Factortame* is more satisfactory on this issue.[61] Allan has long offered a rather isolated voice in our constitutional discourse to the effect that orthodox understandings of parliamentary sovereignty are, and always have been, ill-conceived.[62] Allan's suggestion that our current constitutional settlement permits the courts to disapply legislation which is irreconcilable with the concepts of democracy and the rule of law offers a fascinating point of departure for discussing the *Factortame* saga.

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[60] See '*A-G for New South Wales v Trethowan (1931)*', ch 2, pp 36–37.

[61] (1997) 'Parliamentary sovereignty: law, politics and revolution' *LQR* 443.

[62] See particularly (1983) op cit; (1985) op cit; (1993) op cit.

Allan's thesis rests on the presumption that the orthodox, Diceyan view of parliamentary sovereignty misconceives the political objectives that the English Revolution of 1688 was trying to achieve. The Diceyan position, and its more modern restatements, espouse a purely formalist conception of the relationship between statute and the courts. The courts (and presumably everyone else) 'recognise' statute as the highest form of law simply because the 1688 Revolution was fought (and won) by men who wished to establish the legal superiority of measures enacted by the Commons, Lords, and Monarch acting collectively over both the actions of either house, of the Monarch acting under prerogative powers, or of the courts acting under the power of the common law. However, if, following Professor Wade, we regard parliamentary sovereignty as the ultimate political fact of the constitution, it does not seem outlandish to ask (as Dicey and Professor Wade did not) why the revolutionaries wished to achieve this objective? What political or moral purpose was the ultimate political fact intended to serve?

Questioning the 'Why' rather than the 'What' of parliamentary sovereignty

Paul Craig has latterly offered an intriguing answer to this question.[63] Craig's critique begins by noting that 'much of the current literature fails to pay attention to the reasons why Parliament should or should not be regarded as sovereign'.[64] He attempts to fill in this gap by digging deeper into and behind the legal sources underpinning the Diceyan position. Orthodox theories place much reliance, for example, on arguments voiced by Sir William Blackstone, the leading eighteenth-century jurist, in his celebrated *Commentaries* on English law. The key passage asserts that Parliament 'can in short do everything that is not naturally impossible . . . True it is, that what the Parliament doth, no authority can undo'. On its face, Blackstone's text provides unequivocal support for the orthodox position.

However, Craig's critique, unlike the analysis offered by Wade in 1955, then asks *why* Blackstone was led to this conclusion. As suggested in chapter two, the notion that sovereignty should lie in a tripartite Parliament, within which each element possessed veto powers, reflected a belief that the Commons, Lords, and Monarch acting in unison were the only legitimate arbiters of the national interest. The 1688 Revolution

[63] (1991) 'Sovereignty of the United Kingdom Parliament after *Factortame*' *Yearbook of European Law* 221.

[64] Ibid, at 234.

can thus be seen as an attempt to create an anti-majoritarian source of sovereign legal authority. It is this essentially political purpose, Craig suggests, which underlay the acceptance of Parliament as the highest source of law. To put the argument simply, Blackstone and those whose views he represented endorsed the principle of parliamentary sovereignty because they could conceive of no more broadly based mechanism for ensuring that laws enjoyed the consent of the people. Parliament was 'sovereign' for political or moral reasons—namely that it minimised the possibility that the English people[65] would be subjected to factionally motivated legislation.

The sovereign Parliament was not created for a modern society. Its proponents in 1688 had no conception that the powers of the Monarch would diminish to insignificance, nor that the House of Lords would voluntarily acquiesce in the removal of its co-equal powers in the legislative process. Still less would they have envisaged a near universal electorate for the Commons and the emergence of national political parties. Our concept of 'the people' is, of course, now much changed. We regard modern Britain as a mature democracy in which the legitimacy of a sovereign Parliament rests on the periodic consent of the electorate. Yet in our mature democracy Parliament functions as an extremely effective vehicle for the majoritarian or even minoritarian sentiments of a single political party to be given legal effect. While 1688 envisaged Parliament as a consensual forum designed to identify the national interest, it now operates as an arena of conflict intended to promote party interests.

It is at this juncture that Allan's suggestion that notions of 'democracy' and 'the rule of law' can serve as limits on Parliament's legislative competence become significant in relation to the *Factortame* conundrum. The EC Treaties stand in marked contrast to our domestic law-making process. Their terms are not the product of majoritarian or even super-majoritarian law-making. Their every provision has been arrived at through a consensual negotiatory process, demanding the unanimous approval of a growing number of nations—nations which themselves represent differing political philosophies and a multiplicity of cultural inheritances. And as the Treaties have been successively amended by the same protracted, negotiatory, consensual law-making process, so the innovate jurisprudence of the European Court and the Member

[65] Narrowly defined of course as the Monarch, the Lords, and the small portion of citizens permitted to participate in electing members of the Commons.

States' domestic courts have implicitly been granted a unanimous, cross-national seal of legislative approval. The prospect of an EC Treaty provision being narrowly majoritarian, has been reduced almost to vanishing point. In that functional sense, Treaty provisions are a 'higher' form of law than can be produced by any of the EC's Member States within their own legal systems. The Treaties thus represent a modern manifestation of the ideal for which England's seventeenth-century 'revolutionaries' strove.[66]

In comparison with the Treaties, the Merchant Shipping Act fares very poorly when measured against this ideal. It is perhaps unfortunate that legal analysis of the *Factortame* episode has generally been confined to exploring the judgment's impact on the relationship between Parliament and the courts. Even Allan, notwithstanding his concern with substantive values of democracy and the rule of law, approaches the issue in this way. Neither Allan's nor Wade's critique addresses the individual citizen's interest in the case. What has rather been forgotten in respect of *Factortame* is that this particular constitutional episode was triggered by the deliberate decision of a xenophobic minoritarian government to use its Commons and Lords majorities (the one generated by the support of 34% of the electorate; the other derived from the principle of hereditary peerages) to enact a crudely segregationist economic policy which—in addition to clearly breaching the Treaty of Rome—was intended to bankrupt several business enterprises and throw many people into unemployment. It would be a very strange view of 'democracy' which nonetheless accorded legitimacy to such behaviour.

There is little indication that such overtly 'political' reasoning underpinned the *Factortame* decisions. It may well prove to be the case, as Craig has argued, that *Factortame* rests on no more than an adjustment to, or development of, the courts' role as interpreters of legislative intent.[67] That assertion can however only be proven 'correct' as a matter of law if political developments afford the opportunity to put it to a legal test. This could occur in one of two scenarios.

