THE GOVERNMENT OF JUDGES

THE IMPACT OF THE EUROPEAN COURT OF JUSTICE ON THE CONSTITUTIONAL ORDER OF THE UNITED KINGDOM

A study in judicial politics and the reception of law

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Aidan O'Neill

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INTRODUCTION

1. THE INTERACTION OF LEGAL SYSTEMS

This thesis deals with the relationship between legal systems. It looks for and at the evidence that the legal system of the European Communities, as developed by the European Court of Justice, has influenced and shaped the internal order of the English and Scottish legal systems, particularly in the spheres of constitutional and administrative law.

First of all, it might be appropriate to give a note on methodology. The approach adopted in this thesis to the study of the relationship between these bodies of law is primarily that of case-law analysis. Cases from the European Court of Justice and from the national courts of the United Kingdom are examined and their judgements subjected to close scrutiny. Judicial pronouncements are seen to be of particular interest because, under Common law systems (among which I would, for these purposes, group Scots Law) it is what judges say when on the Bench that has normative weight. The doctrinal writings of contemporary legal scholars are rarely referred to in or by the courts and even then they have, at most, persuasive force. [1]

1. See Van Caenegem Judges, Legislators and Professors: Chapters in European Legal History, 1987 in particular "Jurists are dispensable" at 53-67

Thus, questions as to the extent to which Community law has been taken into the legal systems of Scotland and England will be resolved by examining the judgements of the courts rather than by looking at the writings of legal academics. The latter may be of interest in predicting or advocating how the law might be developed, but the only authoritative pronouncements as to the present state of national law are made by judges when acting as judges and deciding cases.

Such a concentration on judicial activity might tend to give the impression that legal hierarchies form elements in a closed system whose frame of reference is and should be only to those norms which have validity within that system. [2] However such a strict positivist analysis would give no clear explanation for change and development in a legal system in the absence of formal legislative enactments, specifically in the acceptance by judges and lawyers of standards, tests and values which have their origins outside the formal parameters of their own legal system. [3] When these borrowed standards were formed in the context of another "foreign" legal system this phenomenon may be termed the "reception" of law.

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2. See Kelsen "The Pure Theory of Law: its methods and fundamental concepts" translated with an introduction by C.H. Wilson in (1934) 50 Law Quarterly Review 474-498

3. For an attempt to develop a theory of such legal change see Watson The Evolution of Law, 1985.

2. LEGAL RECEPTIONS AND TRANSPLANTATIONS

(i) Examples of the reception of law

The general definition of "reception of law" as the penetration of one system of laws into other legal systems is, however, insufficiently precise. It could mean simply the partial reception of law by way of individual legal borrowings or transplants of individual legal concepts from other systems, an example of this would perhaps be the statutory introduction of the law relating to trusts (an English concept) into Scots law. [4] What I am interested in this thesis is, however, the model of full reception whereby a whole new body of authoritative doctrine is taken up by one legal system from another and that other system is accepted to be a source of "higher law".

The primary exemplar of this phenomenon is clearly the reception of Roman law into the various systems of customary law which applied in mediaeval mainland Europe and in Scotland. With the re-discovery of Justinian's *Corpus Iuris Civilis* in the West and the development of legal studies within the emerging universities of Europe, Roman law, as interpreted over the centuries by the Glossators, the Commentators and Humanists, was accepted

4. For further examples see Alan Watson Legal Transplants, 1974.

as an authoritative source of law. Roman law was seen, throughout Western Continental Europe and Scotland, to be a higher law which supplemented gaps in the prevailing customary laws, and in some cases, came to replace customary law fully. [5]

In England, however, Roman law was not received as an authoritative source. In England customary law was taught, developed and defended not in the universities but in the Inns of Court, the schools of the barristers who practised before the courts. English legal education was accordingly isolated from the academic developments taking place in the universities throughout Europe. Thus, English law developed outside the trends of European legal history. [6]

However, in its own history English law mirrored Roman law in becoming an authoritative source and model for other legal systems. English law was exported and received into other jurisdictions with the growth of the British colonialism. The United States, Canada, (including Quebec), Australia, India, Ceylon, the West Indies, Hong Kong and Singapore, South Africa, Israel, and Scotland since its political union with England in 1707, were all subject to the influence of English law

5. For a general outline of the reception of Roman law in Western Europe see Robinson, Fergus, Gordon An Introduction to European Legal History, 1985

6. See Milsom Historical Foundations of the Common Law (2nd edn) 1981 at Chapter 2

and their legal systems have been marked as a result. [7]

The reception of laws continues in the present day. A more recent example of partial reception is the export of certain aspects of United States law, particularly those laws relating to cartels and to anti-competitive practices to certain American trading partners, notably Japan, in the interests of ensuring fair and free trade between the countries.

Free trade is also the apparent driving force behind the most recent example of full-scale reception of laws, namely the reception of European Community law within the municipal legal systems of the Member States. Thus, while the English legal system may have succeeding in developing outside the trends of European legal history, with the accession of the United Kingdom to the European Community the Scottish and English legal systems have become dependent upon a system of laws being developed by the European Court of Justice.

(ii) Two modes of legal reception

As well as partial and full reception, one might distinguish two modes by which foreign law is received: directly and indirectly. Direct reception would be the

7. See generally Hooker Legal Pluralism: an introduction to colonial and neo-colonial laws, 1975

formal imposition of another system's standards and approaches on to the receiving legal system; indirect reception is rather a process of legal osmosis, whereby foreign legal concepts spillover into the workings of the other legal system, notwithstanding the absence of any formal legal norm requiring the application of the other legal system's standards.

In this thesis, I will look at the manner and pace of this reception of the new body of Community law into the legal systems of the United Kingdom. The evidence for both direct and indirect reception of Community law concepts into the municipal law of the United Kingdom will be looked at and its significance considered. This empirical study is ultimately aimed at assessing the possibilities for and likelihood of the development of a "European Common Law" [8] formed from a marriage, sealed by the European Court of Justice, between the civilian systems of the Continent and the common law systems found in the British Isles.

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8. On this theme see generally Schwarze "Tendencies towards a Common Administrative Law in Europe" [1991] European Law Review 3; Koopmans "European Public Law: Reality and Prospects" [1991] Public Law 53; Koopmans "The Birth of European Law at the Crossroads of Legal Traditions" (1991) 39 American Journal of Comparative Law 493; Grossfeld "The Internal Dynamics of European Community Law" (1992) 26 The International Lawyer 125

3. SCHEMATIC OUTLINE

In Chapter 1 we consider the gradual transformation of the foundation Treaties of the European Communities into "constitutional documents" which form the basis for an independent legal order. This is a process which began almost immediately the Court of Justice of the European Communities was set up in 1957. It has been continuing to the present day, most recently with the apparent development by the Court of the idea that certain provisions of the foundations Treaties of the European Communities are entrenched and may no longer be amended.

By the time of the United Kingdom's accession to the European Communities in 1972 it was clear that Community law formed a distinct legal system which was capable of creating directly effective rights for the nationals of Member States which were not only independent of national laws but were to be regarded as superior to them. In Chapter 2 we look at the way in which the doctrine of the superiority of Community law was gradually taken up by the courts of the United Kingdom, a process which culminated in Factortame 2 in which the House of Lords unequivocally accepted their duty under Community law to disapply Acts of Parliament which they considered to be contrary to rights guaranteed under Community law. The acceptance by the courts of the supremacy of Community law is the pre-requisite to the full reception of Community law into national law.

In Chapter 3 we examine one of the consequences of the United Kingdom courts' acceptance of the doctrine of the supremacy of Community law, namely the growth of the judicial review of national legislation for its conformity with Community law. Of particular importance in this regard is the principle of proportionality which Community law requires to be applied, in a number of instance, in the assessment of the "validity" of national legislation. The application of the doctrine of proportionality in the context of the judicial review of legislation is seen as an example of the direct reception of a Community law doctrines into the legal systems of the United Kingdom. It is an example of reception, because proportionality is a concept which has been developed in non-U.K. legal systems and, in some ways, runs counter to the native tradition. It is direct because its application in the national review of legislation is a specific requirement of Community law.

In Chapter 4 we look for evidence supporting the "indirect" reception of the doctrine of proportionality by seeing if that doctrine, as developed in Community law, has been applied by United Kingdom courts in areas of national administrative law outside the scope of Community regulation. We conclude that pressure for such indirect reception exists, but that judicial hostility to the concept has thus far prevented the unequivocal acceptance of proportionality.

In the concluding chapter we suggest that if there is reception of Community law doctrines and general principles only in those areas of national law which directly relate to matters also covered by Community law, this will have the effect of creating two paradigms of law and legal reasoning. It is suggested that such a situation is an inherently unstable one, and that the tendency will be for political and legal pressure to increase to allow for the application of Community law concepts across the full range of national law, in the interests of consistency in the application of the law.

It is suggested that the much discussed common European law can only develop if Community law is fully received beyond the areas of its immediate application into areas of national law which, as yet, fall outside the scope of Community law. With the phenomenon of indirect reception there will be a growing together of the legal systems of the member states and the emergence of truly European Common law, under the aegis of the European Court of Justice.

CHAPTER 1

THE EUROPEAN COURT OF JUSTICE AND THE "EUROPEAN CONSTITUTION"

THE EUROPEAN COURT OF JUSTICE AND THE "EUROPEAN CONSTITUTION"

"Be you never so high yet the law is above you." [1]

1. A EUROPEAN ADMINISTRATIVE COURT

A supra-national European Court was first set up under article 7 the 1951 Treaty of Paris which created the European Coal and Steel Community. The duty of this Court of the Coal and Steel Community was to ensure that in the interpretation and application of that Treaty the law was observed. To this end the Court was given jurisdiction to review the legality of acts of the High Authority, the executive of the Coal and Steel Community, as well as, in certain circumstances, the acts of enterprises engaged in the coal and steel industry. [2]

In 1957 the European Economic Community was formed by the Treaty of Rome. This Treaty also envisaged a role for a Court to ensure that the law was observed by the various institutions and member states in applying and interpreting the Treaty. [3] A new Court of Justice was formed to replace the earlier Court of the Coal and Steel Community, while continuing to exercise that Court's

1. Lord Denning commenting on Tameside Borough Council v. Secretary of State for Education [1977] AC 1014

2. See article 31 of the Treaty of Paris 1951

3. See article 164 of the Treaty of Rome

jurisdiction conferred under the Treaty of Paris. [4]

This notion of a special tribunal entrusted with the task of controlling or checking the acts of administrative authorities, particularly insofar as their decisions affect individual interests, derived from the notion of a complete separation between judicial and executive functions as developed in post-Revolutionary France and spread throughout continental Europe during the Napoleonic adventure. The French developed a system of two distinct legal orders, public or administrative law and private law. The law as regards relations between the state and the individual was seen to be *sui generis* and so distinct from the law governing relations between fellow private citizens as to require a quite separate hierarchy of courts - the administrative courts headed by the *Conseil d'Etat;* the "private" courts headed by the *Cour de Cassation.* [5]

The European Court of Justice was set up under the foundation treaties of the European Communities to control the administrative acts of the new executive institutions set up under the treaties. The Court of Justice seems to have been intended to be an

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4. See the Annex to the Treaty of Rome Convention on Certain Institutions Common to the European Communities, March 25 1957.

5. See generally Brown and Garner French Administrative Law (1973) and Guy Braibant Le droit administratif francais (1984).

administrative law court on the model of the *Conseil d'Etat* with the task of ensuring that the institutions of the Community respected the Community treaties. Its purpose was to ensure the proper administration of the Community order within a legal framework. Reflecting on the reasons for the founding fathers of the Communities providing for the existence of a Court of Justice, Lord Mackenzie-Stuart has stated: [6]

> "[H]aving once created an administrative authority with power to take administrative decisions affecting individual interests, the concept of such an authority not being controlled by an independent tribunal would be sufficiently outrageous as to be positively offensive"

The setting up of a Court of Justice under the Treaty of Rome ensured that those bodies which acted under and with reference to the Treaties of Paris and Rome did so within a legal order. Acting within a legal order meant, for the Court, that the acts of such bodies were subject to judicial review and, if found wanting, were liable to be struck down as invalid because not in conformity with the Treaties.

It is interesting to note that on the French model of courts on which the European Court was originally based

6. see Lord Mackenzie-Stuart The European Communities and the Rule of Law London 1977 at page 7

there is no possibility for the judicial review of legislation once formally enacted. The separation of powers as understood in post-revolutionary France (given the experience during the *Ancien Regime* of judicial review of laws by the *Parlements*) meant that the duty of judges was seen to be one of applying the law, rather than questioning it. [7]

2. TRANSFORMING THE TREATIES

In a judgement of 1986 the European Court asserted its jurisdiction to review the legality of acts of the European Parliament, notwithstanding the failure of the original draftsmen explicitly to grant the Court any such power under the Treaties. The Court stated: [8]

> "[The Community] is based on the rule of law, inasmuch as neither the Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with *the basic constitutional charter, the Treaty*."

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7. Since the adoption of the Constitution of the Fifth Republic in 1958 there has a limited form of constitutional review of draft legislation, prior to its formal enactment, which may be carried out by the Conseil Constitutionnel. See Beardsley "Constitutional Review in France (1975) Supreme Court Review 189 at 204; Davis "The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court (1986) American Journal of Comparative Law 45

8. Parti Ecologiste 'Les Verts' v. European Parliament (C-294/83) [1986] 1339 at 1365

The history of the European Court of Justice shows a development of the role of the Court from being a purely administrative court modelled on the French *Conseil d'Etat* into a Constitutional court, apparently inspired by the activism of the American Supreme Court. [9] This development is not one which was specifically envisaged in the Treaties, [10] but is the result simply of the Court making ever growing claims about its own role in promoting "an ever closer union of the peoples of Europe" [11] and ensuring that "in the interpretation and application of the Treaty the law is observed". [12]

This transformation in the Court's role has occurred as a

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9. See Lord Mackenzie-Stuart "Problems of the European Community - Transatlantic parallels" (1987) 36 International and Comparative Law Quarterly 183; Temple Lang, "European Community Constitutional Law: the division of powers between the Community and Member States" (1988) 39 Northern Ireland Legal Quarterly 209; Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 American Journal of Comparative Law 205

10. See Petersmann "Constitutionalism, Constitutional Law and European Integration" (1991) 46 *Aussenwirtschaft* 247 at 256:
"The EEC Treaty was concluded as an international agreement among government and was carefully placed into the then existing framework of worldwide monetary and trade agreements, such as the IMF agreement and Gatt whose provisions served as a model for the customs union rules of the EEC."

11. See the first preamble to the Treaty of Rome:
"Determined to lay the foundations of an ever closer union among the peoples of Europe"

12. Article 164 of the Treaty of Rome:
"The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."

result of case by case developments by the Court. [13] One technique used by the Court in introducing innovations and fundamentally new principles into the text of the Treaty has been to introduce the broad principle by way of *obiter* remarks in a case, but not immediately applying the new principle to the facts of the case before it. Thereafter, however, the case in which the principle was first enunciated, although not applied, is referred to as authority for the existence of the new principle of law. [14] The Court is obviously assisted in this technique by the fact that it is a Court of Final Instance and there is no appeal against its ruling and its general development of doctrine, even where such development is a result of reading provisions into the Treaty, [15]

13. For an overview of these developments see Mancini "The Making of a Constitution for Europe" (1989) 26 Common Market Law Review 595. For suggestions for further developments in the Court's constitutional role see Mischo "*Un role nouveau pour la Cour de Justice ?*" (1990) *Revue du Marche Commun* 681.

14. For an example of this technique in the development of the notion of the direct effect of directives compare Van Duyn v. Home Office (41/74) [1974] ECR 1337 to Ursula Becker v. Finanzamt Muenster (8/81) [1982] ECR 53. On the development of the claim by the European Court to have jurisdiction to give rulings on the meaning to be attributed to provisions of national law which make reference to Community law compare Dzodzi v. Belgian State (C-297/88, 197/89) [1990] ECR 3763 with Gmurzynska-Bscher v. Oberfinanzdirektion Koeln (C-231/89) 1990 ECR 4003.

15. See, for example, the series of cases relating to the involvement of the European Parliament in the Community legislative and judicial processes: Maizena v. Commission (C-139/79) [1980] ECR 3393 on Parliament's right to intervene in cases before the Court; Parliament v. Council (Transport Policy) (C-13/83) [1985] ECR 3333 on Parliament's *locus standi* to raise actions under article 175; Les Verts. v. European Parliament (C-294/83) [1986] ECR 1339 on the possibility of the Court reviewing the legality of Parliament's acts under article 173,

rendering other provisions of the Treaty otiose and ineffective, [16] or, indeed, contradicting the plain wording of the Treaty. [17]

The Treaty does not, in terms, apply directly or generally to private citizens in their relations to Member States. The Treaty does allow any natural or legal person to institute proceedings against executive decisions of the Council and Commission either directly addressed to that person or of direct and individual concern to them. [18] However, failure by a Member State

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confirmed in Council v. Parliament (Budget) (C-34/86) [1986] 3 CMLR 94; Parliament v. Commission (Chernobyl) (C-70/88) [1990] ECR 2041 on Parliament's competence to bring actions under article 173 to defend its powers and privileges.