Will domestic courts apply statutes which expressly contradict EC law?

The first would arise if a Euro-sceptic government, commanding a majority in the Commons and Lords,

[66] This rationale obviously has less force in respect of EC secondary legislation, especially if that legislation can be enacted by qualified or simple majority vote.

[67] (1991) op cit.

were to promote legislation (perhaps, for example, another Merchant Shipping Act unilaterally withdrawing the UK from the Common Fisheries Policy) which stated in s 1:

> This Act is intended to breach the obligations accepted by the United Kingdom in its capacity as a member state of the European Community. The courts of the United Kingdom are hereby expressly ordered to apply the terms of this Act, irrespective of any rule of law deriving from the European Communities Act 1972 or the Treaties establishing the European Community or any judgment of the European Court of Justice.

We might then suppose that a non-UK EC national who wished to fish in UK waters in accordance with the terms of EC law launched an action in the English courts seeking an injunction to prevent the Act being applied. There would then be no scope for a domestic court to uphold the precedence of EC law through innovative techniques of interpretation. Nor could resort be made to theories distinguishing implied and express statutory commands.

If a domestic court wished to uphold the *Costa* and *Van Gend* principles in this situation, it could do so only by bluntly stating that Parliament had no power to disapply EC law while the UK remained a member of the Community. Building on *Costa* and the 'loyalty duty' contained in Art 5 of the Treaty, the argument would be that EC law cannot be 'supreme' if its supposed supremacy is divisible or suspendable at the whim of a national Parliament. If Parliament wishes unilaterally to terminate the 'effet utile' of EC law in the UK, it may do so only by passing legislation which repeals the European Communities Act 1972 and withdraws this country from the EC. This sounds, of course, like a very speculative hypothesis; but it perhaps takes a far smaller leap of the jurisprudential imagination to go to this point from *Factortame (No 2)*, than it did to reach *Factortame (No 2)* from the views which prevailed in many political and legal circles when the UK joined the EC in 1972.

Will domestic courts apply a statute withdrawing the United Kingdom from the EC?

Yet even this scenario, irreconcilable though it may seem with orthodox constitutional principles, does not betoken a permanent loss of parliamentary sovereignty. The final step in that direction could only be taken if Parliament enacted legislation purporting to withdraw the United Kingdom from the Community and the UK courts then refused to apply the Act. Thus far, little serious thought has been given to the argument that

Parliament cannot expect such legislation to be applied by domestic courts.[68] But such an argument is a perfectly logical development of the foundations laid by the ECJ in *Van Gend* and *Costa* and of those set down by the House of Lords in *Factortame (No 2)*.

As noted earlier, the ECJ told us in *Van Gend* that the EC was 'more than just an agreement between Member States'. It was rather:

> . . . a new legal order of international law for the benefit of which the states have limited their sovereign rights, and the subjects of which comprise not only the Member States but also their nationals.[69]

An alternative way of expressing this principle is to say that we as citizens of the United Kingdom each enjoy certain entitlements (and are subjected to certain obligations) which our domestic organs of government, acting unilaterally, are not legally competent to alter. As the Community's legal competence expanded following the Single European Act, new entitlements and obligations have been created, and the original ones bestowed by the Treaty of Rome have become more firmly rooted in our legal and political culture. This would imply that any such alteration in the UK's relationship with the EC could lawfully be accomplished only through the mechanisms of EC law. The question then becomes how can that alteration lawfully be effected?

Prior to 2009, Community law contained no express provisions for Member State withdrawal.[70] The only way that result could lawfully be achieved (as a matter of EC law, and hence, given the supremacy of EC law over contradictory domestic statutes, as a matter of domestic law) was if the EC Treaties were amended to reconstitute the Community with one fewer member. That process, as specified in Art 236, required the convening of an Inter-Governmental Conference, at which all existing Member States had to agree to alter the Treaty's provisions. From this perspective, as a matter of EC law (and of acute political irony), any one

[68] Wade hinted at the possibility; (1996) op cit at p 570: 'It may be accepted, at least at this point in time, that Parliament could indeed repeal the Act of 1972 altogether'.

[69] Case 26/62: [1963] ECR 1 at para 12.

[70] See further 'Conclusion', p 416.

of the other Member States would have had a veto power over UK departure from the Community.[71]

To suggest that UK courts might simply have refused to apply the provisions of legislation seeking to withdraw the UK from the Community is perhaps, a fanciful argument. The sovereignty of Parliament, as generally understood, would undoubtedly have to have been challenged in the most confrontational of ways by such judicial action. There is nonetheless some force in the contention—for the reasons outlined earlier—that for the UK courts to have denied our modern Parliament the power either expressly to breach EC law, or to leave the Community altogether, would not challenge the sovereignty of Parliament but rather restore its original purpose. Perhaps this would indeed amount to a revolution; but more in the sense of our constitutional order turning a full circle and returning to the anti-majoritarian ethos underpinning the 1688 revolution than of embarking on a wholly new and uncharted political adventure.

The reappearance of the political doctrine? Monetary union, collective ministerial responsibility, and the fall of Margaret Thatcher

Several factors contributed to Conservative MPs' decision to remove Margaret Thatcher as their leader (and thence to her decision to resign as Prime Minister) in November 1990. As chapter ten suggested, the unpopularity of the community charge led many Conservative MPs to fear defeat in the next general election. Thatcher's close personal identification with the poll tax offered an obvious reason for some Conservative MPs to want a new leader. Others remained continuingly unhappy with her evident preference for a presidential style of Cabinet government (a preference which had triggered the resignations of Heseltine in 1985 and Nigel Lawson in 1989). But the catalytic event was Thatcher's attitude towards the UK's EC membership.

The Treaty of Rome (Title II, Chapter 1) had contained various (seemingly non-justiciable) provisions heralding a co-ordinated approach to macro-economic policy. Member States undertook to maintain the stability of their respective currencies and an approximate equilibrium in their balance of payments. The Commission was empowered to monitor Member States' performances in this regard, and to offer financial assistance to Member States suffering a severe currency or balance of payments crisis.

[71] Since the EC is (per *Van Gend*) a 'new legal order of international law', the rules in 'ordinary' international law permitting unilateral State withdrawal from treaty arrangements would not apply.

These modest co-ordinatory policies were seen by some observers as a tentative first step towards full blown ‘monetary union’, which would ultimately require a single EC currency and a central EC bank controlling the Community’s money supply and interest rates. This objective has an obvious economic logic in the context of creating a truly ‘common’ market, as it removes the transaction costs engendered by currency exchanges and ensures that businesses in particular Member States are not advantaged or disadvantaged vis-à-vis their EC competitors as a result of their own government’s monetary policy.

But full monetary union also had profound political implications. A single EC currency and a central EC bank would present a distinct challenge to orthodox notions of national sovereignty. By the late 1960s, it is possible to argue that western economies were sufficiently closely interconnected for it to be practically impossible for any one European country successfully to pursue economic policies entirely independent of those adopted by neighbouring states. Nevertheless, economic and monetary union would remove such practical controls as national governments still possessed, thereby significantly extending the de facto federal nature of the Community and adding further force to arguments for a full political federalisation on the American model.

The EC’s first steps towards monetary union had begun in 1969, but rapidly foundered during the recession of the early 1970s. Roy Jenkins, having resigned from the Labour government to become President of the Commission in 1977, put the issue at the top of the Commission’s list of priorities, and by 1979 the European Monetary System (EMS) was in place. The EMS existed outside the legal structure of the Treaty, and so was not a Community measure in the strict sense. Its central feature was the Exchange Rate Mechanism (ERM), which placed fairly tight limits on fluctuations in currency exchange rates. Member States were not obliged to join the ERM, and successive Labour and Conservative governments chose not to do so, preferring to retain autonomy in exchange rate and interest rate policies. The SEA itself made scant reference to monetary union, beyond noting the obvious point that giving the EMS and ERM a legal basis within Community law would require further Treaty amendment. However in 1988, the European Council instructed Jacques Delors to produce a phased plan for achieving de facto and de jure economic and monetary union. The 1989 Delors *Report on Economic and Monetary Union* envisaged a three-stage process. Firstly, a gradual ‘convergence’ of the Member States’ economies in respect of such matters as

inflation rates, economic growth, and the balance of payments; secondly, the locking of all Member States' currencies into a far tighter ERM, which would tolerate only very small currency fluctuations; and thirdly, the introduction of the single currency.

While many Member State governments welcomed the plan, the UK government expressed reservations. The Conservative manifesto for the 1989 EC elections warned that monetary union would 'involve a fundamental transfer of sovereignty. . . . The report, if taken as whole, implies nothing less than the creation of a federal Europe'.[72] Nevertheless, at the Madrid Summit in 1989, the European Council agreed to begin the first stage in 1990, and to initiate the process of Treaty amendment to establish a timetable for phases two and three. The British government also agreed that it would enter the ERM at some point in the near future.

It seems that the Thatcher government regarded the Madrid summit as a recipe for delay rather than prompt action. However, the other Member States took quite the opposite view, with the result that by mid-1990, the Prime Minister and some of her Cabinet colleagues were making distinctly hostile comments about the Delors plan. We noted in chapter nine that Nicholas Ridley, perhaps the Cabinet member most in sympathy with Thatcher's EC views, had resigned in July 1990 after giving an interview critical of Germany. Some parts of that interview merit further attention here. Ridley had suggested that monetary union was simply 'a German racket designed to take over the whole of Europe'; he thought that the scheme posed an intolerable threat to British sovereignty: 'You might just as well give it to Adolf Hitler, frankly'.[73]

Ridley's resignation might have been thought to suggest that Ministers holding such sentiments should at the least not express them in such terms. But the Cabinet was clearly split on the monetary union question. The UK finally joined the ERM in October 1990, yet immediately afterwards the Prime Minister herself engaged in a Ridleyesque tirade against the Delors plan. At the European Council's Rome Summit, the other eleven Member States expressed their willingness to accelerate plans for further monetary integration. Thatcher resolutely opposed any such initiative, describing the summit as 'a mess' and her fellow heads of

[72] Quoted in Nicoll W and Simon T (1994) *Understanding the new European Community* at p 158 (London: Harvester Wheatsheaf).

[73] *The Spectator* 14 July 1990.

government as living in 'Cloud Cuckoo Land'. On her return to the Commons, Thatcher accused Jaques Delors and the Commission of trying to 'extinguish democracy', and announced she would greet every 'federalist' EC measure with a resounding 'No!'.

Thatcher's outburst prompted Geoffrey Howe (the then Deputy Prime Minster) to resign from the Cabinet. His initial explanation that his resignation was over the question of government policy towards the EC was to be expanded upon in a speech to the Commons on 13 November 1990.[74] Howe was never noted as an inspiring orator. He once earned the memorable soubriquet from Dennis Healey that to be criticised by him in debate was 'like being savaged by a dead sheep'. His resignation speech did not contain any stylistic fireworks; but its content had an explosive political effect.

Howe attributed many of the country's economic difficulties to the government's refusal to join the ERM in 1985. He then revealed that the government's eventual commitment to join had been extracted from an unwilling Prime Minister only when he (then Foreign Secretary) and Nigel Lawson (the then Chancellor) had threatened to resign from the Cabinet if it did not do so. Yet Howe suggested that the question of ERM membership was merely a symptom of a more pervasive Prime Ministerial distaste for the European Community. Echoing Lord Bridge's oblique criticism in *Factortame (No 2)*, Howe asserted that it was a serious error to regard closer European integration, as the Prime Minister appeared to do, as involving the 'surrender of sovereignty'. Making an overt reference to the Bruges speech, Howe argued that such hyperbolic language served only to create:

> . . . a bogus dilemma, between one alternative, starkly labelled 'co-operation between independent sovereign states', and a second, equally crudely labelled alternative, 'centralised federal super-state', as if there were no middle way in between.[75]

Howe observed that the EC's development was more likely to proceed in a direction which coincided with British interests if the government argued its case from the centre of the EC policy-making process, rather than standing on the sidelines and eventually being dragged reluctantly into a reformed Community in which the political agenda had been set to reflect the preferences of its other members. But Howe's criticism of

[74] *HCD* 13 November 1990 cc 461–465.

[75] Ibid, at c 463.

Thatcher did not dwell merely on tactics; it reached also to the question of her basic attitude towards the UK's EC partners. Howe saw no merit in what he termed Thatcher's 'nightmare image' of an EC 'positively teeming with ill-intentioned people, scheming in her words to "extinguish democracy", to "dissolve our national identities" and to lead us "through the back-door into a federal Europe"'.[76] Against such Europhobic 'background noise', it was impossible for the Chancellor of the Exchequer to be taken seriously by other Member States in any discussion of EC economic policy.