16. See Commission v. Council (Titanium Dioxide) (C-300/89) [1991] ECR 2867 which effectively renders ineffective article 130S procedure on the adoption of environmental protection measures by subordinating it to article 100A on the completion of the internal market. The rationale for this decision appears to be that the latter procedure allows for greater participation by the European Parliament in the legislative process and permits measures to be passed by way of majority voting rather than by unanimity in the Council of Ministers. For commentary on this judgment see Crosby "The Single Market and the Rule of Law" 1991 European Law Review 451; Barnard "Where politicians fear to tread ?" [1992] European Law Review 127; Somsen (1992) 29 Common Market Law Review 140

17. See Firma Foto-Frost (C-314/85) ECR [1987], [1988] CMLR 57 and Zuckerfabrik v. Suederithmarschen AG v. Hauptzollamt Itzehoe (C-143/88; C-92/89) [1991] 415 restricting the competence of national courts to declare a Community provision invalid, contrary to the plain wording of article 177 which clearly envisages national courts acting in this area. For an analysis of the latter case see Schermers (1992) 29 Common Market Law Review 133.

18. See article 173 of the Treaty of Rome. Article 175 of that Treaty also allows any natural or legal person to complain to the Court of Justice that a Community institution has failed to address to that person any act other than a recommendation or an opinion.

properly to fulfil an obligation laid on it by the Treaty laid that State open to legal action brought only by the Commission or by another member state before the Court of Justice. [19]

There was and is no provision for private parties to challenge Member State's actions in relation to their (non-)conformity with the Treaty or to pray in aid, before their national courts, provisions of the Treaty against national laws. Further, there was and is no provision in the Treaty to the effect that Community law would prevail over national laws in the courts of Member States. The Treaty specifies only that Community regulations should be binding in their entirety and directly applicable in Member States while Community directives should be binding as to the results to be achieved, but should leave to national authorities the choice of forms and methods to that result. [20]

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19. See articles 169 and 170 of the Treaty of Rome

20. See article 189 of the Treaty of Rome

(i) Direct Effect of Treaty Articles

The first of these matters was addressed in a judgment of 5 February 1963, some five years after the setting up of the Court of Justice. In Van Gend en Loos [21] the Court proclaimed that the spirit of the Treaty of Rome which referred in its preamble to a union of peoples and not simply of governments, together with the fact that the peoples of Europe were involved in the functioning of the Community through the European Assembly and the Economic and Social Committee showed that the Treaty was more than an agreement creating mutual obligations between the contracting states, but was a new legal order of international law which imposed obligation and conferred rights on individuals independently of national legislation. These rights of individuals could be created expressly in the Treaty or could follow as a direct corollaries from the fact that Member States have particular obligations under the Treaty, such as the obligation in the instant case not to introduce new customs duties or to increase existing ones. By this decision the European Court established that the Treaty could be "directly effective" in the sense that it was capable of creating for individuals rights enforceable before their national courts, independently of national

21. Van Gend en Loos v. Neederlandse Tarief Commissie [1963] ECR 1. For an extended analysis of the competing arguments for and against the direct effectiveness of the Treaty provisions see Stein ""Lawyers, Judges and the making of a Transnational Constitution" (1981) 75 American Journal of International Law 1, 3-10

legislatures.

(ii) Supremacy

The precise relationship between national law and the law of the Community was not spelled out in the provisions of the Treaty. This matter was addressed in a case decided one year after Van Gend en Loos. In Costa v. ENEL, [22] the European Court held that obligations undertaken by Member States under the Treaty of Rome could not be called into question by subsequent legislative acts of those Member States. If this were the case Community obligations would be contingent, rather than unconditional; the law stemming from the Treaty would accordingly be deprived of its character as Community law; and the legal basis of the Community would therefore be called into question. The Court stated that in entering the Community, Member States had permanently limited their sovereignty to extent that their subsequent unilateral legislative acts could not prevail against Community obligations. Community law is to be regarded as supreme over national law.

22. Costa v. ENEL (6/64) [1964] ECR 585. See Stein op. cit. note 19, 10-16

(iii) Directives and direct effect

The Court has built upon these principles of direct effect and supremacy. It has extended the notion of direct effect as applying not only to Treaty provision, but at least, as against the State and its institutions, [23] to directives which have not been timeously implemented by Member States. [24] It has held that, even in cases involving only private parties, national courts have an obligation to interpret national law in the light and purpose of any relevant directives, [25] whether or not the national law originated before or after adoption of the directive. [26]

(iv) The Principle of Effectiveness

The obligation on Member States and their courts under Article 5 of the Treaty to facilitate the achievement of the Community's tasks, to ensure fulfilment of the obligations arising from the Treaty or resulting from action by Community institutions and to abstain from any measures which might jeopardize the attainment of the

23. See Marshall v. Southampton and S.W. Hampshire Area Health Authority (C-152/84) [1986] ECR 723

24. See Franz Grad v. Finanzamt Traunstein [1970 ECR 825 and Van Duyn v. Home Office (41/74) [1974] ECR 1337

25. See Van Colson v. Land Nordhein-Westfalen 1984 ECR 1891

26. Marleasing SA v. La Comercial Internacional de Alimentacion SA (C-106/89) [1990] ECR 4153 also reported in [1992] 1 CMLR 305

Treaty's objectives has also become a fruitful source for the Court to construct specific legal duties. [27] From this article the Court has deduced the principle that a Member State is liable to individuals for damages resulting from that State's failure to implement Community provisions which provide for individual rights within its national territory [28].

As one commentator has stated: [29]

> "[T]he European Community has already acquired many of the features one would expect to find in a federation. This is largely due to the efforts of the European Court, which has not hesitated to remodel the law even when this has entailed adopting a solution different from that envisaged in the Treaties."

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27. See Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 CMLRev 645 for a survey of European Court jurisprudence in this matter.

28. See Francovich and Boniface v. Italian State, (C-6,9/90) ECJ 19 November 1991, not yet reported at para 36. For an analysis of this case see Duffy, "Damages against the State: a new remedy for failure to implement Community obligations" 1992 European Law Review 133

29. See Hartley "Federalism, Courts and Legal Systems: the Emerging Constitution of the European Community" (1986) 34 American Journal of Comparative Law 229 at 247

3. THE COMMUNITY LEGAL ORDER AS A TRANSNATIONAL CONSTITUTION

The original formulation of the status of European Community law by the European Court was that the Treaty of Rome was "more than an agreement which merely created mutual obligations between the contracting states" but instead constituted "a new legal order of international law" [30]. The Court soon altered this formulation to emphasise that Community law was *sui generis* and should not be seen as simply another part of general international law. As the Court stated in Costa v. ENEL: [31]

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."

(i) Obligations assumed under International Treaties

It is not only in its direct effectiveness within Member States that Community law is to be distinguished from general international law. The European Court has not been slow to emphasize the distinctiveness of the

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30. See Van Gend en Loos [1963] ECR 1 at 12

31. [1964] ECR 585 at 593

Community legal order from general law of international treaties. Treaty obligations assumed under classic (post-Westphalian) public international law might be seen as analogous to contract law in depending for their existence on the brute fact of continuing agreement of the parties involved. Both contract and international law involve the creation of mutual obligations by the agreement of two or more sovereign individuals. The mutuality principle whereby the default of one party in carrying out his obligations might have the effect of suspending the reciprocal obligations of the other party would appear to apply both to contract and public international law. [32] Obligations under a contract are assumed by the free act of the parties and the parties retain the radical capacity to repudiate the obligations assumed under the contract, although repudiation of these obligations may give rise to certain consequences under the general legal order under which the contract is created, for example damages for breach of contract. [33]

In comparison to the obligations of citizens under municipal law systems, public international law may also be described as relatively normatively weak. Not only are the international norms subject to variation by

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32. See Article 60 of the Vienna Convention on the Law of Treaties for the conditions of applicability of this principle in public international law

33. For a general account of the Law of Treaties see Brownlie Principles of Public International Law, 4th edn 1990, Chapter 25.

mutual agreement of the parties and new norms may be created by simple customary practice, but states can choose to refuse to submit to or to renounce the jurisdiction of international courts. It might be said, somewhat cynically, that the normative strength of international law appears to be in inverse proportion to the political strength of the sovereign states in question.

(ii) Community membership analogous to citizenship ?

The Community legal order, at least according to the European Court's aspirations, is entirely different from classic public international law in these aspects of the role of continuing consensus, the possibility of contrary customary practice overriding formal written norms, and even in the permissibility of the variation of obligations by explicit agreement of the contracting parties. It is, or should be regarded as, normatively strong.

For the European Court, Community law constitutes an overarching legal order which is greater than the continuing consensus which originally created it. For a state to become part of the European Community is, in the eyes of the European Court, more akin to an individual taking on the citizenship of a country, rather than one individual making a contract with another. Once citizenship has been taken up, the citizen cannot pick

and choose among the obligations which apply to her. Citizenship involves a package of rights and obligations, both as regards ones fellow citizens and as regards the central authority. Further, like citizenship, in the view of the European Court membership of the Community cannot be renounced unilaterally by one member state. The Treaty of Rome was created for "an unlimited period" [34] and contains no provisions for the secession of states from the Community. [35] It would appear to be from these facts that the Court felt able to make the following claim: [36]

> "The transfer by the State from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."

(iv) Community law as a supra-national legal system

Community law is seen by the European court to be a new supra-national legal hierarchy, superior to the legal orders of individual Member States. This new legal

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34. See article 240 of the Treaty of Rome

35. Although secession from the Community was effected by Greenland by formal amendment of the Treaty in 1985 in accord with the provisions of article 236

36. Costa v. ENEL [1964] ECR 585 at 594

order draws its legitimacy from a particular political vision of a what constitutes "an ever closer union of the peoples of Europe". Member States are regarded not as having delegated power to the Community but actually to have transferred their sovereignty thereto, at least in certain areas. Thus in Van Gend en Loos the European Court spoke of the institutions of the Community as being "endowed with sovereign rights" and that the Member States "had limited their sovereign rights, albeit within limited fields" [37] The European Court's model appear to be one in which Community law is seen as constituting a new sovereign order of law, which although initially brought into being by the consensus of the governments of Member States, does not depend on but transcends any such consensus for its continued existence and binding force on both the Member States and their citizens.

The ideal appears to something almost Hobbesian: namely the creation of a new (pooled) sovereign power to which individual national member state governments have irrevocably subordinated themselves. Developments in Community law are justified insofar as they make for the fuller realization of this vision. This vision obviously has profound implications for questions such as the possibility of national derogations from the requirements of Community law, the idea of continuing national sovereignty and the possibility of (unilateral) secession from the European Union. As one commentator

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37. [1063] ECR 1, 12

has put it:

> "The Member States, although originally the creators of the Communities, are no longer the independent masters of the Treaties but are bound by them." [38]

This high vision of Community law becomes clear when the question as to whether or not there can be said to be limits on the powers of the Member States acting with the Community institutions to make substantive amendments to the foundation Treaty of the European Community is addressed.

4. ARE THERE LIMITS ON THE POWER OF MEMBER STATES TO AMEND THE TREATIES ?

One of the characteristics of written constitutions is that they are regarded as in some sense a higher law, existing on a different order to the general run of legislation. One common feature of this difference is that special procedures are required to be followed before a constitution can be amended. Thus, in the United States, constitutional amendment normally requires the votes of both the House of Representatives and the Senate, together with ratification by at least three

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38. See Schwarze The role of the European Court of Justice in the Interpretation of Uniform Law among the Member States of the European Communities, 1988 at 11

quarters of the states of the Union. [39] Certain constitutions even provide that some features of the constitution cannot be altered. Thus the French and Italian Constitutions both hold a republican form of government to be unchangeable [40], while the German *Grundgesetz* provides that its provisions relating to fundamental rights protection, a democratic form of government and the division of the country into *Laender* cannot be amended. [41]

The Treaty of Rome provides a procedure under article 236 for its amendment whereby the Government of any Member State or the Commission may submit proposals to the Council for amendments of the Treaty. The Council, after consultation with the Parliament and, where appropriate, the Commission, may then deliver an opinion in favour of calling a conference of the representatives of the Member States Governments. The President of the Council shall then convene such an Inter-Governmental Conference so that the amendments to be made to the Treaty should be determined by common accord. Once such accord has been reached, the amendments shall enter into

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39. Article 5 of the United States Constitution. See Gunther Constitutional Law (12th edn.) 1991 at 201

40. See article 139 of the Italian Constitution, and article 89 of the French Constitution

41. See Doehring "The Limits of Constitutional Law" in Bernhardt/Beyerlin (eds.) Reports on German Public Law and Public International Law, 1986. Article 79(3) of the Grundgesetz provides that:

> "Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 to 20 shall be inadmissible."

force only if and when they are ratified by all of the Member States in accordance with their respective constitutional requirements. It should be noted that there is nothing in the wording of the Treaty of Rome to indicate that any provisions of the Treaty certain provisions of it might be entrenched against this procedure of amendment.

(i) ECJ v. EEA

The question of the non-alterability of certain provisions or aspects of the Treaty has, however, recently arisen. In August 1991 the European Court was requested by the Commission to give its Opinion [42] on the legality of a draft Treaty concluded between the European Community and the European Free Trade Association (EFTA). [43] The Court delivered its Opinion on 14 December 1991. [44] The view of the Court was that the tenor of the agreement reached with EFTA was incompatible with the Treaty of Rome.

The grounds on which the Court found the EFTA agreement to be incompatible with the EC Treaty indicate

42. Under article 228(1) of the Treaty of Rome.

43. For an account of the negotiations leading to this first draft Treaty see Jacot-Guillarmond "*Droit international et droit communautaire dans le futur Traite institutant l'EEE*" (19910 46 *Aussenwirtschaft* 317.

44. See Re the Draft Treaty on a European Economic Area (Opinion 1/91) European Court of Justice 14 December 1991 reported in [1992] CMLR 245

unequivocally how far the European Court considers the European Community system to constitute an entirely new legal order, distinct from both municipal law and the general order of international law. The Opinion also shows the extent to which the Court sees that it is its duty is to protect the Community legal order in all its distinctiveness.

The EFTA agreement was seen by the Court to be simply an agreement under general public international law, involving no transfer of legislative sovereignty by the parties to it. [45] The Court looked at the details of the EFTA agreement critically, with a view to determining whether or not conclusion of this agreement by the Community might in any way compromise the characteristics of the Community legal order as this has been developed in the jurisprudence of the Court since the Court was first set up in 1957.

This agreement was intended to create a European Economic Area (EEA) between the Community and EFTA in which rules on free trade and competition identical to those existing within the Community were to be applied. As part of the

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45. Protocol 35 of the EEA Agreement contained the following preamble:

> "Whereas the Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and whereas this consequently will have to be achieved through national procedures ... "

procedures to ensure that the same rules were applied within the Community and in the new European Economic Area, the draft Treaty provided for the establishment of an EEA court hierarchy to provide a system of judicial supervision within the European Economic Area. The proposed new hierarchy consisted of an independent EEA Court, functionally integrated with the European Court of Justice, and an EEA Court of First Instance. The new courts were to consist of a number of judges from the European Court of Justice and the Court of First Instance sitting together with judges appointed from the various EFTA Member States.

The European Court found that the system of judicial supervision proposed under the EEA Treaty was incompatible with the EEC Treaty on a number of grounds. In particular the Court asserted that the European Community differed in its essentials from the proposed European Economic Area. The latter was no more than a free trade area with a common competition policy while the objective of European Community Treaties was "to contribute together to making concrete progress towards European unity." [46] and its free trade rules and competition policy were simply means to achieving that objective rather than final ends in themselves. [47] Further, the Court asserted that the EEA was established

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46. Article 1 of the Single European Act.

47. See para 18 of the Court's Opinion

on the basis of an international Treaty, creating rights and obligations among the contracting parties but providing for no transfer of sovereignty to the inter-governmental institutions which the Treaty sets up. By contrast, the Court stated that the European Community Treaty was the constitutional charter of a Community based on the rule of law, which law was supreme over the law of Member States and directly applicable to the nationals of the Member States. [48]

(ii) Same words, different meanings.

The "essential differences" perceived by the European Court between the European Community and the proposed European Economic Area rest simply on repeated judicial assertions rather than from any particular differences in the wording of the two treaties. As we have seen, the doctrines of Community law's supremacy and direct applicability together with the claim that entry into the Community involves (an irreversible ?) transfer of sovereignty result from the case law of the Court of Justice and are not to be found in any provision of the Treaty of Rome. Notwithstanding that the provisions of the EEA and the Treaty of Rome on free movement and competition are identically worded, the Court appears to consider them essentially different. The Court stated: [49]

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48. *Ibid.* paras 20-1.

49. *Ibid.* para. 22

> "[H]omogeneity of rules of law throughout the European Economic Area is not secured by the fact the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording."