Howe's speech is a graphic example of the Commons' capacity to serve as a forum for calling the executive to account. The speech revealed not simply a disagreement between a Prime Minister and a senior colleague on a matter of major substantive importance, but also suggested that the country was being governed by a dogmatic leader who held an ill-mannered contempt for any divergent opinion (be it within Cabinet or from other EC Member States), and who utterly rejected traditional principles of Cabinet government. Such criticisms of Thatcher had frequently been made by opposition parties; but they were likely to carry more weight with Conservative MPs when delivered by the man who had served as Chancellor and Foreign Secretary for over ten years in Thatcher's Cabinets.

Thereafter, domestic political events moved with great rapidity. Michael Heseltine, five years after leaving the Cabinet, challenged Thatcher for leadership of the Conservative Party. Her failure to win an adequate majority in the subsequent election held among Conservative MPs led to her resignation as party leader and Prime Minister, and then to John Major's eventual succession.

These events reinforce the presumption that EC membership has wrought significant changes in both orthodox constitutional theory and orthodox constitutional practice. In practical terms, the constitutional history of twentieth-century Britain has been dom-inated (except during the two world wars) by a straightforward party political division, in which single-party governments with relatively distinct and coherent ideological beliefs have deployed a Commons majority to use Parliament's legal sovereignty to pursue their preferred policy programmes. But that picture may now be changing. In part, that is attributable to the courts' recognition of supra-legislative constraints on parliamentary sovereignty on EC matters. It may be fanciful to equate *Costa* and *Factortame* with the pre-revolutionary supra-legislative notion of

[76] Ibid, at c 464.

'common right and reason', but the analogy is not entirely spurious. But perhaps of greater immediate significance to analysts of the British constitution is the argument that the demise of Margaret Thatcher, seen in conjunction with the extraordinary party political alignments produced in the 1972 Accession controversy and the 1975 referendum, indicates that the EC has introduced a profound ideological fault line into the very core of the traditional party political divide. In 1990, it seemed plausible to suggest that neither the Labour nor Conservative Party could any longer rely on its MPs to present a unified front on EC questions. Equally, it appeared that EC questions could never be settled in any definitive sense, for Euro-sceptics seemed wedded to the belief that only a bare Commons majority would be needed to unravel whatever EC commitments Parliament had previously undertaken. In combination, these factors held out the prospect of a significant weakening of Prime Ministerial authority vis-à-vis the Cabinet, and of government authority vis-à-vis the Commons. We will return to this question in the final section of this chapter. But before doing so, we must make one final journey to the case law of the ECJ.

V. **The *Francovich* remedy**

Thatcher's dominance of Britain's political agenda in the 1980s (and thence of much of Britain's constitutional history in that decade), lent her resignation major domestic significance. Yet it was of little moment for the on-going development of the Community's constitutional history. Very rapidly, all eyes turned to the proposals that would eventually feature in the Maastricht Treaty on European Union. But in the interim, the ECJ was continuing its efforts to clarify the relationship between EC law's normative supra-nationalism and the Member States' respective constitutional autonomy.

Francovich

The EC Directive at issue in *Francovich*[77] (No 80/987) required Member States to institute (by October 1983) a scheme which guaranteed a minimum level of financial protection for workers whose employers became insolvent. The maximum amount of compensation envisaged was modest, being only three months' salary. Nevertheless, Italy chose to ignore the directive. The Commission instituted an Art 169 action against Italy in 1987.[78] The ECJ held Italy to be in breach of its Treaty obligations, but the Italian government still

[77] *Francovich and Bonifaci v Italy*: Cases C–6, 9/90: [1991] ECR-I 5357, [1993] 2 CMLR 66, ECJ.

[78] *EC Commission v Italy*: Case 22/87: [1989] ECR 143.

refused to implement the directive. Francovich was owed some six million lira by his employer, who had become insolvent in 1985. An Italian court had given judgment in Francovich's favour against the employer under Italian insolvency laws, but since the employer had no resources, it was not possible for that judgment to be enforced. Mr Francovich consequently sued the Italian state in the domestic courts for the compensation he would have received if Directive 80/987 had been correctly incorporated into national law. In an Art 177 reference, the ECJ was asked; firstly, if the directive was directly effective against the Italian state; and, secondly, if it was not directly effective, could Mr Francovich nevertheless claim damages against Italy to reimburse him for the loss he had suffered as a result of the directive's non-implementation?

It is conceivable that the ECJ might have found Directive 80/987 directly effective, and thereafter simply applied the supremacy principle to 'instruct' the domestic court to award Francovich the minimum compensation the EC law required. However the Court concluded (somewhat unconvincingly)[79] that the measure was not directly effective, since it afforded Member States the choice of financing the scheme themselves or requiring it to be underwritten by private sector institutions.

One could suggest two powerful reasons for assuming that the remedy alluded to in the second question would be a very effective means of ensuring that Member States complied with their EC law obligations. Firstly, a damages remedy—especially if it embraced punitive as well as compensatory damages—could prove extremely expensive for the government concerned. Secondly, it would be much more difficult in domestic political terms for a government to ignore a judgment of a national court in an action brought by one of its own citizens than a judgment of the 'foreign' ECJ in an action initiated by the Commission. One might equally suggest that the very efficacy of the remedy would explain why it has no explicit existence in the Treaty's text: the original Member State governments would surely not have wished to subject themselves to such a regime.

Notwithstanding the absence of any explicit textual base for the claimed remedy, the ECJ found in Francovich's favour on the second question. The Court employed an interpretive methodology very reminiscent of its technique in *Van Gend*, suggesting that: 'This problem must be examined in terms of the

[79] Steiner J (1993) 'From direct to *Francovich*: shifting means of enforcement of community law' *EL Rev* 3.

general scheme and basic principles of the Treaty'.[80] This purposive approach led the ECJ to hold that: 'the principle of the liability of the state for damage to individuals caused by a breach of Community law for which it is responsible is *inherent in the scheme of the Treaty*'.[81]

Literalists might suggest that 'inherency' is simply a cloak underneath which the ECJ has invented an entirely novel principle of law, which could legitimately be introduced into the EC's constitution only by an amendment to the Treaty via Art 236. The Court did also suggest that this inherent principle also enjoyed some textual basis in Treaty Art 5, but even that conclusion demands some fairly creative interpretation.

The ECJ continued by identifying three conditions which had to be satisfied before individuals could rely on this newly discovered principle. Firstly, that the relevant EC measure was intended to confer benefits on individuals. Secondly, that the substance of such benefits was clearly defined by the directive. And thirdly, that a causal link existed between the individual's loss and the Member State's breach of its Treaty obligations. Since all three conditions were met in Francovich's case, he could recover damages from the Italian state. *Francovich* seemingly opened a new chapter in the history of the domestic impact of EC law. The judgment itself left unanswered many important questions: how tight a causal link would be required between the Member State's misfeasance and the loss caused; would liability attach only to egregious and deliberate failure to implement a directive (evidenced by failure to comply with an Article 169 judgment) or extend even to unwitting mistakes; would there be a ceiling on the quantum and heads of damages available; on which particular organ of government would liability ultimately fall; and to what extent would the ECJ be prepared to allow the national courts to devise their own answers to these issues?[82] More broadly, one might wonder if the remedy should be limited simply to failure to implement a directive,[83] or whether it should extend to any breach of EC law?

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[80] [1993] 2 CMLR 66 at para 30.

[81] Ibid, at para 35 (emphasis added).

[82] For initial speculation see Steiner (1993) op cit: Craig P (1993) '*Francovich*, remedies and the scope of damages liability' 109 *LQR* 595.

[83] Ie, to plugging the enforceability gap created by *Marshall* which *Von Colson* and *Marleasing* left unfilled.

A principle of broad or limited scope?

Yet even if *Francovich* was initially to be narrowly construed, the ECJ's gradual extension of the initially limited concept of direct effect created in *Van Gend* might suggest that *Francovich* would grow into an expansive and highly effective tool for citizens to use to enhance the effet utile of EC law. This supposition was borne out a few years later in *Brasserie du Pêcheur SA v Germany*.[84] The issue before the ECJ in *Brasserie* was whether the damages remedy was to be regarded solely as an alternative to direct effect available only in respect of non-implementation of a directive, or whether it was an additional remedy that might be invoked in respect of any breach of EC law. Unsurprisingly, the ECJ favoured the latter approach:

> [T]he right of individuals to rely on the directly effective provisions of the Treaty is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty. . . . [I]n the event of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts . . . the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.[85]

When seen in conjunction with *Marleasing, Francovich* and *Brasserie du Pêcheur* also reinforce the supposition that the ECJ is developing its own version of the 'mutual recognition' rather than 'Euronorms' approach to integration which underpinned the Single European Act. Both judgments place responsibility for ensuring the effet utile of Community law firmly in the domestic constitutional arena, the onus being placed on national courts to pull their respective legislatures into line with EC principles. On a grander scale, these might lead us to suggest that the EC is now lending a further, geographical dimension to traditional British understandings of the separation of powers, in the sense that national judiciaries may be beginning to see themselves as sharing more common ground with their counterparts in the ECJ and the other Member States than with their own countries' legislative and executive branches. It might be argued, for example, that we can identify a 'ripple effect', in which principles espoused by the ECJ and thereafter applied by the domestic courts in respect of EC matters have also begun to influence judicial decision-making on purely domestic

[84] Case C–46/93: [1996] ECR I–1029, ECJ.

[85] Ibid, at paras 20 and 22.

issues. An obvious example of this in the English context is the judgment in *Pepper v Hart*,[86] in which—using *Pickstone* as a springboard—the House of Lords departed from the traditional 'exclusionary rule' and concluded that reference might be made to *Hansard* as a guide to statutory interpretation. That result was not, nor could be, in any sense required by EC law. Rather we might suggest that the constitutional principles of the EC have become sufficiently firmly established in the minds of British judges to begin to merge into the courts' constantly evolving conceptions of the contemporary role of the common law. If the hypothesis about a 'ripple effect' is proved accurate, then a further, significant shift towards a purely federalist constitution has slipped, indirectly, and largely unnoticed via the EC's 'new legal order' into the domestic legal system. Other shifts, in contrast, played out in the political rather than judicial arenas, have attracted rather more attention.

VI. **Maastricht and Amsterdam**

The substantive reforms to the Community's legal structure introduced by the Maastricht Treaty on European Union (TEU) in 1993 were perhaps less far-reaching than those in the Single European Act.[87] Yet the amendment process proved extremely problematic in several states.

Before that political process ran its course, however, France's *Conseild' Etat* took a significant step towards accepting that French law should fully accept the precedence and direct effect doctrines. The *Conseil*'s judgment in *Rauol Georges Nicolo*[88] did not reverse *Cohn-Bendit* in express terms, but certainly indicated that the status of EC law within France had undergone a profound change. In *Nicolo*, the *Conseil* accepted that French law should now rest on the basis that Art 55 of the French constitution did require the domestic courts to attach precedence to EC treaty articles even if they were inconsistent with the requirements of subsequently enacted French legislation. Shortly afterwards, in *Boisdet*,[89] the *Conseild' Etat* extended this principle to accept the applicability of the precedence and direct effect principles to EC

[86] See 'Opening Pandora's box', pp 251–255.

[87] For a longer, but accessible guide see Hartley T (1993) 'Constitutional and institutional aspects of the Maastricht Agreement' 42 *International and Comparative Law Quarterly* 213.

[88] [1990] 1 CMLR 173.

[89] [1991] CMLR 3.

secondary legislation. *Boisdet* effectively did overrule *Cohn-Bendit*. However, the point must be made that the *Conseil d'Etat* offered these developments as changes in French constitutional law. Neither judgment accepted the ECJ's insistent contentions as to the autonomous status of Community law.

The terms of the Maastricht Treaty

The least controversial of the amendments was one of nomenclature; the Community was formally renamed as the EC rather than the EEC. Questions of labelling retained a symbolic importance throughout the negotiatory process. The British government insisted that any reference to the creation of a 'federal' Europe be deleted from the TEU's text. An ambivalent formula was eventually adopted; that the TEU would be 'a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen',[90] but which would respect the 'national identities' of Member States.

The TEU introduced several minor extensions in the EC's competence.[91] The Com-munity gained powers over consumer protection, industrial policy, and some education and cultural matters. More significantly, a specific timetable was set for phases two (1 January 1994) and three (1 January 1997 or 1999) of Delors' plan for monetary union.

Further modest efforts were made to reduce the Community's continuing democratic deficit. A new type of law-making process, requiring 'co-decision' between the Parliament and the Council in some areas, has increased the Parliament's influence. Some effort was also made to strengthen the links between the Community and individual citizens by creating a (largely symbolic) status of EU 'citizenship', and by empowering EC nationals to stand for office and vote in local or European elections anywhere in the Community.[92]

The Maastricht negotiations emphasised the plurality of meanings attached to the concept of federalism, both by different Member States, and by different political parties within an individual country.[93] The

[90] TEU, Art A.

[91] See by Lane R (1993) 'New Community competences under the Maastricht Treaty' *CML Rev* 939.