The Court once again emphasises the idea that the actual wording of a provision is not its paramount interest; rather, what it considers of primary importance is divining the spirit and then reflecting on the general scheme of the Treaty in which the provision is found. In this way the same words can be made to mean different things. As has been observed: [50]

> "[F]or the European Court, the teleological method frequently precedes and conditions the textual method of interpretation."

In its Opinion. the European Court went on to note that the proposed EEA court would be called upon to decide on the interpretation of rules which will have been adopted wholesale from Community law and which go to the fundamentals of the Community legal order. It would seem that identity of wording is of some relevance there. Further, in determining the *locus standi* of the parties appearing before it, the EEA court might require to come

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50. Slynn, "The Court of Justice of the European Communities" (1984)33 International and Comparative Law Quarterly 409 at 421

to a decision as to the respective competences of the Commission and the Member States of the Community.

In addition, the draft Treaty provided that the European Court of Justice was to be required to pay due account to the decisions of the EEA court and the national courts of the EFTA states when applying and interpreting the EEA agreement or provisions of the EC Treaties which were identical in substance to the EEA provisions.

All of these matters, in the Opinion of the Court, represented an encroachment on the exclusive jurisdiction of the Court of Justice under the Treaty of Rome and undermined the autonomy of the Community legal order in pursuing its own particular objectives. Consequently the proposed system of judicial supervision in the EEA was found to be contrary to article 164 of the Treaty of Rome. [51]

(iii) Are there entrenched provisions in the Treaty of Rome ?

The Court concluded its first opinion on the Treaty with

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51. In response to the judicial objections to the first draft EEA Treaty, the Treaty was revised and a reference was made to the European Court for a further Opinion in February 1992. The Court delivered its Opinion in favour of the revised Treaty, which no longer sought to create an EEA court in April 1992. See Opinion 1/92, 8 April 1992.

the question posed by the Commission as to whether or not Article 238 of the Treaty of Rome dealing with conclusion of association agreements between the Community and certain third parties permitted the establishment of the system of courts provided for in the agreement. In the event of the incompatibility of article 238 with such a system the Commission proposed that that article might be suitably amended so as to allow for a system of courts functionally integrated with the Court of Justice and guaranteeing the specific nature and integrity of Community law. However the Court stated: [52]

> "Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of Community law.
>
> For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement."

This is a statement of extraordinary implications. The Court appears to be suggesting that the Member States of the Community, even when acting collectively in accordance with the procedure laid down in the Treaty, cannot amend the Treaty in any way which compromises the

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52. Paras. 70-1

provision that "the Court of Justice shall ensure that in the interpretation of this Treaty the law is observed" or, indeed, any other provision which might be regarded by the Court as constituting part of the "very foundations of Community law". Such a purported amendment would appear to be, in some sense, "illegal". But what does this mean ? The court appears to be suggesting that the Treaty contains certain entrenched provisions which are unalterable.

5. THE JUSTIFICATION FOR THE TRANSFORMATION OF THE TREATIES

The outcome of the European Court's creative interpretation of the Treaties has been the creation within the territory of the Communities of a federal legal system, in the sense that Community law constitutes a separate legal system, distinct from the municipal legal orders of the Member States (Community law cannot, for instance, be amended by the legislatures of the Member States) but differing from classic international law in that it falls to be applied by the courts of the Member States to any cases brought before them, when the European Court has declared a particular provision of Community law to be directly effective or applicable. [53] This federal development in the law has not, however,

53. On the characteristics of a federal legal system see Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 American Journal of International Law 205

been matched by any clear political development of a federal nature. Even after the conclusion (but not yet the ratification) of the Maastricht Treaty on European Political Union, there remains a clear disjunction between the legal and political regimes which apply within the Communities. [54] This disjunction has come about as a result of judicial activism

The Treaty of Rome did not convert itself into a federal constitutional document, it was and is consciously and consistently re-interpreted and re-written by the European Court so as to take on federal constitutional characteristics. As one author has stated, by way of apologia for the Court's approach: [55]

> "If you do not admit that you are writing a constitution, you fail to say certain things which you would otherwise certainly include. This means that the courts have to decide whether the things you have omitted are there or not."

Once the assumption is made that the Treaties were always intended to be a constitution, and that the Court is therefore simply fulfilling its role in drawing out the

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54. On this disjunction see Weiler "The Community System: the dual character of supranationalism" 1981 1 Yearbook of European Law 267

55. Temple Lang "The Development of European Community Constitutional Law" (1991) 25 The International Lawyer 455 at 456

implications of that unfinished Treaty, the approach of the Court becomes clear. The European Court appears to see itself as sole guarding of the vision of the "Founding Fathers" and imposes that view over even the views of all the Member States Governments. The Court appears to regard itself the proper guardian of the values of the (yet to be fully realized) European polity.

The legal key to the Court's approach appears to be article 164. In the face of silence in the Treaty regarding "constitutional foundations" the Court has had recourse to article 164 which enjoins it to ensure that the law is observed in the interpretation and application of the Treaty. The Court uses this provision in a substantive way and not simply as a formal injunction relating to the need to apply general procedural norms of consistency and universality in the reaching of decisions. Rather, the provision is seen as allowing the court to refer to some higher, unwritten natural law. The European Court uses article 164 as a *carte blanche* for it to assume new grounds of jurisdiction [56], to incorporate into Community law references to fundamental

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56. See the Opinion of Advocate-General Mancini in Les Verts [1986] ECR 1339 at 1350:

> "[T]he obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission"

For a general discussion of the court's case law in this area see Arnull, "Does the Court of Justice have inherent jurisdiction ?" (1990) 27 Common Market Law Review 683.

rights [57] or to more general principles of law [58], and it would appear from the first EEA opinion, to declare the fundamentals of the Treaty to be unalterable. Article 164 places an absolute duty on the Court to ensure that the law is observed and contains no reference to any limits on the power or jurisdiction of the European Court. Thus, every innovation is justifiable by reference to article 164.

In the case law of the European Court there appears to be little discussion of these problems. As one former President of the Court has stated [59]:

> "Once the idea of a court of arbitration was abandoned and a judge was charged with ensuring the respect for the law which the Treaties were instituting, that judge could not ignore the very aims of that law. ... Thus, within the Community, the judge is the repository of the

57. For a recent example of this see Elleniki Radiophonia Tileorasi v. Dimotiki Etairia Plirofoissis (260/89) [1991] ECR 2925. See Coppel and O'Neill "The European Court of Justice: taking rights seriously?" (1992) Common Market Law Review for a critical survey of the Court's case law on the matter of human rights protection

58. See for example Internationale Handelsgesellschaft (11/70) [1970] ECR 1125 applying the principle of proportionality. Generally see Akehurst "The Application of General Principles of Law by the Court of Justice of the European Communities" [1981] British Yearbook of International Law 29 and Michele Vacca: "L'integrazione dell'ordinamento communitario col diritto degli stati membri e con i principi generali di diritto" Rivista di Diritto Europeo 1991, 339

59. Robert Lecourt in Le juge devant le Marche Commun 1970 at 64 [Author's translation]

> will of the Treaties' authors who disappeared on the day the Treaties were signed, only reappearing on the rare occasions when new agreements are concluded. They have made the judge the guardian of their joint work, which is to say of its objectives, its institutions and of its law."

The Court concentrates on realizing the preambles of the Treaties. The Court assumes that the preambles embody the real hidden spirit of the Treaty. They further assume that it is their duty to uncover the true nature of the Treaty, particularly in the face of a lack of political will in the Member States. Accordingly the Court feels itself justified in departing, wherever necessary to achieve the objectives of the Community, from any strict or literal reading of the provisions of the Treaty. [60] Collins puts it thus: [61]

> "[T]he outstanding characteristic of the Court's method of interpretation is that it has regard to the principles and objectives of the Treaties, even when no ambiguity is involved.

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60. Lecourt in L'Europe des juges, 1976 at 237 states: "He [the judge] can add nothing to the Treaties, but he must give them their full meaning and interpret their provisions so as to completely realize the consequences, implicit or explicit, required by the letter and the spirit of the Treaties."
[Author's translation]

61. Collins European Community Law in the United Kingdom, 4th edn. 1990 at 238

> The Court sees its role as essentially a dynamic one, to contribute to the development of the Communities." [62]

The intention of the Treaty as gleaned from its formal preamble is given a normative status higher than the text of the operative provisions of the Treaty itself. Indeed, as part of the process of carrying out of a dynamic role, it would appear that the Court is committed to promoting the intention (of the promoters) of the Treaty over and against the understanding or intention of those who actually ratified or acceded to the Treaty, namely the Member States.

6. THE LEGITIMACY OF THE TRANSFORMATION OF THE TREATIES

The assertion is often made that the Treaty of Rome was really a Constitution for a European Federation, which political expediency required to be left inchoate. [63] The assumption is made that it is entirely legitimate,

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62. For a brief survey of the European Court's role in promoting integration see Koopmans "The Role of Law in the next stage of European Integration" (1986) 35 International and Comparative Law Quarterly 975

63. See Temple Lang "The Development of European Community Constitutional Law" (1991) 25 The International Lawyer 455 at 456:

> "The European Founding Fathers knew that what they wanted had to be done gradually. Jean Monnet wrote that economic integration and setting up a Community institution with binding legal powers over States would be "the first practical foundations of a European federation indispensable for the preservation of peace.'"

and may indeed be required of those applying and interpreting the "intensely political text" [64] of the Treaty to complete the Treaty and to realize the vision of the civil servants and politicians (elevated to the status of "Founding Fathers) who were responsible for conceiving of the Treaty. This approach raises a number of issues, neatly summarised by Weiler: [65]

> "Who are the elusive "Founders" ? Are they Jean Monnet and the others, or are they the Member State negotiators ? How do we, and how should the Court, elucidate their intentions in the absence of a legislative history of the negotiations of the Treaties ? How do we determine their intention in relation to issues which they did not contemplate, or which they deliberately left vague or over which they compromised or disagreed ? What do we do in the case of conflict between text and intention? Should we interpret the text with the purpose of elucidating the intention, or should we seek the intention in order to elucidate the text ? ... [I]s it so clear in legal theory that the intention of the Founders

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64. As described by Lord Mackenzie-Stuart in The European Communities and the Rule of Law 1977 at 79

65. Weiler "The Court of Justice on Trial" (1987) 24 Common Market Law Review 555 at 575. For an analysis of the role of the American Supreme Court in relation to the American Constitution see Freeman "Original Meaning, Democratic Interpretation and the Constitution" (1992) Philosophy and Public Affairs 3

should continue to govern years and generations after their demise ?"

The political implications of the Court's activism are rarely addressed. [66] The Court relies on an unwritten law to find provisions of the fundamentals of the Community to be unalterable even by formal Treaty amendment. The Court limits the powers of the Member States and the central Community institutions, but leaves itself unlimited and unlimitable. The Court is unlimited because only it would appear to have access to the higher law which allows it to expand and alter express Treaty provisions. It can therefore read anything it deems fitting or appropriate into the Treaty, but never is there any explicit indication as to the criteria which guide the Court in completing the inchoate Treaty.

In asserting that certain unspecified foundational provisions of Community law are entrenched, the Court is maintaining that the sovereignty of the Member States of the Community has not simply been pooled when entering the Community, but has been lost. The supra-national body which the Member States constitute together appears to be fundamentally limited, in a way in which most of

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66. See however Rasmussen On Law on Policy in the European Court of Justice, 1986 for a sustained attack on the policy choosing and making role of the European Court which stands as an almost lone exception to the body of literature favourable to the Court's activities.

the individual States were not limited prior to entering the Community. The whole is less than the sum of its parts. The Court does not appear to consider whether or not such a result was ever agreed to intended or understood by the Member States when they created and/or acceded to the Communities.

Further, on the basis of this doctrine developed by the Court, the Court is unlimitable because any attempt by the Member States even acting together with the Community institutions to limit the Court may be claimed by the Court to be void as contrary to article 164. [67] The reliance by the Court on article 164 and natural law stands without justification or challenge. The Court's case law, culminating in the first EEA opinion shows a tendency toward creeping infallibility. We might be said to be witnessing the development of "judicial papalism".

This argument rests on the assumption that judicial law making by the European Court is to be regarded as objectionable because it is law making without any direct democratic mandate. The judges are neither politically

67. For an attempt by the Member States to involve themselves in specific court judgments, see the protocol to the Maastricht Treaty relating to the retrospective effect of the Court's judgment in Barber v. Guardian Royal Exchange Group [1990] ECR 1889. For the possible implications of this protocol see Coppel "The Retrospective Effect of Barber and the Maastricht Treaty" 1992 Benefits and Compensation International 26; Hudson "Some reflections on the implications of the Barber decision" [1992] European Law Review 163.

or legally accountable for their decisions. Extensive law-making by judicial activism accordingly exacerbates the oft-lamented democracy deficit within the Community.

Further, the suggestion by the Court of the existence of entrenched provisions in Community law which cannot be altered even by Treaty amendment places the Court above the Treaties and thus, it might be said, above the law. The insinuation of a category of entrenched provisions into the corpus of Community law fundamentally alters the institutional balance within the Community - as envisaged by the Founding Fathers ? - in that the Court holds itself to stand supreme even against the collective action of the Member States together with the other central institutions of the Community in seeking to amend the Treaty.

7. **ARE NATIONAL COURTS BOUND BY THE EUROPEAN COURT'S VISION FOR EUROPE** ?

Much has been made, by commentators sympathetic to the project of the Court of Justice, of the fact that the European Court has no sanctions open to it to compel the national courts of Member States to apply Community law as developed by the European Court. It is possible for national courts to refuse to refer a matter to the European Court [68] and to refuse to apply a ruling of the

68. See in particular the Cohn-Bendit case, Conseil d'Etat, 22 December 1978, Dalloz 1979 p. 155; (1986) 27 CMLR 543. For the impact of this case on the Court of

European Court once a reference has been returned to it [69] Thus the French *Conseil d'Etat* has refused to accept the doctrine of the direct effectiveness of directives and the German [70] and Italian Constitutional Courts [71] both have expressed certain reservation regarding the compatibility of the doctrine of the supremacy of Community law over national law with those courts' duties to protect the fundamental rights guaranteed in their respective national constitutions.[72]

Justice see Gerhard Bebr "The Rambling Ghost of 'Cohn-Bendit': Acte Clair and the Court of Justice" 20 Common Market Law Review (1983) 439; also Tatham "Effect of European Community Directives in France: the development of the Cohn-Bendit jurisprudence" (1991) 40 International and Comparative Law Quarterly, 907. The Cohn-Bendit rejection of the direct effective of directives was followed by one German court, the Federal Tax Court. See the *Bundesfinanzhof* decision of 1981 Re Value Added Tax Directives reported in [1982] 33 CMLR 527

69. For an example of this see Hartley "Federalism, Courts and Legal Systems" (1986) American Journal of Comparative Law 229 at 237

70. See the 1974 Bundesverfassungsgericht decision in Internationale Handelsgesellschaft mbh v. Einfuhr- und Vorratstelle fuer Getreide und Futtermittel reported in [1974] 2 CMLR 540. This case has since been modified by the Federal Constitutional Court decision in Wuensche Handeslgesellschaft (Case 2 BvR 197/83) reported in [1987] 3 CMLR 225. For commentary on this case see Lanier "*Solange*, farewell: the Federal German Constitutional Court and the recognition of the Court of Justice of the European Communities as Lawful Judges in (1988) 11 Boston College International and Comparative Law Review 1.

71. See Frontini v. Ministero delle Finanze Case 183 of 27/12/73 reported in [1974] 2 CMLR 383-9 and Spa Fragd v. Amministrazione delle Finanze (Decision 232 of 21 April 1989) reported in (1989) 72 *Rivista di Diritto Internazionale* 103. For a commentary in these cases see Gaja "New Developments in a continuing story: the relationship between Italian and EEC law" (1990) 27 Common Market Law Review 83

72. For an analysis of, *inter alia*, the Italian and

When national court's accept and apply the European Court's innovations in the law, this is understood to be an acceptance by the national judiciary of the correctness of the European Court's approach such as to confer retrospective legitimacy on the development and to justify further development on the same principles. The application by national courts of Community law as developed by the European Court is seen as victory of the European Court and the acceptance of their vision of law.

In point of fact, the application by national courts of European Court jurisprudence need imply neither approbation nor legitimation of the European Court's approach. National courts might apply Community law as interpreted by the European Court simply because they have been so instructed by their national Parliaments, and not because they accept the natural law vision which appears to drive the European Court.

Thus, in the United Kingdom, at least, the acceptance of the *acquis communautaire* and the application by the courts of Community law doctrines can be seen as a consequence not of the acceptance of some *idee d'Europe* involving the subordination of national State sovereignty to the central Community institutions but rather as a a

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German constitutional case law see Schermers "The Scales in Balance: National Constitutional Court v. Court of Justice" (1990) 27 Common Market Law Review 97

result of their healthy respect for the notion of national Parliamentary supremacy. It is the United Kingdom Parliament which has instructed the United Kingdom courts to apply Community law. When and if that Parliament instructs those courts to cease to apply Community law, then Community law will no longer be applied within the United Kingdom. [73] This attitude might be characterised as one which sees the European Community resting on the base of a continuing consensus and provisional self-limitation on the part of the Member States of their sovereign powers. It is a vision inspired more by Locke rather than Hobbes.

8. CONCLUSION

Effectively what we end up with are radically different lines of legitimacy and of justification. Can these differing lines of justification and legitimacy co-exist? One tendency of the European Court's jurisprudence has been to make it almost impossible to define what limits

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73. Thus Lord Denning in Macarthys Ltd. v. Smith [1979] 3 AllER 325 at 329:

> "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision of it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."

In the same case Lawton LJ stated at 334:

> "Parliament's recognition of European Community law ... by one enactment can be withdrawn by another."

there might be to Community competences *vis a vis* Member States. [74] It has become clear that Community law, as interpreted by the European Court, requires national courts to interpret and apply Community law in accordance with the principles developed by that Court with a view to contributing to the development of the Community, often at the expense of Member State powers. [75]

In the United Kingdom context a conflict between the two line of legitimation will necessarily arise when and if the United Kingdom courts are required to apply Community law over and against provisions of national law. Such a course brings into question the cornerstone principle of United Kingdom constitution, namely the sovereignty of Parliament.

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74. See Weiler "Problems of legitimacy in post-1992 Europe" (1991) 46 *Aussenwirtschaft* 411 at 425-6:

> "Sooner or later "Supreme" courts in the Member States would realize that the "socio-legal contract" announced by the [European] Court in its major constitutionalizing decisions, namely that 'the Community constitutes a new legal order ... for the benefit of which states have limited their sovereign rights, albeit within limited fields' ... has been shattered, that although they (the 'Supreme" courts) have accepted the principles of the new legal order - supremacy and direct effect - the fields do not seem any more to be limited, and that in the absence of Community legislative or legal checks it will fall on them to draw the jurisdictional lines of the Community and its Member States."

75. For a survey of specifically "European" modes of interpretation of law in comparison to those prevailing in the United Kingdom and Ireland see Millett Rules of Interpretation of EEC Legislation (1989) 11 Statute Law Review 163.

The European Court asserted in Simmenthal [76]

> "[I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and national law of the Member States on the other is such that these provisions not only by their entry into force ***render automatically inapplicable any conflicting provision of current national law*** but ... also ***preclude the valid adoption of new national legislative measures*** to the extent to which they would be incompatible with Community provisions."

Simmenthal echoes the approach arrived at two hundred years earlier in the United States of America in Marbury v. Madison, [77], which laid the foundation for the judicial review of legislation in that country:

> "The constitution is either a superior paramount law, unchallangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall be pleased to alter it. If the former part of the alternative is true, then ***a legislative act***

76. Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629 at 643 para 17

77. 5 US 368, 389, (1803) 1 Cranch 103, at 177

> ***contrary to the constitution is not law;*** if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

In the following chapter we shall look at how this doctrine set out in Simmenthal doctrine was received by the Courts of the United Kingdom.

CHAPTER 2

SIMMENTHAL AND FACTORTAME : A SEA CHANGE IN THE BRITISH CONSTITUTION

SIMMENTHAL AND FACTORTAME: A SEA CHANGE IN THE BRITISH CONSTITUTION

Full fathom five thy father lies;
Of his bones are coral made;
Those are now pearls that were his eyes;
Nothing of him that doth fade
But doth suffer a sea-change
Into something rich and strange. [1]

1. JUDICIAL REVIEW OF MEMBER STATES' LEGISLATION

The Treaty of Rome gave no power to the European Court to review the validity of Member State legislation directly. However, Articles 169 and 170 of the Treaty allow the European Court, in direct actions brought against one Member State by the Commission or by another Member State, to declare that a Member State has failed to fulfil an obligation under the Treaty, by for example enacting or failing to repeal a contentious provision of national law. If the Court makes such a judgment article 171 of the Treaty obliges the Member State to take such measures as are necessary to comply with the Court's judgment. The Maastricht Treaty contains an amendment to article 171 to the effect that the Court also be given the power to fine any Member State which fails to fulfil its obligations under the Treaty.

Of far greater importance in the development of the

1. Shakespeare The Tempest, Act 1, Scene 2

judicial review of Member States' legislation has been the preliminary reference procedure provided under Article 177. When questions relating to the interpretation of the Treaty or to the validity and/or interpretation of the acts of Community institutions are raised before Member State courts, and the Member State court considers that a decision on the question is necessary to enable that court to give judgment in the case, the national court may, (or if it is a court against whose decision there is no remedy under national law, must) request the European Court to give a ruling on the question of Community law. An additional reason for making an Article 177 reference, not expressly mentioned in the Treaty as it is a consequence of the European Court's jurisprudence since Van Gend en Loos, is to determine whether or not a provision of Community law is directly effective within the Member State.

Article 177 procedure would seem to have been aimed at ensuring a uniformity of interpretation of Community law throughout the Member States. [2] However, given the European Court's declaration of the doctrine of the supremacy of Community law over inconsistent national laws, questions then arise before national courts as to the compatibility of provisions of national law with Treaty provisions and with secondary Community

2. See Mashaw "Ensuring the observance of law in the interpretation and application of the EEC Treaty: the role and functioning of the renvoi d'interpretation under Article 177" (1970) Common Market Law Review 258

legislation. The resolution of this question may require reference to the European Court in order for the national court to ascertain the correct interpretation to be given to the relevant provisions of Community law.

The European Court's remit under article 177 procedure is simply to set out the correct interpretation of Community law and it has no power to interpret or to rule on the validity of provisions of national law. In point of fact Article 177 procedure has been used by the European Court to highlight inconsistencies between national legal provisions and the rules of Community law, thereby requiring the national courts, in fulfilment of their duty under Article 5 of the Treaty and as a consequence of the doctrine of supremacy of Community law, not to apply the inconsistent national law.

Thus, in the context of an article 177 reference in Simmenthal, the European Court stated: [3]:

> "[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and must accordingly ***set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.*** ... [A]ny provision of a national legal system and legislative,

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3. Amministrazione delle Finanze dello Stato v. Simmenthal (C106/77) [1978] ECR 629 at 644 [Emphasis added]

> administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law"

In its judgment in Simmenthal the European Court made it clear that the application of Community law over and against the provisions of national law was not a matter which concerned only the Constitutional courts of the Member States. Rather, the provisions of Community law were held to so completely permeate the legal system of the Member States that Community law fell to be applied by all courts within the national hierarchy. Community law laid on every judge in a national legal order the duty to give precedence to the provisions of Community law over all and any conflicting national laws.

The trinity of Van Gend en Loos, Costa v. ENEL and Simmenthal established the three essential characteristics of the Community legal order: its creation of directly effective rights for the citizens of member states; its supremacy over the national legal orders of the member states; and its universal

applicability, by and within all courts of the member states. The application of Community law over and against the provisions of national law was laid squarely at the door of national courts.

The problem for the United Kingdom courts is that their absolute duty to accor supremacy to Community law could, potentially, conflict with their equally absolute duty to apply the laws passed by the United Kingdom Parliament.

2. PARLIAMENTARY SUPREMACY IN THE UNITED KINGDOM

The prevailing constitutional orthodoxy in the United Kingdom, as expressed from Dicey [4] on, was that the doctrine of Parliamentary supremacy, which had been established in the constitutional settlement which followed the expulsion of James II and VII in 1688-89, meant that there were and could be no legal limits (in contrast to political or practical ones) on the power of Parliament to pass whatever laws it wished. As a corollary of this it was seen as the duty of the courts simply to apply the laws passed by Parliament. There was no possibility of any development of the higher constitutional review of legislation because there existed no higher legal standard against which such legislation might be judged.

4. See Dicey The Law of the Constitution (10th edition 1959) 39-40.

This approach to Parliamentary supremacy remained the dominant English consensus [5] notwithstanding certain academic arguments advanced by Scots [6] to the effect that the Acts of Union of 1707 between England and Scotland created a new basic law (*Grundgesetz*) of the United Kingdom and set limits on the power of the new Parliamentary body created on the abolition of the separate Parliaments of England and Scotland. Judges in Scotland have, however, never struck down any provisions of a post-Union Act of Parliament on the grounds of their contravention of articles of the Acts of Union. The judges in Scotland have studiously avoided giving an unequivocal answer to the question as to whether or not they indeed have any such power. [7]

The constitutional position was recently summarised by Lord Donaldson MR as follows: [8]

"Our unwritten constitution rests upon a

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5. See Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined, (1975) 92 Law Quarterly Review 591; Allan "The Limits of Parliamentary Sovereignty" [1985] Public Law 614

6. See for example J.D.B. Mitchell "What happened to the Constitution on 1 January 1973 ?" (1980) 11 Cambrian Law Review 69; D.N. MacCormick "Does the United Kingdom have a Constitution ?" [1978] 21 Northern Ireland Legal Quarterly 1; Walker & Himsworth "The Poll Tax and Fundamental Law" [1991] 36 Juridical Review 45

7. See MacCormick v. Lord Advocate 1953 SC 396, 411-2; Gibson v. Lord Advocate 1975 SLT 134; [1975] 1 CMLR 563; Re Pringle, petitioner 1991 SLT 330; Murray v. Rogers 1992 SLT 221.

8. See M. v. Home Office [1992] 2 WLR 73 at 99

> separation of powers. It also rests upon a mutual recognition of those powers. It is for Parliament to make new laws and to amend old laws, including the common law. It is for the courts to interpret and enforce the law. It is for the government to govern within the law. Each within its own sphere is supreme. Ultimate supremacy lies with Parliament, but only to the extent that it can control the government by its votes and that it can control the courts by using the full legislative procedure for changing the law, either generally or with a view to reversing a particular decision by the courts."

The accession of the United Kingdom to the European Communities in 1972 resulted in the incorporation of the legal systems of the United Kingdom into the Community legal order. By Sections 2 and 3 of the European Communities Act 1972 the courts of the United Kingdom were required to apply law in the United Kingdom as interpreted by that Court. [9]

As we have seen, the European Court's interpretation of Community law requires national courts to give

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9. See Allan "Parliamentary Sovereignty: Lord Denning's Dextrous Revolution" (1983) 3 Oxford Journal of Legal Studies 22; McCaffrey "Parliamentary Sovereignty and the Primacy of European Law: a matter of construction ?" (1991) 42 Northern Ireland Legal Quarterly 109.

superiority to the provisions of Community law over and against those provisions of national law. However, while the Community doctrines of superiority, direct effect and permeability might have been unequivocally established in the jurisprudence of the European Court within six years of the acceptance of the United Kingdom's legal systems into the Community legal order, the actual reception of those doctrines in the practice of the courts in the United Kingdom has required more time. [10] There has been a time lag between European constitutional theory and United Kingdom court practice.

3. JUDGES AND PARLIAMENT: THE INSTITUTIONAL BALANCE IN THE UNITED KINGDOM

Writing in 1980, Mauro Cappeletti stated the following: [11]

> "If ... the United Kingdom accepts the doctrine [of the supremacy of European Community law], a novel form of judicial review of legislation will have been adopted by a nation which, even more rigourously than France, has purported to reject all forms of judicial review since, at least, its Glorious Revolution of 1688."

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10. See Lester "The Influence of European Law on English Administrative Law" 1991 1 Rivista Italiana di Diritto Publico Comunitario 921, 923-6

11. Cappeletti, The Judicial Process in Comparative Perspective (1989), Cap 4 "The Mighty Problem of Judicial Review" at 166

While the superiority of European law and the competence of the European Court definitively to expound the requirements of European law in relation to national laws was generally accepted in *obiter* remarks by the United Kingdom judges from the time of the accession of the United Kingdom to the European Communities [12] the courts of the United Kingdom rarely disapplied provisions of Acts of Parliament on their own initiative. [13]

There is evidence of a greater readiness among lower level administrative tribunals and quasi-judicial bodies to take it upon themselves to disapply provisions of primary and secondary national legislation as being contrary to Community law. [14] However, Costa v. ENEL,

12. See eg Lord Denning in Macarthys Ltd. v. Smith [1981] 1 All ER 111 at 120:

> "It is important now to declare, and it must be made plain that the provisions of article 119 of the EEC Treaty take priority over anything in our English statute. That priority is given in our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law; and whenever there is any inconsistency, Community law has priority."

13. See Gormley "The Application of Community Law in the United Kingdom, 1976-1985" (1986) 23 Common Market Law Review 287 at 307; Usher "The Impact of EEC legislation on the United Kingdom Courts" (1989) 10 Statute Law Review 95

14. See the decision of the National Insurance Commissioner, 14 June 1977, Case number CS 2/77 reported as Re Medical Expenses Incurred in France 20 CMLR 317; the decision of the National Insurance Commissioner 23 September 1976, CS 7/76 Re an absence in Ireland [1977] 1 CMLR 5, 9-10; the decision of the Deputy Comptroller of the Patent Office in Haug v. Registrar of Patent Agents [1976] 1 CMLR 491; the decision of the Resident Magistrate in Pigs Marketing Board (Northern Ireland) v. Redmond [1979] 3 CMLR 118; the decision of the VAT

the *locus classicus* of the doctrine of the supremacy of Community law over national law was cited or referred to in only four cases [15] before the United Kingdom courts prior to the European Court judgment in Factortame 2 of 19 June 1990 [16] and in none of these cases was any national law "disapplied" in favour of Community law.

Since it was decided in 1978 Simmenthal has been cited or referred to by the United Kingdom courts in twelve separate cases [17] of which only three [18] involved the

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tribunal in Merseyside Cablevision Ltd. v. The Commissioners [1987] 3 CMLR 290; the decision of the Industrial Tribunal in Marshall v. Southampton and South West Hants. Health Authority [1988] 3 CMLR 389, overruled on this point by the Employment Appeal Tribunal.

15. This is the result of a "Lexis search". The cases which referred to Costa v. ENEL were Blackburn v. Attorney General [1971] 2 All ER 1380, decided on 10 May 1971 prior to the accession of the United Kingdom to the European Communities; R v. Attorney General, ex parte ICI, Queen's Bench Division, 60 Tax Cases 25 January 1985; Sun International v. Sun Oil Trading Company and Another Queen's Bench Division, unreported judgment of 30 July 1986; R v. Secretary of State for Transport, ex parte Factortame and others (Factortame 1) in both the Court of Appeal (reported in [1989] 2 CMLR 353) and the House of Lords (reported in [1990] 2 AC 85).

16. R v. Secretary of State for Transport, ex parte Factortame and others (C-213/89) [1990 ECR reported in [1990] 3 WLR 818

17. This is a result of a "Lexis" search. The cases referred to are: W.H Smith Do-it-all v Peterborough City Council [1991] 1 QB 304, 4 June 1990; Factortame Ltd. and Others v. Secretary of State for Transport [1990] 2 AC 85, 18 May 1989; Merseyside Cablevision Ltd v The Commissioners, Manchester VAT Tribunal, [1987] VAT Rep 134, [1987] 3 CMLR 290, 30 January 1987; R v Secretary of State for Social Services ex parte Schering Chemicals Limited [1987] 1 CMLR 277, 10 July 1986; Bourgoin SA and others v Ministry of Agriculture Fisheries and Food, [1986] 1 QB 716, 29 July 1985; R v Attorney General (ex parte Imperial Chemical Industries Plc) 60 Tax Cas 1, 25 January 1985; Allen & Hanburys Ltd v Generics (UK) Ltd, Chancery Division (Patents Court), [1985] FSR 229, [1985]

national court actually disapplying provisions of an Act of Parliament which were seen to be inconsistent with Community law.

Where it was felt that no reference needed to be made to the European Court, on the grounds that the applicable Community law was unequivocal, rather than directly overrule inconsistent provisions of national law new canons of interpretation for national legislation and regulations intended to implement, or at least conform to, Community law were developed, in particular, by the House of Lords. Rather than exegesis of the plain language of the text, the Lords adopted an eisegetical approach to the national provisions which should be read in conformity with Community obligations, even to the extent of reading into the national regulations such words and phrases as were necessary to ensure their harmony with Community law. [19]. The justification for

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1 CMLR 619, 7 December 1984; Bulk Oil (Zug) A.G. v. Sun International Ltd. and Another [1984] 1 WLR 147 30 September 1983; R v Secretary of State for the Home Department, ex parte Santillo [1981] QB 778 19 December 1990; R v Henn; R v Darby [1981] AC 850, 27 March 1980; Macarthys Ltd v Smith [1979] ICR 785, 25 July 1979; Shields v E Coomes (Holdings) Ltd [1978] ICR 1159, 27 April 1978

18. W.H Smith Do-it-all v Peterborough City Council [1991] 1 QB 304, 4 June 1990; R v. Secretary of State for Transport, ex parte Factortame Ltd. (Queen's Bench Division) [1989] 2 CMLR 353, overruled by both the Court of Appeal and the House of Lords on the question of "disapplication" (see *infra*); Merseyside Cablevision Ltd v The Commissioners, Manchester VAT Tribunal, [1987] VAT Rep 134, [1987] 3 CMLR 290, 30 January 1987.