[92] Raworth P (1994) 'A timid step forwards: Maastricht and the democratisation of the EC' *EL Rev* 16.

[93] See Koopmans T (1992) 'Federalism: the wrong debate' *CML Rev* 1047.

constitutional device eventually adopted to paper over these ideological cracks was the concept of 'subsidiarity'. This in itself is a term bearing several meanings relating to decentralisation of decision-making power.[94] The TEU defined it in what is now Art 3b of the EC Treaty:

> In areas which do not fall within its exclusive competence, the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The TEU also introduced significant reforms in respect of the Social Charter. Eleven of the twelve Member States had wished to place the 1989 Declaration on a legal basis within the Treaty of Rome, thus making it directly effective in all Member States. The Major government rejected this reform. This resulted in the rather peculiar legal creature of a Protocol on Social Policy, attached to the TEU, in which the other eleven states agreed to incorporate the Charter, and all twelve states agreed that the eleven could use Community institutions (including the ECJ) to administer it.

But for both proponents and opponents of a United States of Europe, other aspects of the TEU may have seemed of greater long-term importance. The TEU provided that the EC itself was now to be seen as merely one 'pillar' of the 'European Union' (EU). The other two pillars would be Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA), which in combination substantially extended the range of the former system of 'European Political Co-operation' introduced by the Single European Act. In formal, legal terms, the CFSP and JHA were not part of the EC, and should perhaps be seen as an exercise in traditional inter-governmental co-operation rather than another 'new legal order' operating in parallel to the Community. However they were serviced by the EC's institutions, and there can be little doubt that many proponents of the Maastricht reform anticipated that all three pillars would eventually merge into a single legal order. CFSP and JHA took the Member States into far less justiciable territory than that covered by the EC. Nationalist sentiment is likely to be most intense over questions of foreign and defence policy: national

[94] Peterson J (1994) 'Subsidiarity: a definition to suit any vision' *Parliamentary Affairs* 116; Emiliou N (1994) 'Subsidiarity: panacea or fig leaf', in O'Keeffe D and Twomey P (eds) *Legal issues of the Maastricht Treaty*.

governments would seem unlikely to wish to cede control over so emotive an issue as involvement in foreign wars, which may dilute EU responses to the point that they are utterly ineffective. Certainly the first test of the EU's ability to operate as an effective foreign policy player, the war in former Yugoslavia, suggested that the framers of the TEU had underestimated the difficulties that would attend joint initiatives in this area.

The inference that Maastricht may have gone too far too fast may also be drawn from consideration of the fate of the plans to achieve monetary union within the EC. The ERM collapsed late in 1993, before the TEU came into effect. The Member States could not maintain exchange rate stability in the face of massive speculation on the international money markets against the weaker currencies. Consequently several countries, including Britain, left the system. The Community's failure to resist these forces undermined its credibility in the eyes of supporters of further integration, and was construed as a sign of more pervasive weakness by its opponents. It is therefore unsurprising that the ratification and incorporation of the Treaty proved so tortuous in several Member States.

The ratification and incorporation of the Maastricht Treaty

Under the terms of Art 236 of the Treaty of Rome, those parts of the TEU which amended the EC Treaty could not come into force until it had been ratified by all the Member States in accordance with their own constitutional procedures. The people of Denmark had initially rejected the terms of the Treaty in a referendum. Some rapid renegotiation between the Member States ensued, whereupon the TEU was approved by a tiny majority in a second Danish referendum. Public opinion was also sharply divided in France, in which the requisite referendum produced a very small majority in favour of the Treaty. In Germany, the political argument was clearly won by pro-Maastricht forces, although the German government subsequently faced an (unsuccessful) legal challenge which argued that the TEU was inconsistent with provisions of the Basic Law.[95] Ratification' of the TEU presented considerable political difficulties in the UK. The non-EC pillars of the Treaty were unproblematic; since there was no need to incorporate their provisions into domestic law, the government could satisfy its international law obligations simply by ratifying the measures through an exercise of the prerogative. In contrast, the TEU's reforms to

[95] *Brunner v European Union Treaty* [1994] 1 CMLR 57.

the EC would have to be incorporated. Since the TEU increased the powers of the European Parliament, the government was bound by the European Parliamentary Elections Act 1978 s 6 to gain parliamentary approval of the TEU before ratifying it. Given the then small size of the government's Commons majority,[96] and the presence of a dozen anti-EC backbenchers within Conservative ranks, it was not clear that approval would be forthcoming. After a series of complex political manoeuvrings in the Commons,[97] the government was defeated by eight votes on a motion concerning the Social Policy Protocol. The Prime Minister thereupon announced that the government's motion on the Protocol would be the subject of a vote of confidence the next day, and implied that a defeat would lead to a dissolution. For rebel Conservative MPs, the prospect of a general election in which they might lose their seats was sufficiently daunting to bring them back into (the party) line. The government's majority in the confidence vote was forty.

But the controversy had not run its course. In a manner reminiscent of Mr Blackburn's feeble attempt to prevent the UK's accession to the Community in 1971, right-wing Euro-sceptics launched a legal action after their cause had been defeated in the Commons.[98] The action was fronted by Lord Rees-Mogg, a cross-bench peer and former editor of *The Times*, and financed by Sir James Goldsmith, an expatriate financier. Such arguments as Rees-Mogg could muster against ratification and incorporation were peremptorily dismissed by the High Court. The litigation was a trivial event compared to the extraordinary convolutions that had gripped the Commons and divided the Conservative Party in previous months; convolutions that continued in the following months.

At the 1992 Edinburgh Summit, the Member States had agreed to a modest increase in the Community budget from 1995 onwards. When the Major government introduced legislation in November 1994 to incorporate that obligation into domestic law, it encountered a substantial rebellion from backbench Conservative MPs. For a government whose majority was then only fourteen, the prospect of a Commons

[96] The Conservative majority at the 1992 election was twenty-one.

[97] These are described in the first edition of this book at pp 554–557.

[98] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457. See Rawlings R (1994a) 'Legal politics: the United Kingdom and ratification of the Treaty of European Union (part two)' *Public Law* 367.

defeat was very real. The Prime Minister then announced that the second reading vote would be a matter of confidence, evidently on the basis that a government which could not honour its international obligations could not continue in office. Should the government be defeated, the entire Cabinet would resign and the Prime Minister would ask the Queen to grant a dissolution.[99] Rebel Conservatives promptly accused the Prime Minister of constitutional sharp practice in elevating a minor financial matter to the status of a confidence issue, and some discussion ensued as to whether the Queen would be conventionally obliged to grant a dissolution in such circumstances. Such speculation ultimately proved of only academic interest. The threat of a general election at a time when the Labour Party enjoyed a substantial lead in the opinion polls was again sufficient to bring most potential rebels back into the government camp. Nevertheless (in a manner reminiscent of Roy Jenkins' elevation of his perception of national interest over party interest in the 1972 accession votes), eight Conservative MPs abstained at second reading. They were subsequently stripped of the party whip, and rumours abounded that their local constituency associations were being pressurised by Conservative Central Office to withdraw their support from the errant MPs at the next general election.