19. See Garland v. British Rail Engineering [1983] AC 751 at 771, [1982] 2 CMLR 174 AT 178-9; Pickstone v.

such a novel approach to legislative interpretation appeared to be that if the intention of Parliament was indeed to implement Community law, then it was the duty of the courts in carrying out Parliament's intention to re-cast the relevant regulations to ensure this conformity with Community law as this was developed over time by the European Court. [20]

However, the general practice of the United Kingdom courts continued to be to regard Acts of Parliament as the final word on the law. Thus Lord Donaldson M.R. was able to state in earlier stages of the Factortame litigation [21]:

> "[I]t is fundamental to our Constitution that it is for Parliament to legislate and for the judiciary to interpret and apply the fruits of Parliament's labour. Any attempt to interfere with primary legislation would be wholly

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Freemans [1989] AC 66, [1988] 3 CMLR 221; Litster v. Forth Dry Dock Engineering Co. Ltd. [1990] A.C. 546

20. Compare the approach taken to legislation not intended to implement Community obligations in Duke v. G.E.C. Reliance [1988] AC 618, [1988] 1 CMLR 719; affirmed in Finnegan v. Clowney Youth Training Programme [1990] 2 CMLR 859. These two cases should perhaps be re-considered in the light of the European Court's most recent affirmation in Marleasing SA v. La Comercial Internacional de Alimentacion SA (C-106/89) [1990] ECR 4135, [1992] 1 CMLR 305 of the duty of national courts to interpret provisions of national law in the light of the wording and purpose of Community directives, whether the latter pre- or post-date the former. See Mead "The obligation to apply European law: is Duke dead" [1991] European Law Review 490.

21. Factortame 1 (Court of Appeal) [1989] 2 CMLR 353 at 397.

unconstitutional."

Indeed a presumption developed that Acts of Parliament were to be regarded as valid and compatible with Community law, unless and until that matter had been finally and unequivocally ruled upon by the European Court of Justice. Thus the first judgment of the House of Lords in Factortame [22], prior to the ruling of the European Court, was interpreted by the Scottish Inner House as wholly confirming the proposition that

> "a statute passed by the United Kingdom Parliament must be presumed to be valid, until such time as the Act has been declared to be invalid by a court of competent jurisdiction." [23]

It is not clear from the judgement of the Scottish court which national courts, if any, they considered to be competent to declare an Act of Parliament invalid.

The institutional balance as between the United Kingdom courts and Parliament reflected in this presumption as to the validity of acts of Parliament was to be challenged in the Factortame litigation which followed legislation by the United Kingdom aiming at putting an end to the practice of "quota-hopping" whereby non-U.K. nationals were able to benefit from the fishing quota allocated to

22. R. v. Secretary of State for Transport, ex parte Factortame and others (H.L.) [1990] 2 AC 85

23. See Murray v. Rogers 1992 SLT 221 at 225, 228.

the United Kingdom under the Common Fisheries Policy by registering their vessels in the British Register of Shipping. [24]

4. FACTORTAME - THE FACTS [25]

In 1988 the U.K. Parliament passed the Merchant Shipping Act 1988 in order, it was claimed, to implement and enforce the quota system established by the common fisheries policy. The Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 were brought in under this Act. These regulations required all vessels previously registered under the Merchant Shipping Act 1894 to re-register under new conditions which were designed to exclude non-British vessels, specifically Spanish, from eligibility for registration. Registration was the pre-requisite to obtaining a licence to fish

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24. For a survey of subsequent European Court decisions on the problem of quota-hopping see Churchill in (1992) 29 Common Market Law Review 405.

25. The litigation in Factortame is somewhat complicated, involving as it does one judgement in the High Court ([1987] 1 CMLR 277) and in the Court of Appeal ([1989] 2 CMLR 353) two judgments in the House of Lords ([1990] 2 AC 85; [1990] 3 WLR 818 at 856) and two rulings by the European Court on two separate article 177 references made by the English High Court and the House of Lords respectively ([1991] 1 AC 603 and [1991] 3 All ER 769). For convenience I shall refer to all stages of the litigation prior to the first European Court judgment of 19 June 1990 (Case 213/89) as Factortame 1. The European Court judgment of 19 June 1990 together with the House of Lords second judgment applying the European Court's ruling will be referred to as Factortame 2. The European Court judgment of 25 July 1991 in Case 246/89 (reported in [1991] 3 All ER 769] will be referred to as Factortame 3.

under the quota permitted the U.K. under the Community's Common Fisheries Policy. The Act came into force on 1 December 1988 and it was provided that the validity of registrations under the previous Act would expire on 31 March 1989.

(i) The High Court

The validity of the new Merchant Shipping Act and of the regulations made thereunder was immediately challenged as contrary to Community law by the owners of fishing vessels which had been refused registration under the new regime. The court at first instance, holding that the matter raised substantive questions of Community law, ordered that a reference be made to the European Court of Justice under article 177 for a preliminary ruling on those matters of Community law which had been raised in the proceedings. Pending the decision of the European Court on these substantive matters, the Divisional Court made an *interim* order purporting to "disapply" the operation of both the principal Act and the disputed regulations made under it and forbidding the Secretary of State from enforcing those regulations as against the parties to the case, thereby allowing their previous registrations under the 1894 Act to continue until the final determination of the cause.

(ii) The Court of Appeal

The Secretary of State appealed only against the *interim* orders and not the article 177 reference which continued to the European Court of Justice. The decision of the Divisional Court to grant *interim* relief in the above terms was reversed by the Court of Appeal on 22 March 1989. This judgement of the Court of Appeal was itself appealed against by the trawler owners. Thus, by the time the case reached the House of Lords the matter at issue was one concerned with procedural law regarding the availability of *interim* relief pending the determination of the substantive issues raised by the passing of the 1988 Act.

(iii) The House of Lords 1

The Court of Appeal decision to reverse the order to disapply the Act and regulations *ad interim* was upheld by the House of Lords on 18 May 1989 on two grounds of national law: (i) that the courts in England had no power to grant injunctions against the Crown and (ii) that there was a presumption in English law that Acts of Parliament were valid and compatible with Community law unless and until the matter was finally and authoritatively decided by the European Court of Justice. 26 Thus, standing the traditional theory of the sovereignty of Parliament, the national courts in the

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26. See Lord Bridge [1990] 2 AC 85 at 112

United Kingdom could have no power to "disapply" an Act of Parliament pending a decision from the European Court as to the compatibility of the Act with Community law.

(iv) The European Court of Justice 1

Notwithstanding the apparently unequivocal position in domestic law, the House of Lords was persuaded that it was necessary to make a reference to the European Court in order to determine whether or not there existed some overriding principle derived from the jurisprudence of the European Court of Justice which compels national courts of Member States, whatever their own law may provide, to assert and, in appropriate circumstances to exercise, a power to provide an effective interlocutory remedy to protect putative rights in law.

Relying on the principle of co-operation of national courts to ensure the full and effective protection of rights acquired under Community law in every member state, the European court held in the House of Lords Factortame reference that : [27]

> "Community law must be interpreted as meaning that a national court which, in a case before it concerning law, considers that the sole obstacle which prevents it from granting *interim* relief is a rule of national law ***must***

27. R. v. Secretary of State for Transport ex parte Factortame Ltd. and Others (C-213/89) E.C.J. judgement 19 June 1990.

set aside that rule."

(v) The House of Lords 2

On receiving this ruling back from the European Court, the Lords granted an order restraining the Secretary of State "from withholding or withdrawing registration in the register of British fishing vessels maintained by him pursuant to the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988." [28]

5. THE IMPLICATIONS OF FACTORTAME

It is submitted that the decision of the European Court in Factortame 2 has brought about a fundamental change in the attitude of United Kingdom courts as regards their role within the constitutional order of the United Kingdom. As the practice of the courts change, so does the unwritten constitution. One consequence of the European Court's decision in Factortame 2 has been to effect a significant constitutional change in the United Kingdom by fundamentally weakening the presumption of the validity of an Act of Parliament in relation to Community law and by making it clear to the United Kingdom courts that the question of the judicial review of national legislation for its conformity with Community law is

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28. See R. v. Sec. of State for Transport, ex parte Factortame (No. 2) [1990] 3 W.L.R. 818.

primarily a duty laid upon national courts.

The acceptance of a new vision and the consequent rejection of the heretofore traditional understanding of Parliamentary sovereignty is clear from two statements of Lord Bridge of Harwich made at various stages in the Factortame litigation. When the matter was first before the House of Lords Lord Bridge stated: [29]

> "If the applicants fail to establish the rights they claim before the E.C.J. the effect of the *interim* relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will ... I am clearly of the opinion that as a matter of English law, the court has no power to make an order which has these consequences.

However in his second judgment in the case following the European Court's ruling Lord Bridge expressed the view that the United Kingdom's accession to the European Communities in 1972 meant that the courts of the United Kingdom had fully accepted the jurisdiction of the European Court of Justice with all that implied, including acceptance of the Simmenthal decision. He stated: [30]

> "Under the terms of the Act of 1972 it has

29. Factortame Ltd. and Others v. Secretary of State for Transport [1990] 2 AC 85 at 143.

30. Ibid. 857-8 [Emphasis added].

> always been clear that it was the duty of a United Kingdom Court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of law ... Thus there is ***nothing in any way novel*** in according supremacy to rules of law in those areas in which they apply and ***to insist that, in the protection of rights under law, national courts should not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.***"

This is somewhat disingenuous of Lord Bridge. If the matter were so clear in European law, what need then was there for a reference by the House of Lords to the European Court when the doctrine of *acte clair* could have been be applied *interim* relief granted immediately ? [31] Factortame 2 might well mark the "logical recognition" of the supremacy, but it is the first unequivocal recognition by the highest court in the United Kingdom of the implications of that supremacy for the practice of all courts of the United Kingdom. Lord Bridge attempts to disguise the extent of the change brought about by

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31. For criticism of the "parochialism" of the Lords in making a reference to the European Court rather than themselves applying clear principles of Community law see Gravells "Disapplying an Act of Parliament pending a preliminary ruling: Constitutional enormity or Community Law Right?" [1989] Public Law 568.

Factortame 2, by presenting it simply as a case where the national courts were granted rights to suspend Acts of Parliament temporarily, to supplement the power they have had since 1972 to "disapply" them permanently. As we have seen, however, the power to disapply Acts of Parliament was rarely used and barely acknowledged.

In fact, the creation of a power to grant *interim* relief in these circumstances means that henceforth it is the judgment of the national courts alone which results in the suspension of Acts of Parliament, rather than the judgment of the European Court.

The fact that the judgment of the European Court was seen to be saying something new and altering the traditional constitutional understanding is made clear from certain remarks made by the head of the Court of Appeal two weeks after the European Court's judgment in Factortame 2. Lord Donaldson MR modified his statement as to the proper relationship between courts and legislature in the United Kingdom to the following effect: [32]

> "The constitutional position is clear. Subject only to a recent pronouncement by the European Court in R. v. Secretary of State for Transport, ex parte Factortame (No. 2) (C-213/89) [1990] 3 WLR 818, the significance of

32. See R v. Secretary of State for the Environment, ex parte Hammersmith [1990] 3 WLR 925 at 934, judgment of 3 July 1990

> which has yet to be worked out, Parliament has a limitless right to alter or add to the law by means of primary legislation, enacted by the full constitutional process of debate and decision in both Houses on first and second readings of the Bill, committee and report stages and third readings followed by Royal Assent. The result is a statute and in relation to statutes the only duty of the judiciary is to interpret and apply them."

6. FACTORTAME AND THE RECEPTION OF SIMMENTHAL

Simmenthal has been cited in only seventeen separate cases in the thirteen years from the beginning of 1979 to the end of 1991. [33] The year refers to the year of the decision in which Simmenthal was first cited in that case, rather than necessarily the year in which the case was concluded or reported. If one includes different stages in the same cases in these same years, Simmenthal

33. This is a result of a "Lexis" search. This total includes the cases cited in note eighteen, together with five other cases decided in the course of 1991, all of which also cite Factortame 2. These cases are R v Secretary of State for Employment ex parte Equal Opportunities Commission [1992] 1 All ER 545, [1991] IRLR 493, 10 October 1991; R v Dairy Produce Quota Tribunal for England Ex parte Dent, Queen's Bench Division (Crown Office List), CO/0260/89, unreported 8 July 1991; Kirklees Borough Council v Wickes Building Supplies Ltd; Mendip District Council v B & Q plc [1991] 4 All ER 240, [1991] 3 WLR 985, 30 April 1991; R v Inland Revenue Commissioners, ex parte Commerzbank AG [1991] STC 271, 12 April 1991; Secretary of State for Scotland & Greater Glasgow Health Board v Wright & Another, Employment Appeal Tribunal, [1991] IRLR 187, 11 March 1991

was cited on a total of twenty two occasions. The distribution was as follows (the figure in brackets includes the total of multiple citations at different stages in the same case:

SIMMENTHAL	**YEAR OF DECISION**	**NUMBER OF CITATIONS**
	1978	2 (2)
	1979	1 (1)
	1980	1 (2)
	1981	0 (0)
	1982	0 (0)
	1983	1 (1)
	1984	2 (2)
	1985	1 (2)
	1986	1 (1)
	1987	1 (1)
	1988	0 (0)
post-Factortame 1		
	1989	1 (3)
	1990	1 (2)
post-Factortame 2		
	1991	5 (5)

By the end of 1991 Factortame had been cited on a total of twenty two occasions. The case in its various stages has been cited to support two distinct general propositions.

One result of the Factortame 1 judgment was a "firming

up" of the idea as to what constituted the proper relationship between the executive and the judiciary in teh United Kingdom. Thus Factortame 1 has been cited as authority for the fact that injunctions cannot be granted against the Crown, and that the Crown is, in some ways, not fully subject to the supervisory jurisdiction of the courts, in matter which concern English law alone. Such citation was made on ten occasions. [34] They are distributed thus:

FACTORTAME 1	YEAR OF DECISION	NUMBER OF CITATIONS
	1990	2 (3)
	1991	8 (8)

The second proposition, drawn from the European Court and from the second House of Lords judgments in Factortame 2

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34. M. v. Home Office and Another [1992] 2 WLR 73, 29 November 1991; R v. Secretary of State for Transport, ex parte Blackett Queen's Bench Division (Crown Office List) CO/2494/91 unreported 15 November 1991; Mbala v. Home Office and Another, Queen's Bench Division (Crown Office List) The Independent 6 August 1991, The Times 5 August 1991 CO/910/9 unreported 26 July 1991; R v. Secretary of State for the Home Department, ex parte Muboyayi [1991] 1 WLR 442, 25 June 1991; R. v. Secretary of State for Education and Science, ex parte Birmingham City Council, Queen's Bench Division (Crown Office List) CO/2633/90 unreported 14 May 1991; Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd. and Another, Privy Council, [1991] 1 WLR 550, 13 May 1991; R v. Secretary of State for the Home Department, ex parte Mbala, Queen's Bench Division (Crown Office List) unreported 3 May 1991; R v. Secretary of State for the Environment, ex part Knowsley Metropolitan Borough Council, Queen's Bench Division, (Crown Office List) CO/1720/90 unreported 12 February 1991; R. v. Secretary of State for Education and Science, ex parte Avon County Council, [1991] 1 QB 558, [1991] 2 WLR 702, 15 May 1990; R v. Secretary of State for the Environment, ex parte Doncaster Metropolitan Borough Council, (Crown Office List) CO/749/90 unreported 10 May 1990.

is that, in matters touched by Community law, all measures to protect rights under Community law are available to the United Kingdom court - these measures include the disapplication of Acts of Parliament and the granting of injunctions against the Crown. Only in matters where Community law is relevant might Factortame 2 be applied to allow for the full judicial review of legislative and administrative action. Such citation was made on twelve occasions. [35] In tabular form the distribution is as follows:

FACTORTAME 2	**YEAR OF DECISION**	**NUMBER OF CITATIONS**
	1990	2 (2)
	1991	10 (10)

35 R. v. Secretary of State for Transport and Another ex parte Evans and Another Queen's Bench Division (Crown Office List) CO/1390/90) unreported 2 December 1991; M. v. Home Office and Another, Court of Appeal (Civil Division) [1992] 2 WLR 73, 29 November 1991; R v Secretary of State for Employment ex parte Equal Opportunities Commission Queen's Bench Division, [1991] IRLR 493, 10 October 1991; Mayor and Burgesses of the London Borough of Hillingdon v RMC Homecare (East) Ltd, Queen's Bench Division unreported 26 July 1991; R v Dairy Produce Quota Tribunal for England Ex parte Dent, Queen's Bench Division (Crown Office List), CO/0260/89, unreported, 8 July 1991; Kirklees Borough Council v Wickes Building Supplies Ltd; Mendip District Council v B & Q plc, Court of Appeal, Civil Division, [1991] 4 All ER 240, 30 April 1991; R v Inland Revenue Commissioners, ex parte Commerzbank AG, Queen's Bench Division (Crown Office List), [1991] STC 271, 12 April 1991; Secretary of State for Scotland & Greater Glasgow Health Board v Wright & Another, Employment Appeal Tribunal, [1991] IRLR 187, 11 March 1991; Chief Adjudication Officer and Another v. Foster, Court of Appeal (Civil Division) [1992] 1 QB 31, 21 February 1991; R. v. Ministry of Agriculture, Fisheries and Food, ex parte Bostock, Queen's Bench Division [1991] 1 CMLR 691, 26 July 1990; R v. Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council, Court of Appeal (Civil Division) [1991] AC 521, 3 July 1990

All of the five cases which cited Simmenthal after the European Court and House of Lords decision in Factortame 2 also made reference to Factortame 2.

It is clear that the decision in Factortame 2 has coincided with a substantial increase in the references made in the United Kingdom courts to Simmenthal. It is submitted that this increasing reference to Simmenthal within the United Kingdom courts is indicative of a growing awareness among lawyers and judges of the implications of the doctrine of the supremacy of Community law for the United Kingdom. It may, indeed, be argued that the decision of the European Court of Justice on 19 June 1990 and its implementation by the House of Lords in Factortame 2 on 9 July 1990 represents the unequivocal reception of the Simmenthal doctrine into the jurisprudence of the United Kingdom and in particular, of the acceptance of possibility of the judicial review of legislation in the United Kingdom

7. **CONCLUSION**

The idea that the Courts in the United Kingdom are doing nothing more than realizing the will of Parliament is the shibboleth of constitutionalism as traditionally understood in the United Kingdom. It is, however, impossible to maintain this formula when the United

Kingdom courts actively review and openly suspend Acts of Parliament as contrary to the higher law embodied in the Treaty of Rome.

The importance of the European Court's decision in Factortame 2 is firstly that it emphasises to the United Kingdom courts that it is their duty to apply Community law to national Acts of Parliament. Once this is done the proposition that in applying Community law national courts are doing no more than implementing the will of national Parliaments appears fictional. Factortame 2 forces the United Kingdom courts openly to acknowledge that, as Community courts, their duty is to further the achievement of the goals of the Community. Factortame 2 has thus brought about the reception in the United Kingdom of the doctrines of supremacy and permeability as expounded by the European Court in Simmenthal.

Under Community law, it is the duty of every court in the United Kingdom to consider whether or not an Act of Parliament should be applied or disapplied in the case before it, depending upon that court's understanding of the requirements of Community law. As Mustill L.J. has stated: [36]

> "Since [the accession of the United Kingdom to the European Communities] the courts have been obliged to read statutes of the United Kingdom

36. W.H. Smith Do-it-all Ltd and Another v. Peterborough City Council [1990 2 CMLR 577, 580; [1991] 1 Q.B. 304.

> in the light of the general principles laid down in the Treaty of Rome, as developed in instruments of the Council and Commission, and as expounded by the European Court of Justice. The interaction between these instruments and the public and private rights of organisations and individuals in Member States is complex, but one thing must be taken as clear for the purposes of the present case; that if there is a collision ... the former must yield."

Further, no court within the national judicial hierarchies can properly seek to impose rules which restrict the right of lower courts within that same hierarchy to "disapply" Acts of Parliament since this is a power which derives from Community law. [37]

Legal theory as developed by the European Court has lead inexorably to the complete and substantive review of acts of Parliament by the national courts. This development, which has been a, perhaps unforeseen, result of judicial activism on the part of the European Court, involves a substantive shift in the institutional balance among executive, legislature and judiciary. A silent revolution in the political structure of the United

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37. Lord Goff in Factortame 2 [1990] 3 WLR 818 at 871 does appear to attempt to limit the national courts by suggesting that their power to disapply Acts of Parlaiment should be used only in exceptional circumstances when there is a "strong *prima facie* case that the law is invalid".

Kingdom, in particular to the traditional understanding of the separation of powers, has been effected by the activities of a foreign court. The implications of such a revolution for the primacy of national parliamentary democracy have yet to be realized.

No longer can the national government be confident of enforcing its own enacted laws within its own territory before its own courts, because the duty of the courts in the United Kingdom, while the United Kingdom remains a member of the European Communities, has become to apply the rules of English, Northern Irish or Scots law only insofar as these are compatible with Community law. [38]

Factortame 2 marks the unambiguous acceptance of the supremacy of Community law by the United Kingdom courts and with it the general reception of the fact that the jurisprudence of the European Court of Justice has had the effect of creating a truly federal legal system: the foundation treaties of the European Communities have been ascribed constitutional status; the acts of the central institutions are treated as a higher federal law; and the legislation of the Member States is permitted to stand insofar as it does not contravene or trespass upon Community law. It is the duty of national courts, under Community law, to realize this vision within their own

38. See Koopmans, "Legislature and Judiciary: Present Trends", in Cappelletti (ed), New Perspectives for a Common Law of Europe (1978) 309, 319-22.

jurisdictions.

The realization of this vision in the United Kingdom requires the introduction of the judicial review of national legislation by national courts. It is to this problem that I will turn in the next chapter.

CHAPTER 3

FACTORTAME'S WAKE

THE DIRECT RECEPTION OF COMMUNITY LAW

FACTORTAME'S WAKE

THE DIRECT RECEPTION OF COMMUNITY LAW

"The British have no more wish to be governed by judges than they have to be judged by administrators" [1]

1. THE JUDICIAL REVIEW OF LEGISLATION IN THE UNITED KINGDOM

(i) Introduction

In Factortame 2 the European Court held that the principle of the full and effective protection of rights under Community law required that courts in the United Kingdom should be able to set aside any potentially conflicting national laws *ad interim*, pending a final decision by the European Court on the relevant Community law While opinions may differ as to the extent to which this decision represented any new development in Community law since Simmenthal, [2] the effect of the judgment in the United Kingdom has been to encourage the bringing of cases before the courts seeking the judicial

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1. Lord Devlin The Times 27/10/76, cited by Mackenzie-Stuart The European Communities and the Rule of Law (1977) at 78

2. See Akehurst "Parliamentary Sovereignty and the Supremacy of Community Law" (1990) British Yearbook of International Law 351; Gravells "Effective Protection of Community Law Rights: temporary disapplication of an Act of Parliament" (1991) Public Law 180

review of United Kingdom legislation for its compatibility with Community law. [3]

As we saw in the previous chapter, the idea of the judicial review of legislation is totally alien to the constitutional development of the United Kingdom since its creation as a unitary state in 1707. Coke C.J.'s claims in 1610 [4] that the English Common law could in many cases

> "controul acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void"

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3. See for example W.H. Smith Do-it-All Ltd and Another v. Peterborough City Council [1990] 2 CMLR 577; B & Q plc v. Shrewsbury and Atcham Borough Council [1990] 3 CMLR 535; Mendip District Council v. B & Q plc [1991] 1 CMLR 113; R. v. Minister of Agriculture, Fisheries and Food, ex parte Bostock [1991] 1 CMLR 681; Milk Marketing Board v. Cricket St. Thomas Estate [1991] 3 CMLR 123; Stoke on Trent City Council v. B & Q plc [1991] 2 WLR 42; Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd. [1991] 3 WLR 985; R v. Secretary of State for Employment, ex parte the Equal Opportunities Commission [1992] 1 ALL ER 545; R v. Dairy Produce Quota Tribunal for England, ex parte Dent Queen's Bench Division (Crown Office List) CO/0260/89, unreported 8 July 1991; Mayor and Burgesses of the London Borough of Hillingdon v. RMC Homecare (East) Ltd. Queen's Bench Division, unreported 26 July 1991; Kier Ltd v The Commissioners of Customs and Excise, London VAT Tribunal LON/89/1743X, (Transcript) 31 December 1991; Wisebeck Construction Ltd v The Commissioners of Customs and Excise London VAT Tribunal LON/91/10202, (Transcript) 30 October 1991; W Emmett & Son Ltd v The Commissioners of Customs and Excise, London VAT Tribunal, LON/90/1316Z, (Transcript), 7 October 1991

4. Dr. Bonham's case (1610) 77 Eng Rep 646, 652 (CP 1610).

did not survive the seventeenth century constitutional upheavals which culminated in victory for the partisans of Parliament's absolute supremacy and sovereignty.

Prior to the entry of the United Kingdom into the European Communities, the position regarding the possibility of the judicial review of legislation could be accurately summarised as follows: [5]

> "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known in this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law of this country, is illegal."

Notwithstanding the fact that it is now generally accepted in the United Kingdom that "the Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament" [6] the centuries' long tradition of the courts' deference Parliament has resulted in some reluctance on the part of the courts to substitute their judgment for that of the democratically elected legislature, as appears at times required of them under

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5. Ungoed-Thomas J. in Cheney v. Conn [1968] 1 WLR 242 at 247.

6. Hoffman J. in Stoke-on-Trent City Council v. B & Q plc [1990] 3 CMLR 31 at 34

Community law.

(ii) National judicial review of legislation as the interpretation and application of Community law

In considering whether or not to disapply an Act of Parliament, either *ad interim* or finally, the national courts are engaged in the act of applying Community law. The European Court has consistently affirmed the need for Community law to be applied throughout the Member States in a uniform manner, declaring that: [7]

> "[T]he purpose of article 177 of the EEC Treaty is to ensure that all provisions which form part of the legal order are applied uniformly within the Community so as to avoid any variation in their effects resulting from the interpretation given them in different Member States."

Given the high importance ascribed to the principle of uniformity in application and interpretation of Community law and the development by the European Court of article 5 of the EEC Treaty [8] which requires all national authorities, including national courts [9], "to take all

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7. Sevince v. Staatssecretaries van Justitie (C-192/89) [1990] ECR 3461 at 3501 para 11.

8. See Temple Lang "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 Common Market Law Review 645

9. See Van Colson v. Land Nordrhein-Westfalen (C-14/83) [1984] ECR 1891

appropriate measures ... to ensure fulfilment of the obligations arising out of this Treaty" and to "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty", it is clear that the United Kingdom courts have to assess their own national law, in cases of potential conflict with Community law, on the same basis and principles as would the European Court. [10] The European Court has imposed an "interpretative obligation" on national courts to use the same principles and modes of reasoning as used by the European Court when faced with matters of Community law in order to ensure that advancement of the aims and objectives of the Communities as outlined in the Treaties. [11] It is therefore the duty of all judges in the United Kingdom to subject all legislation, Acts of Parliament as much as Statutory Instruments, to examination and review if and when they are challenged to determine the conformity of such legislation to the body of supreme law which applies in the United Kingdom, namely Community law.

Community law is not, however, simply a matter of particular regulations and directives, but includes a

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10. See generally Grossfeld "The Internal Dynamics of European Community Law" (1992) 26 The International Lawyer 125

11. See Prechal "Remedies after Marshall" (1990) 27 Common Market Law Review 451; de Burca "Giving Effect to European Community Directives" (1992) 55 Modern Law Review 215

number of general principles of law as well as fundamental rights. [12] These principles include: proportionality [13]; the protection of legitimate expectations and the preservation of legal certainty [14]; the standard of formal equality that like cases be treated alike [15]; respect for fundamental rights [16]; the rights of the defence including confidentiality of communications between client and lawyer [17], due process and considerations of natural justice [18]; the non-retroactivity of penal provisions [19].

These principles, too, have to be applied and interpreted by United Kingdom courts in assessing the "constitutionality" of U.K. law against the free market regime provided for by the original treaties. [20] As one

12. See Lasok & Bridge Law and Institutions of the European Community (5th ed 1991) 179-203; Hartley The Foundations of European Community Law (2nd ed 1988) 129-152; Wyatt & Dashwood The Substantive Law of the EEC (2nd ed 1987) 59-71

13. R. v. Intervention Board for Agricultural Produce, ex parte Man (Sugar) (C-181/84) [1985] C.M.L.R. 759, [1986] 2 All E.R.

14. See Decker (C-99/78) [1979] ECR 101

15. See Ruckdeschel (C-117/76, 16/77) [1977] ECR 1753 at 1769

16. Hauer v. Land Rheinland Pfalz (C-44/79) [1979] ECR 3727

17. AM & S Europe Ltd. v. Commission (C-155/79) [1982] ECR 1575 at 1610-3

18. Transocean Marine Paint (C-17/74) [1974] ECR 1063 at 1079

19. R v. Kirk (C-63/83) [1984] ECR 2689

20. See Temple Lang "The Place of Legislation in

former member of the Court has stated: [21]

> "When judges apply Community law in national courts they must, as I see it, apply Community law as defined by the European Court of Justice. That Court has recognised that certain fundamental principles are part of such law - proportionality, the protection of legitimate expectations, legal certainty, the avoidance of retroactivity without just cause, to name only four."

(iii) Schema

A complete survey of the way in which these principles have been applied in the United Kingdom is obviously beyond the scope of this work. Accordingly, in this chapter I will restrict myself to looking at the way in which the United Kingdom courts have dealt with the application of the Community doctrine of proportionality in the judicial review of legislation. This doctrine, as we shall see, requires the national courts to assess the legislation from the point of view of its appropriateness, necessity and overall balance.

The application by United Kingdom courts of the principle

European Community Law" (1989) 10 Statute Law Review 37 at 46-8.

21. Slynn: "But in England there is no ..." Festschrift fuer Wolfgang Zeidler (1987) Vol 1, pp 397-408 at 400

of proportionality is of particular interest from the point of view of the analysis of the reception of laws because, unlike may of the aforementioned principles, [22] it is a principle which is without precedent or counterpart in the domestic law of the United Kingdom. It is also a principle of which applies specifically to the judicial review of legislation.

There have been two areas of law in which the Community doctrine of proportionality has, thus far, been accepted and applied by the United Kingdom courts in the context of the judicial review of national legislation. The first is in the review of the English Sunday trading legislation as set out in the Shops Act 1950. The second is in the application of the tests of indirect discrimination to the provisions relating to part-time workers contained in the Employment Protection (Consolidation) Act 1978. I will look at both of these areas, but before doing so it is clearly necessary to examine the Community's doctrine of proportionality.

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22. See Usher "The influence of national concepts in decisions of the European Court" (1976) 1 European Law Review 359

2. PROPORTIONALITY IN COMMUNITY LAW

Proportionality has been defined, by a British judge, as the general principle "that a steam hammer should not be used to crack a nut" [23] or, in other words, that excessive means should not be adopted in order to attain permissible objects.

(i) Proportionality in German law

Proportionality is a principle which was first developed in German administrative law (there termed *Verhaeltnissmaessigkeit*) [24] in the nineteenth century. As a principle of administrative law it requires that administrative authorities should use proportionate or non-excessive means in seeking to achieve some permissible end. *Verhaeltnissmaessigkeit* is now also held to underpin the Constitution and the Rule of Law in Germany [25] and is applied by the Federal Constitutional Court is assessing the compatibility of legislation with the fundamental rights protected in the *Grundgesetz*. [26]

23. Lord Diplock in R. v. Goldstein [1983] 1 WLR 151 at 155

24. See M.P. Singh German Administrative Law in Common Law Perspective (1985) pp. 88-101 for an account of the history of the principle.

25 See Kommers Judicial Politics in West Germany: a study of the Federal Constitutional Court, 1976 at 210-1

26. See Starck "Constitutional Definition and the Protection of Rights and Freedoms" in Starck (ed.) Rights Institutions and Impact of International Law according to the German Basic Law, 1987, 19 at 29-33

For legislation to satisfy the constitutional principle of *Verhaeltnissmaessigkeit* it has to pass three tests. Firstly, it should be shown to be appropriately and effectively aimed at a legitimate end, in the sense that the relationship between means and ends is neither impossible or unlawful (*Geeignetheit eines Mittels*). Secondly, it should be demonstrated to be necessary, in the sense that there are no less restrictive means which might achieve the same purpose (*Erforderlichkeit eines Mittels*). Lastly it should be seen to be proportionate or balanced, in the sense that any injury or restriction on the individual caused by the act should be offset by the gain to the community as a whole (*Verhaeltnissmaessigkeit im engener Sinne*). [27]

(ii) Proportionality appropriated by the European Court

Although finding its original source in German law, the proportionality test has been independently developed by the European Court in the course of its own case law. [28]

27. See Kommers The Constitutional Jurisprudence of the Federal Republic of Germany, 1989 at 53.

28. See Akehurst "The application of general principles of law by the Court of Justice of the European Communities" (1981) 52 British Yearbook of International Law 28 at 39; Schmitthoff "The Doctrines of Proportionality and Discrimination" (1977) European Law Review 32; Herdegen "The relation between the principles of equality and proportionality" (1985) 22 Common Market Law Review 683-96; Lugato "Principio di proporzionalita e invalidita di atti comunitari nella giurisprudenza della Corte di Giustizia delle Comunita Europee" (1991) Rivista di Diritto Comunitario e Scambi Internazionali 269.

In an early case, Fedechar [29], brought under the Coal and Steel Treaty, the European Court held that, to be lawful and valid under Community law, the reaction of the High Authority to an unlawful act must be proportionate to the scale of that act.

In Internationale Handelsgesellschaft [30] the European Court applied the principle, which it saw as derived from the proportionality test, that "the individual should not have his freedom of action limited beyond the degree necessary for the public interest" in determining the validity of a system of forfeiture of deposits paid to the Commission when applying for import or export licences.