The Treaty of Amsterdam

The Labour Party's victory at the 1997 general election took much political heat out of the constitutional controversies attending the United Kingdom's membership of the Community. The Labour Cabinet was firmly pro-European in outlook, and while a few backbench Labour MPs fell into the Euro-sceptic camp, they were an insignificant grouping within the parliamentary. The Conservative Party under its new leader William Hague continued its stridently Euro-sceptic tone, but given the size of the government's Commons majority Conservative Euro-scepticism had also become wholly insignificant.

The Blair government immediately demonstrated its pro-EC credentials by incorporating the Social Charter into UK law. It stood back however from participating in the launch of the single European currency in 1999. The government's official position on this issue was that it supported the single currency in principle, but would not join it until economic conditions were appropriate. The government also promised

[99] Technically, of course, Mr Major would have to have asked for the dissolution before resigning.

that the United Kingdom would not join unless the electorate voted to do so in a referendum.[100]

The new government also found itself plunged immediately into a new round of Treaty amendment negotiations. The proposals aired in the Amsterdam Treaty were relatively modest in effect.[101] Its most significant innovation was to transfer much of the Justice and Home Affairs pillar of the EU into the EC, thereby bringing its terms within the jurisdiction of the ECJ. While the Amsterdam amendments did not incorporate the European Convention on Human Rights into the EC's legal order, the new Treaty did extend the EC's competence into a range of overtly 'political matters'. Under Art 13, the Community gained powers to address discrimination not just on the basis of nationality, but also gender, sexual orientation, disability, race and ethnicity, and religious belief. The Amsterdam Treaty also further refined the Community's institutional balance, enhancing the power of the Parliament by extending the range of legislative matters which had to be taken by the co-decision procedure. The ratification process proved less problematic than was the case with the Maastricht Treaty. It was only in Demark that there seemed any likelihood that the proposals would be rejected. In the event, they were approved by a comfortable majority in a referendum.

It might however be suggested that the proposal of any amendment proposals so soon after Maastricht damaged the EC's credibility. It becomes increasingly difficult to regard the EC treaties as containing 'constituent' principles if those principles are altered every few years. Such rapid change suggests that the treaties are more appropriately seen as part of the rather sordid world of party politics rather than as a cross-national and cross-party attempt to identify and adhere a series of fundamental political values.

Conclusion

The impression that the EU is now a political and legal order engaged in a process of constant constitutional amendment was reinforced when a further inter-governmental conference met at Nice in 2000. The proposals under consideration at Nice were in part issues left unresolved at Amsterdam. The primary questions to be addressed concerned the admission into the EU of as many as ten new Member States, many

[100] On shifts in Labour Party policy towards the EU in this era see Fella S (2006) 'New Labour, same old Britain? The Blair government and European treaty reform' *Parliamentary Affairs* 621.

[101] See Craig P (1998) 'The Treaty of Amsterdam: a brief guide' *Public Law* 351.

of them countries from the former eastern bloc, and the alterations that such enlargement would demand for voting systems within the Council and structure of the Commission and the Court.[102] A proposal was also made that the EU should add its own Charter of Rights to the Treaty framework. The United Kingdom was opposed to giving any such Charter justiciable status, and it was eventually agreed that the Charter would have the status of a 'Solemn Proclamation' appended to the new Treaty.[103] The amendments were initially rejected by Ireland, and in a manner reminiscent of Denmark's eventual ratification of Maastricht, the proposals were eventually approved by Irish voters late in 2002.

The admission of ten new members, many of them poorly developed in economic terms and lacking any deeply-rooted democratic culture, presented the EU with substantial challenges. The difficulties of securing consensus among so many and so very different governments and peoples for any further major change to the treaties was graphically illustrated by the ignominious collapse of attempts to introduce a 'constitution' for the Community in 2004 and 2005. The proposed 'constitution' was the result of an inquiry headed by the former French President, Giscard D'Estaing. If adopted by the Community, the constitutional Treaty would have introduced substantial changes to the scope of Community competence, to its institutional structure, and to the status of Community law within the Member States. Its terms were decisively rejected in referendums in France and Denmark, and the proposals were withdrawn without being put forward for the approval of the majority of Member States.

The capacity of 'rejected' Treaty amendments to resurface and subsequently gain acceptance from the Member States was hardly a novel feature of the Community's development by this time. It was perhaps therefore unsurprising that proposals which in the view of many commentators[104] bore a very close resemblance to those of the 'constitution' re-appeared in a draft Treaty which was approved by an

[102] A helpful guide is offered in Shaw J (2001) 'The Treaty of Nice: legal and constitutional implications' *European Public Law* 195.

[103] See Rogers I (2002) 'From the Human Rights Act to the Charter: not another human rights instrument to consider' *European Human Rights LR* 343.

[104] Most significantly M D'Estaing himself; see his letter to *Le Monde* of 26 October 2007 : 'Traité européen : "les outils sont exactement les mêmes, seul l'ordre a été changé dans la boîte à outils"'.

intergovernmental conference held at Lisbon in 2007. The Blair and Brown governments subsequently insisted that the terms of the Lisbon Treaty were so different from—and so less significant than—those of the rejected constitution that they did not regard themselves as bound (in a moral sense) by the promise made in the Labour Party's 2005 election manifesto that a referendum would be held to establish if voters wished the United Kingdom to ratify the EU constitution. The government's position on this point likely owed more to an assumption that voters might not support the new Treaty than to a sincere belief that the Treaty's contents differed meaningfully from those that had been in the constitutional Treaty. The Lisbon Treaty was then rejected by Irish voters in 2008. With admirable persistence, the Irish government re-submitted the question to a further referendum in October 2009, this time securing a positive vote. The Treaty came into force shortly thereafter.

From a lawyer's perspective, a notable feature of the Lisbon Treaty was the provision made in Art 50 for a Member State to leave the EU, either through a negotiated process or unilaterally:

<Extract open>

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

<Extract close>

Should Parliament pass legislation to withdraw the United Kingdom from the EU in terms which respect Art 50, there can be no doubt that the Act would be applied by domestic courts.[105] The more intriguing question is how the courts would react to withdrawal legislation which was not consistent with Art 50.