In a series of cases from Cassis de Dijon [31] onward the

29. Federation Charbonniere de Belgique v. High Authority of the European Coal and Steel (C-8/55) [1956] ECR 245 at 299.

30. Internationale Handelsgesellschaft v. Einfur und Vorratsstelle fuer Getreide und Futtermittel (C-11/70) [1970] ECR 1125; [1972] CMLR 225. See paragraph 20 of the judgement together with the opinion of Advocate General Dutheillet de Lamothe at 1146.

31. See Rewe-Zentral AG v. Bundesmonopolverwaltung fuer Branntwein ('Cassis de Dijon') (C-120-78) [1979] ECR 649; Walter Rau Lebensmittelwerke v. De Smidt PvbA (C-261/81) [1982] ECR 3691; Commission v. Denmark ('Danish Bottles') (C-302/86) [1988] ECR 4607 at 4629 para 6:

> "In the absence of common rules relating to the marketing of the products in question, obstacles to free movement within the resulting from disparities between national laws must be accepted insofar as such rule, applicable to domestic and imported products without distinction, may be recognised as being necessary in order to satisfy the mandatory requirements recognized by law. Such rules

European Court has applied the principle of proportionality in relation to article 30 of the EEC Treaty on the free movement of goods restricted by article 36 public policy derogations. The Court has held that such derogation are valid only to the extent that they are proportionate, in the sense of there being no less restrictive alternative which might satisfy the same public policy aims, without being a means of arbitrary discrimination or disguised restriction on trade among the member states.

More recently, in FEDESA [32], the fifth chamber of the European Court stated the following:

> "The Court has consistently held that the principle of proportionality is one of the general principles of law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must also be proportionate to the aim in view. If a member state has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods."

32. R. v. Minister of Agriculture, Fisheries and Food and another, ex parte Federation Europeene de la Sante Animale (FEDESA) and others (C-331/88) [1990] ECR 4023; also reported in [1991] 1 CMLR 507.

must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

(iii) Proportionality exported to the Member States

In matters concerning Community law, the principle of proportionality falls to be applied by the national courts in the same manner as it would be applied by the European Court. As Advocate General Mancini has stated: **33**

"The general principles elicited by the Court from the primary and secondary provisions of Community law, and in particular from those fundamental values which are common to the legal systems of the Member States, form part of the Community legal order and may therefore be relied upon by individuals before the national court which, as is well known is also a Community court ... The general principles of law and, in particular, the principle of proportionality have direct effect. Accordingly they must be applied by national courts if the circumstances in relation to which they are relied upon display a connection with the Community system."

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33. In Jongeneel Kaas v. Netherlands (C-237/82) [1984] ECR 483 at 520, 522 It should be noted that this part of his Opinion did not form the basis of the Court's decision in the actual case.

Like the German doctrine, the principle of proportionality when applied under Community law to the "constitutional" judicial review of Member States' legislation is a complex test, involving three separate evaluations: (i) the national legislation should be appropriate or relevant in the sense that the substance of, and the relationship between, the means used and the ends sought in the national legislation is neither factually impossible nor unlawful in general Community law; (ii) the national legislation should be necessary or indispensable, in the sense that it constitutes a formulation which least restricts the general operation of Community law; (iii) the national legislation should be balanced or proportionate in the sense that it does not excessively adversely affect the four freedoms (of persons, services, goods and capital) protected under the Community treaties. [34]

34. See the Opinion of Advocate-General Van Gerven in SPUC v. Grogan (C-159/90) ECJ judgment of 4 October 1991, reported in [1991] 3 CMLR 689 at paragraph 27:

> "The principle [of proportionality] has two aspects. **First**, in order for a national rule to be justified under law it must be objectively necessary in order to help achieve the aim sought by the rule: that means it must be **useful** (or relevant) and **indispensable**, in other words it must not be capable of being replaced by an alternative rule which is equally useful but less restrictive of the freedom to supply services. **Secondly** if the national rule is useful and indispensable in order to achieve the aim sought, the member state must nevertheless drop the rule, or replace it with a less onerous one if the restrictions caused to intra-Community trade by the rule are **disproportionate**, that is to say of the restrictions caused are out of proportion to the aim sought by or the result

3. PROPORTIONALITY AND POLITICS IN THE UNITED KINGDOM

The application of, particularly, the latter two tests included within the Community doctrine of proportionality involves the national courts in deciding large questions. Such matters as determining whether or not national legislation excessively affects Community and might be better and less restrictively formulated are not ones which the United Kingdom courts have traditionally seen themselves as competent to decide. Thus, in Gibson v. The Lord Advocate, [35] a Scottish case in which a challenge was made to the validity of certain EEC fishing regulations on the grounds that they were contrary to Article XVIII of the Treaty of Union between Scotland and England which provided that "no alteration be made in laws which concern private right, except for the evident utility of the subjects within Scotland" Lord Keith of Kinkel stated: [36]

> "The making of decisions upon what must essentially be a political matter is no part of the function of this court, and it is highly undesirable that it should be. The function of this court is to adjudicate upon the particular rights and obligations of individual

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brought about by the national rule."

35. Gibson v. Lord Advocate [1975] 1 CMLR 563.

36. *ibid.* at 570

> persons, natural or corporate, in relation to other persons or, in certain circumstances, to the State. A general inquiry into the utility of certain legislative matters as regards the population generally is quite outside its competence."

More recently Hoffman J., in a judgment concerning the compatibility of the English Sunday trading restriction with article 30 of the Treaty of Rome, called upon the European Court to exercise restraint in judicially reviewing legislation and in requiring national courts to do the same. He stated: [37]

> "In my judgment it is not my function to carry out a balancing exercise or to form my own view as to whether the legislative objects could be achieved by other means. These questions involve compromises between competing interests which in a democratic society must be resolved by the legislature. ... The function of this court is to review the acts of the legislature but not to substitute its own policies or values. This is not an abdication of judicial responsibility. The primacy of the democratic process is far more important than the question of whether our Sunday trading laws could or could not be improved."

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37. In Stoke on Trent City Council v. B & Q plc [1991] 2 WLR 42 at 57

Notwithstanding Hoffman J.'s fears for the democratic process and Lord Keith's concerns as to the proper delimitation between politics and judging, Community law as it currently stands requires national courts to apply these tests in evaluating national legislation.

4. THE APPLICATION OF PROPORTIONALITY TO SUNDAY TRADING

In a series of cases which have resulted from challenges by large retailing concerns to the restrictions on Sunday trading in England and Wales laid down by Section 47 of the Shops Act 1950 it has become clear that the national courts duty to "disapply" provisions of Acts of Parliament held to violate Community law is not being used consistently across the country because the principle of proportionality is being interpreted in differing ways. The result of this confusion has been a lack of uniformity in the application of both the provisions of national law and the principles of Community law within one Member State.

(i) A history of litigation

Sunday trading cases have been coming before the English courts as a result of what has been termed a "war of attrition" conducted since 1987 by large retailers against the restrictions imposed upon their trading on

Sundays by the Shops Act 1950. [38] The tactic of the campaign against the Shops Act 1950 has been to find "European defences" on which resist application of the Act in the particular case. The favoured defence to date has been to claim that the restrictions on trading on a Sunday contravene article 30 of the EEC Treaty by constituting an quantitative restriction on imports from other member states of the Community. Evidence is produced to show that retailers who are required to close on a Sunday lose a proportion of their potential turnover, some of which would be attributable to imports from other EEC countries. Further, Sunday shopping is claimed to have particular social characteristics which mean that the loss of sales occasioned by being closed on the Sunday is not made up by the retail outlet being open in the other six days.

(ii) Torfaen Borough Council v. B & Q plc

References were made to the European Court of Justice by a number of courts before whom this defence was presented. The European Court considered the merits of this Article 30 defence in one test case, Torfaen Borough

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38. See Diamond: "Dishonourable Defences: the use of injunctions and the EEC Treaty - case study of the Shops Act 1950" (1991) 54 Modern Law Review 72 for a useful account of the history of the legislation and the campaign currently being conducted against it by large retailers. For an alternative slant on the Shops Act provisions see Arnull "What shall we do on a Sunday ?" [1991] European Law Review 113.

Council v. B & Q plc. [39] The Court held that a restriction on trade which applied without distinction of origin within one member state was a justifiable derogation from the principle of the free movement of goods if the trade restriction was intended to achieve some objective acceptable in law and that the means chosen were proportionate to that end.

The European Court considered that it was clearly "a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty" for a member state to lay down national rules regulating the opening hours of retail premises so as to accord with "national or regional socio-cultural characteristics". Thus the end at which the laws were aimed was, in principle, acceptable in Community law. However, such national rules would only be compatible with Community law if their adverse effect on the free movement of goods in the Community was outweighed by their beneficial effects in reflecting the particular socio-cultural characteristics of the nation or region in which they applied. The European Court concluded that "the question whether the effect of specific national rules do in fact remain within that limit is a question of fact to be determined by the national court." [40]

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39 Torfaen Borough Council v. B & Q plc (C-145/88) [1989] ECR 3851; [1990] 1 CMLR 337; [1990] 1 All ER 129; [1990] 2 QB 19.

40. Paras 12-16 of the judgement of the Court.

In effect the European Court of Justice was instructing the national courts in the United Kingdom to apply the doctrine of proportionality [41] to the provisions of the Shops Act 1950 to determine whether or not the Act's provisions should be applied to the circumstances of the case before.

(iii) W.H. Smith Do-it-all Ltd and Another v. Peterborough City Council

In one of the first cases following the European Court's judgement in Torfaen, W.H. Smith Do-it-all Ltd and Another v. Peterborough City Council [42], this notion of proportionality was considered in certain *obiter dicta* of Mustill L.J. He noted that one interpretation of the concept of proportionality might lead the Courts into a type of cost benefit analysis whereby weight would be attributed, for example, to the aim of realizing the free movement of goods as against the weight to be given to the achievement of particular socio-cultural object (assuming that this could be identified) implicit in the challenged national measure. The learned judge thought that such a weighing exercise would, in general, be too difficult a matter for the courts. It was political

41. As set out in, inter alia, article 3 of the Commission Directive 70/50/EEC of 22 December 1969 on the abolition of measures having an equivalent effect to quantitative restrictions on imports.

42. See note 23.

choice which decided the precedence to be given to different aims in society. Even if values could be given to these different aims, there remained the problem of incommensurability. He asked, rhetorically: [43]

> "How could (say) a desire to keep the Sabbath holy be measured against the free-trade economic premises of the Common Market ?"

Instead Mustill L.J. favoured an alternative approach to the determination of whether or not the restrictive effect of a national rule on trade exceeded the effects intrinsic to that rule. This approach involved breaking the question down to a series of judgements. The national court was first to determine whether or not the measure in question could be said to be equivalent to a quantitative restriction on imports. Having answered 'yes' to that question, the court had then to consider whether or not the objective of the national measure was one which Community law accepted as a justifiable one. If the answer to this question were in the affirmative, then the national court could go on to determine whether or not the national measure went further than was necessary to achieve its legitimate purpose.

It is clear that Mustill J. is only applying the appropriateness and necessity tests, and avoids the last test, proportionality in a strict sense whereby he should

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43. *ibid.* at 596.

consider whether or not the restrictions to intra-Community trade caused by the national law are out of proportion to the aim sought by or the result brought about by that national rule

(iv) Stoke on Trent City Council v. B & Q plc

Hoffman J. in Stoke on Trent City Council v. B & Q plc [44] was, when granting an injunction against illegal Sunday trading, was even more restrictive in his understanding of proportionality.

He was hostile to the idea that the doctrine of proportionality might involve the courts in some sort of balancing exercise between the value of relatively shopping free Sundays against the value of free movement of goods within the Community. Neither did he think it appropriate for the court to consider whether or not the legislative objective (which he identified as the ensuring, so far as possible, that shopkeepers and shop assistants did not have to work on Sundays) could be achieved by other less-restrictive means. He stated [45]

> "Is this court to apply its own opinion of the importance of ensuring that shop workers do not have to work on Sundays and weight that against its opinion of the importance of selling more

44. Stoke on Trent Borough Council v. B & Q plc [1990] 3 CMLR 31 at 34; [1991] Ch 48; [1991] 2 WLR 43.

45. At [1991] 2 WLR, 57.

> Dutch bulbs or Italian furniture ? If the legislature has declined to adopt any modifications of the existing exceptions, is the court to say that modifications should nevertheless be introduced because in its opinion they would not detract from the legislative object and would mean that the Act was less of a hindrance to trade ?"

The answer to these questions is that in Community law tjat is precisely his duty. On Hoffman J.'s understanding, however, the doctrine of proportionality is to be limited to a consideration of the first test only, that of a rational connection between the aim sought and the means used in the legislation. Thus, *per* Hoffman J. the court could only hold a measure to be disproportionate if it considered that no reasonable legislature could have held the view that the aim of this legislation justified the reduction in trade consequent upon its application and that that aim could not have been achieved by other, less trade-restrictive, measures. The rationale for this limitation of the court's function was that for the court to substitute its own view as to other less-trade restrictive measures which Parliament might have adopted in order to achieve the same end would be for the court to subvert the democratic process by usurping the function of the legislature.

The approach which Hoffman J. appears to be applying in

considering the proportionality of legislation is that of "Wednesbury unreasonableness", [46] which is a standard developed in English administrative law whereby only decisions which might be described as completely unreasonable, outrageous or absurd decisions might be struck down by the courts. However, as we have seen, the concept of reasonableness implicit within the proportionality test is not "that which is not absurd or outrageous". Rather, the standard applied in the proportionality tests is that of ordinary reasonableness: that is to say, that which constitutes the most efficient and least restrictive thing to do in the circumstances.

Hoffman J.'s approach assimilates the test of proportionality with existing standards applied in English administrative law. Having been instructed by the European Court to apply the tests of proportionality, he attempts to interpret the test in a manner which renders it consistent with the "proper" role of judges, at least as this has been understood since the post-1689 constitutional settlement in the United Kingdom. The equation of proportionality with "Wednesbury unreasonableness" is justified on the basis of broad appeals to constitutional legitimacy and democracy as these have been traditionally understood in the United Kingdom. In particular he seeks to preserve the traditional diffidence shown by United Kingdom judges in

46. The concept of "Wednesbury unreasonableness" is discussed in Chapter 4

relation to political matters.

To back up his understanding of proportionality as containing within it the standards of "Wednesbury unreasonableness", Hoffman J. quoted from a number of cases from Canada and the United States of America. [47] It is noteworthy that reference was made to proportionality as applied to the judicial review of legislation in other common law countries, rather than to the case-law of the European Court of Justice. [48] It is not self-evident that common law countries, with a

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47. He refers to the Canadian cases Ackroyd v. McKechnie (1986) 161 CLR 60, Reference re anti-inflation Act (1976) 68 DLR (3rd) 425 Edward Books and Art Ltd. v. The Queen (1986) 35 DLR (4th) 1 and to the American Supreme Court decision on Sunday trading legislation McGowan v. Maryland (1961) 366 U.S. 420, 507.

48. It is interesting to note that the courts in Canada appear to have adopted the three-fold test of proportionality developed in German and Community law when assessing legislation for its conformity with Section 1 of the Canadian Charter of Rights and Freedoms. In R. v. Oakes [1986] 1 SCR 103 in considering whether legislation limiting the rights and freedoms set out in the Charter could demonstrably be justified in a free and democratic society, the Canadian Supreme Court stated (at 139):

> First, the measures adopted must be carefully designed to meet to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. ... Third there must be proportionality between the effects of the measures which are responsible for limiting the *Charter* rights or freedom, and the objective which has been identified as of sufficient importance."

R v. Oakes was not cited by Hoffman J. in his consideration of proportionality.

tradition of a certain judicial self-restraint, should have developed the notion of proportionality in the same way as those civilian systems with specific constitutional courts whose jurisprudence provided the basis for the adoption by the European Court of Justice of proportionality as a general principle of law.

The fundamental flaw in Hoffman J.'s approach is that proportionality is not a test developed within English law. As we shall see [49] the House of Lords has shown hostility to the proposed reception of the test of proportionality within the general administrative law of the United Kingdom. Proportionality has been developed by courts which do not necessarily share that particular British vision of the polity and of the requirements of the rule of law as regards the proper balance between judges and legislators. Judges in the United Kingdom are not being asked to apply an English law test of proportionality, but in acting as Community courts, to apply a Community law test. They have to act as Community judges.