For a British constitutional lawyer, however, the alterations made by the Lisbon Treaty to the powers and internal arrangements of the EU and the introduction of Art 50 are perhaps of lesser interest than the impact that accession has had on the UK's internal constitutional dynamics. It is undeniable that a substantial and continually increasing proportion of the laws applicable in the United Kingdom are found in the Treaties and secondary legislation. It is similarly clear that the gradual extension of the EU's competence beyond the nominally 'economic' sphere into a range of 'political' issues has lent the EU a far more 'federal' identity than it possessed forty years ago. In that respect, the effective 'sovereignty' of the UK as a nation has been curtailed. Article 50 of the Lisbon Treaty offers a clear route for that curtailment of 'sovereignty' to be reclaimed. But the innovative stream of jurisprudence flowing from *Macarthys* through *Garland* and *Pickstone* and *Litster* to *Factortame* and beyond has substantially restructured the *internal* balance of constitutional power between the legislature, the executive, and the courts.

In 2002, sitting in the High Court in *Thoburn v Sunderland City Council*,[106] Sir John Laws reaffirmed the proposition that the doctrine of implied repeal was no longer applicable in respect of EC matters. Intriguingly, the judgment also suggested that the ECA 1972 possessed what Sir John Laws called 'constitutional' status, which lent it a different legal character (ie being immune to implied repeal) to

[105] I would assume that the 'constitutional requirements' referred to in Art 50(1) could not be satisfied by an exercise of the prerogative, but would require a repeal of the ECA 1972 and all subsequent legislation giving effect to EU provisions.

[106] [2003] QB 151, [2002] 1 CMLR 1461. *Thoburn* was one of the 'metric martyr' cases, in which shopkeepers and market traders found themselves being prosecuted for failure to comply with EC sourced rules requiring weights and measures of goods offered for sale to be exclusively in metric scales. See Boyron S (2002) 'In the name of European law: the metric martyrs case' *European LR* 771.

'ordinary' Acts of Parliament.[107] More interestingly, the case appears to be the first instance of counsel arguing (in accordance with the ECJ's jurisprudence) that EC law takes effect in the United Kingdom simply because of its autonomous status as EC law and not through the 'incorporating' device of the ECA 1972.[108] The Court rejected that submission:

> Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.[109]

The Conservative/Liberal coalition was at pains to underline this reasoning in promoting a European Union Bill in 2010, which was enacted as the European Union Act 2011. The primary political purpose of the Act (in s 2) was to require that any further extension[110] of the EU's political competence could not be approved by a British government unless the proposal had been supported by a majority of voters in a referendum.[111]

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[107] Since the judgment purports to offer principles which are not confined solely to EC law matters—and thus has broad implications for the continued vitality of the doctrine of parliamentary sovereignty—it is revisited at a later stage of this book.

[108] [2003] QB 151 at 182–184. The counsel was Eleanor Sharpstone QC, who subsequently went on to be an Advocate-General at the ECJ.

[109] Ibid, at 184–185.

[110] With some identified exceptions.

[111] See the speech of the then Foreign Secretary, William Hague, at the Bill's second reading; *HCD* 7 December 2010 at c191:

The autonomous effect of EU law point was addressed in s 18:

> 18 **Status of EU law dependent on continuing statutory basis**
>
> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

Section 18 might be thought wholly pointless from a legal (whether domestic or EU in nature) perspective. The provision will have no effect on the ECJ's view of the status of EU law. And in domestic terms, given that orthodox theories as to the sovereignty of Parliament rest on its status as an 'ultimate political fact', Parliament's reiteration of the principle in a statutory text is meaningless. Section 18 is perhaps best seen as, in part, an attempt by the coalition government to pander to the Euro-sceptic fringe of the Conservative Party, and, in part, a warning shot fired by politicians across the bows of judges who the politicians fear may be prone to succumb to the temptations of aligning their constitutional loyalties to the EU rather than Parliament.[112]

From the viewpoint of the political scientist rather than the lawyer, the UK's membership of the EU has been notable for offering us a political issue which transcends the usual rigidities of ideological loyalty within the Conservative and Labour Parties. Perhaps more significantly however, the EU has lent an increasing degree of normalcy within our constitutional morality to the presumption that governmental power—be it legislative, executive, or judicial in nature—can and indeed ought to be divisible on a geographical basis. While mainstream political parties may disagree as to how much governmental

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Indeed, the crowning argument for the Bill was the behaviour of the last Government, who opposed a referendum on the EU constitution, then promised one, then refused to hold one on its substantially similar reincarnation as the Lisbon Treaty. The Bill will prevent Governments from being so deceptive and double-dealing when it comes to giving voters a say.

[112] There is little sign of that happening. The sentiments expressed in s 18 were affirmed by the Supreme Court in *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport and another* [2014] UKSC 3 at para 79.

competence should be exercised through the mechanism of EU law, there is broad acceptance of the legitimacy of the principle that a law-maker other than Parliament should determine how some important political questions are to be resolved. In chapter thirteen, we examine the way in which our modern constitution has addressed that question of the geographical separation of governmental power in the context not of the relationship of the United Kingdom qua country with other nation states, but of the relationship within the United Kingdom of England, Scotland, and Wales.

Suggested further reading

Academic and political commentary

Craig P (1991) 'Sovereignty of the United Kingdom Parliament after *Factortame*' *Yearbook of European Law* 221

Wade HRW (1996) 'Sovereignty—revolution or evolution?' *LQR* 568

Allan TRS (1997) 'Parliamentary sovereignty: law, politics and revolution' *LQR* 443

Steiner J (1993) 'From direct to Francovich: shifting means of enforcement of community law' *EL Rev* 3

Corbett R (1985) 'The 1985 intergovernmental conference and the Single European Act', in Pryce R (ed) *The dynamics of European Union*

Hartley T (1993) 'Constitutional and institutional aspects of the Maastricht Agreement' 42 *International and Comparative Law Quarterly* 213

Craig P (1998) 'The Treaty of Amsterdam: a brief guide' *Public Law* 351

Case law and legislation

R v Secretary of State for Transport, ex p Factortame Ltd (No. 2) [1991] 2 AC 603

Marleasing [1990] ECR I–4315

Francovich [1991] ECR I–5357

EC Commission v United Kingdom [1989] ECR 3125

Litster v Forth Dry Dock and Engineering Ltd [1990] 1 AC 546

R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport and another [2014] UKSC 3