(v) B & Q Ltd. v. Shrewsbury and Atcham Borough Council

A contrasting approach to that of Hoffman J. which does not seek to restrict proportionality to existing standards of national administrative law is illustrated

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49. *infra*, Chapter 4

by a Crown Court judgement dated 20 July 1990, only two days after the Hoffman judgement, which appears not to have been cited to that court. In an appeal from magistrates to the Crown Court in B & Q Ltd. v. Shrewsbury and Atcham Borough Council [50], Judge Northcote applied the "least restrictive alternative test", the second requirement of the proportionality doctrine, and decided that this required that the offending provisions of the Shops Act be disapplied. He stated:

> "The question for the court was therefore in our judgement: 'Could the objective, namely of employee protection with regard to Sunday employment, be achieved by other means which are less of a hindrance to trade?'
>
> The appellant, through his professional witnesses, suggested the following:
>
> 1. A contractual requirement that no employee should be required to work on Sundays against their will.
>
> 2. Extension of the fifth Schedule of the Act to include items the appellant desires to sell on Sundays ...
>
> 3. Some limitation on the hours of opening for Sunday trading.
>
> 4. Licensing by local authorities.
>
> We do not have to say which alternative we favour, but it is clear in our judgement that

50. [1990] 3 CMLR 535 at 538.

> one or other of these means would achieve the desired object with considerable less of a hindrance to trade in general - to trade in goods having an origin in another Member State in particular."

(vi) Alternative Notions of Proportionality in English Sunday Trading Laws

It is clear that there are conflicting notions of what the proportionality test requires of the United Kingdom courts in the judicial review of legislation under Community law. Both Hoffman J. and Judge Northcote were agreed as to the purpose of the Shops Act 1950 and both accepted that this end was one which was justified under law, provided that the measure was proportionate to that end. However, the view of Hoffman J. was that, in applying the proportionality test to legislation the courts should assume that Parliament had considered the legislation to be proportionate in passing the measure. Accordingly the court should only substitute its own judgement as to the legislation's disproportionality if the court could hold that the legislation was such that no reasonable legislature could in fact have considered it to be proportionate.

By contrast, the approach taken by Judge Northcote involves the court actively considering the possibility of a "less-restrictive alternative" to the existing

legislation once the aim of that legislation has been identified. Hence, despite being agreed as to the aim of the legislation, in applying two different tests the judges came to opposite views as to its proportionality.

In an effort to prevent precisely this piecemeal application of the Shops Act throughout England and Wales, Sir Nicholas Browne-Wilkinson V-C expressly approved of the approach of Hoffman J. and stated that it was to be held to be a definitive judgement as far as courts of first instance were concerned on the question of the proportionality of Section 47 of the Shops Act 1950. [51] However Hoffman J.'s judgement in Stoke on Trent City Council v. B & Q plc was appealed directly to the House of Lords which, having heard argument on the matter, decided on 20 May 1991 to make an Article 177 reference to the European Court of Justice for clarification of the European law applicable to the issue. [52]

51. Stoke on Trent Borough Council v. Toys 'R' Us Ltd. 18 October 1990, unreported.

52. Currently before the European Court of Justice as (C-169/91) Stoke on Trent Borough Council v. B & Q plc.

(vii) Sunday Trading - the Constitutional Implications

It is clear that the matters raised by Torfaen go far beyond the limited question as to whether or not the restrictions on Sunday retailing contained in the Shops Act 1950 might be acceptable in Community law. In Torfaen the European Court instructed national courts to assess national legislation which derogated from the free movement of goods on the basis of the principle of proportionality. In this way the doctrine of proportionality has been introduced into the courts of the United Kingdom. Henceforth, national legislation in derogation from Community fundamental freedoms would seem to fall to be reviewed by every court within the United Kingdom on the basis of standards of "ordinary reasonableness".

Secondly there is the question of the proper relationship between the European Court and national courts - the notion of judicial subsidiarity. The task of the European Court under article 164 of the EEC treaty is simply to see that in the interpretation and application of the Treaty the law is observed. Its concern is with Community law. The Court has no jurisdiction or right to rule on questions of national law. However the European Court has emphasised the importance of the principle of the co-operation of national courts to ensure the full and effective protection of rights

acquired under Community law in each member state. [53] In emphasising the superiority of Community law over national law, it has insisted that national courts apply Community principles in assessing national legislation. However, as has been seen in case of the proportionality, the application of these principles has led to non-uniform interpretations and applications of national law. It is interesting to note in this regard the arguments put forward on behalf of the Commission in Reading Borough Council v. Payless Ltd. and others where it was stated: [54]

> [E]xamination of the proportionality of the possible barriers to intra-Community trade in relation to the aims pursued ... cannot be left to be determined by national courts, in view of the danger that different national courts will reach different conclusions on cases which are similar.

If the drive for uniform application of Community leads the European Court to claim that it alone can determine the question as to the proportionality of national law in relation to Community objectives, the Court would be directly and unequivocally interpreting national rather than Community law. This would represent a fundamental

53. See Ward "National remedies after Factortame and Francovich" [1992] Anglo-American Law Review (forthcoming)

54. (C-394/90) not yet decided. See page 29 of the report of the hearing.

shift in the judicial polity within the Community. [55]

5 PROPORTIONALITY AND INDIRECT SEX DISCRIMINATION

(i) Indirect sex discrimination in Community Law

The European Court has adopted and adapted from the United States race relations legislation the concept of "indirect discrimination" whereby the fact that certain (apparently neutral or gender-blind) criteria required by an employer disproportionately and adversely affects employees of one sex rather than the other is held to establish *prima facie* the existence of sex discrimination, notwithstanding the absence of any evidence of intent to engage in sex discrimination. [56] In the face of such evidence of disparate impact of such measures as between men and women, the onus is placed on the party seeking to uphold the validity of those measures to justify them on objective grounds, unrelated

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55. The European Court has been given the opportunity to consider the constitutional issues arising from the Sunday Trading litigation in a number of Article 177 from the United Kingdom: the conjoined cases of Rochdale Borough Council (C306/88), Reading Borough Council v. Payless DIY (C-304/90) and Stoke on Trent City Council v. B & Q plc (C-169/91). The oral hearing in these cases was held on 2 June 1992 and judgment is expected in September 1992. At the time of writing, judgment is still awaited in these references.

56. See Jenkins v. Kingsgate Ltd (C-96/80) [1981] ECR 911, in particular the Opinion of Advocate General Warner at 936-7 referring to Griggs v. Duke Power Company (1971) 401 US 424.

to discrimination on grounds of sex. [57]. Failure of the party seeking to uphold measures to adduce evidence justifying the measures to the satisfaction of the court will lead to the Court to conclude that the measures are a form of unacknowledged sex discrimination and fall to be declared to be unlawful.

In the case of an allegedly discriminatory practice by an individual employer the European court has stated that objective justification of disparate impact practices will be established if the measures can be said to be appropriately and necessarily aimed at meeting some "real need on the part of the undertaking" [58], unrelated to any discrimination on the grounds of sex.

(ii) Indirect sex discrimination in U.K. law

The concept of indirect sex discrimination already existed in domestic United Kingdom law, having been introduced into United Kingdom law by the Sex Discrimination Act 1975. Section 1(1)(b) of the Act is in the following terms:

> "1(1) A person discriminates against a women in any circumstances relevant for the purposes of this Act if - ...

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57. See Bilka-Kaufhaus GmbH v. Weber von Hartz (C-170/84) [1985] ECR 1607 para 30 at 1627.

58. Bilka note 14 para 35 p 1628

(b) he applies to her a requirement or condition which applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justified irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

(iii) Indirect sex discrimination and the review of national legislation

The European Court has extended the notion of indirect sex discrimination beyond that contemplated in the British legislation. European indirect discrimination is held to be applicable not only to the practices of individual employers, but also to the provisions of national legislation of Member States.

In Rinner-Kuehn [59] German legislation provided that six weeks sick pay be paid by employers to employees who worked more than 10 hours a week or 45 hours a month. The requirement of a minimum working period before being

59. Rinner-Kuehn v. FWV Spezial Gebaudereinigung GmbH & Co. KG (C-171/88) [1989] ECR 2743, [1989] IRLR 493

covered by the sick pay provisions gave rise to disparate impact of the provisions as between men and women. The European Court held that in the case of national legislation which is shown to have a disparate impact as between men and women, such legislation will fall foul of the general principle in Community law of equal treatment unless it can be shown to be aimed at achieving some "necessary aim of [a Member State's] social policy". [60] Further such measures will also have to be shown to be "appropriate and necessary" means to achieving the intended objective. [61] This last proviso appears to be a re-statement of the test of proportionality, which, as we have seen, has been developed by the European court as a general principle of law in relation, inter alia, to the lawfulness of Member States' prohibitions of economic activities protected by the European Treaties. [62]

As with the Sunday trading legislation the European Court has consistently stated that the question as to whether or not a measure is objectively justified according to the criteria set out by it is a matter of fact for national courts to establish and is not a matter for the European Court. [63]

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60. Rinner-Kuehn note 16 at para 14 p 2761

61. loc cit.

62. See for example Commission v. Denmark ('Danish Bottles') (C-302/86) [1988] ECR 4607 at 4629 para 6 and R v. Minister for Agriculture, Fisheries and Food, ex parte Federation Europeene de la Sante Animale (FEDESA) and others (C-331/88) [1990] ECR para 13; [1991] 1 CMLR 507

63. Bilka note 14 at para 36 p 1628.

Thus, the task for the national court when national legislation is challenged on the grounds of its causing indirect sex discrimination is to consider firstly whether or not the legislation is aimed at some necessary aim of the State's social policy and, secondly, whether or not the legislative means chosen to achieve that end pass the test of proportionality as developed by the European Court. The current state of Community law requires national judges to take a view as to whether or not national legislative provisions which can be shown, statistically, to have a disparate impact as between men and women can or cannot be justified on the basis of some national social policy. Further, as we have seen, the judges then have to assess the utility, necessity and appropriateness of such national legislation in achieving that policy.

The presumption appears to be that national legislation having disparate impact will be held to be invalid unless shown to be justified by national policy. The onus is on the national authorities to appear before their national courts to defend the legislation. In one way those courts' task is easier when legislation is challenged on the grounds of its allegedly discriminatory impact than simply on its general incompatibility with Community law because the national authorities are required to appear before the court to specify what

policy the legislation is aimed at. In other cases, such as the Sunday trading challenges, the courts have been required to come to their own views as to the policy behind the Shops Act 1950 before determining its compatibility with European law. [64]

6. THE EQUAL OPPORTUNITIES COMMISSION CASE

(i) EOC - indirect sex discrimination and the justification of national policy

The implications of the European Court's decision in Rinner-Kuehn have only recently come to be realised in the United Kingdom. The first case requiring national authorities to justify legislation which has disparate impact was brought before the national courts in October 1991. In R. v. Secretary of State for Employment, ex parte the Equal Opportunities Commission and Another [65] an action for judicial review was brought by the Equal Opportunities Commission (EOC) of a statement made by the Secretary of State for Employment in correspondence with the EOC to the effect that the extant United Kingdom law

64. See for example the Sunday trading cases applying the European Court ruling in Torfaen Borough Council v. B & Q plc (C-145/88) [1989] ECR 3851 viz.: W.H. Smith Do-it-All Ltd and Another v. Peterborough City Council [1990] 2 CMLR 577; Stoke on Trent City Council v. B & Q plc [1991] 2 WLR 42; B & Q plc v. Shrewsbury and Atcham Borough Council [1990] 3 CMLR 535; Mendip District Council v. B & Q plc [1991] 1 CMLR 113, Kirklees Borough Council v. Wickes Building Supplies Ltd. [1991] 3 WLR 985.

65. [1992] 1 All ER 545

contained in the Employment Protection (Consolidation) Act 1978 relating to unfair dismissal and redundancy payments was not contrary to European law.

The EOC argued that the fact that part-time workers were only entitled under the Employment Protection (Consolidation) Act 1978 to bring an unfair dismissal complaint and/or claim for a statutory redundancy payment after five years continuous working, in comparison to the two years required for full time employees constituted indirect discrimination against women workers, contrary to article 119 of the Treaty of Rome as developed in the case law of the European Court of Justice. Statistical evidence was quoted to the effect that by far the greater proportion of part-time employees, some 90%, were women.

The court was quite clear that proceedings might have been brought by individual employees adversely affected by the part-time/full-time threshold before an industrial tribunal which, if it found the submission on the existence of indirect discrimination to be justified, would be entitled to disapply the United Kingdom legislation as inconsistent with the direct rights of that individual employee under Community law. However, given the public nature of the duties of the Equal Opportunities Commission it was appropriate that judicial review proceedings be brought.

> "If as a matter of primary legislation the employment arrangements for a substantial

> number of part-time employees in the United Kingdom are operating in a way which creates improper discrimination in the field of employment contrary to the basic principles of United Kingdom and European Community law that men and women should be treated equally while at work, and the Secretary of State responsible for employment arrangements throughout the United Kingdom wrongly decides that he will not take any steps to reduce or extinguish such wrongful discrimination, an issue of public law is raised in which, having regard to its statutory duties, it seems clear to us that the Equal Opportunities Commission has sufficient interest." [66]

The court accepted that the different qualifying thresholds for full-time and part-time work adversely affected a greater proportion of women than men. Given the fact that the vast majority of part-time workers in the United Kingdom are women and hence disproportionately affected by legislative differences between full-time and part-time workers, the legislation was , on the basis of European Court case law, potentially indirectly discriminatory. [67] Accordingly, the national

66. *ibid.* p 556

67. Nolan LJ stated:
"Although it may appear somewhat strange that legislation which is not intended or worded to create discrimination on the grounds of sex should be liable to be treated as

authorities were required under European law to justify the different thresholds for employment protection between full-time and part-time work contained in the Employment Protection (Consolidation) Act 1978 to the Court. Before the Court could uphold the legislation as valid, it required to find that it pursued a necessary aim of social policy in the United Kingdom and was proportionate in relation to that aim. In the absence of proper justification, the offending provisions of the Act would be declared not to be applicable because contrary to the basic principle of Community law that men and women should be treated equally while at work.

The court accepted the claim of the Secretary of State that the differential between full and part-time employments was aimed at ensuring that "as many individuals throughout the country should be able to work and to do so for as long as and in the circumstances which they choose." The court accepted that any reduction in employment opportunities would be socially undesirable, perhaps indeed unacceptable. Accordingly the aim of the Employment Protection legislation was accepted to be a legitimate one.

> discriminatory simply on the basis that a large proportion of those affected by it happen, as a result of particular social considerations, to belong to one sex rather than the other, it has been held [by the European Court] that an arrangement which has a disproportionate effect on employees of one sex rather than the other is indirectly discriminatory."

(ii) EOC - indirect discrimination and proportionality

Turning to the question as to whether the legislative means were appropriate and necessary for the attainment of the stated objective, the Secretary of State claimed that abolition of the full-time/part-time distinction would lead to an increased burden on employers and consequently to a reduction in the number of part-time jobs available. These claims were criticised by the EOC as "general unspecific and speculative", but the court found the Secretary of State's position to be "inherently logical". As a result, rather than require the Secretary of State to produce positive evidence to show how the differential maintains and/or encourages employment opportunities, the court turned the matter around and sought conclusive evidence from the EOC to show that, contrary to the assertions of the civil servants within the Department of Employment, the abolition of the differential between full- and part-time would not, in fact, lead to any reduction in employment opportunities. Perhaps unsurprisingly the court found such evidence as was produced to it inconclusive of that matter. Nolan LJ stated:

> "As the evidence of the experience and arrangements in the other Member States was more closely analysed it became increasingly apparent that it was impossible to make satisfactory comparisons between the Member States or to reach the conclusion that an

> alteration or removal of qualifying thresholds would have no significant effect on opportunities for women in the United Kingdom to work part-time." [68]

The court did not go on to consider the other aspects of the proportionality test, namely whether or not there was any less restrictive alternative to the present legislation and whether or not the claimed protection of employment opportunities was sufficiently great as to outweigh the negative impact of the continuing discrimination against part-time, which is to say principally women, workers.

(iii) EOC - the Constitutional Implications

The EOC intially sought a battery of remedies from the court. In addition to a declaration to the effect that the distinction between full and part-time employees

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68. In a conjoined application for judicial review, the EOC also argued that, given that redundancy payments are to be regarded as a form of deferred payment for working (On which see Barber v. Guardian Royal Exchange Group Ltd. (C-262/89) [1990] ECR 1889 para 13), U.K. statutory redundancy payments which were calculated, in part, on the basis of the employee's pay immediately before dismissal, discriminated against workers who had transferred to part-time work after a period of working full-time. The vast majority of such workers were women, and hence this statutory mode of calculating redundancy payments also constituted indirect sex discrimination. The Court was sceptical as to whether or not this could be called indirect discrimination against women and in any event found the statutory scheme to be objectively justified as a clear, simple and direct scheme for providing protection to employees, regardless of sex, in the event of redundancy.

contained in the Employment Protection (Consolidation) Act 1978 should be disapplied on the basis of Community law, they also sought a declaration that the United Kingdom was in breach of its obligations under article 119 of the Treaty of Rome and EEC directives 75/117 and 76/207 on equal pay and equal treatment respectively as well as a declaration that the Secretary of State's failure to introduce amending legislation before Parliament constituted a breach of the United Kingdom's obligations under Community law. Finally the EOC sought an order of mandamus to require the Secretary of State to introduce appropriate amending legislation before Parliament to ensure the conformity of United Kingdom law with the requirements of Community law.

In the event, the court held that it had no jurisdiction to ordain the Secretary of State to introduce rectifying legislation had the United Kingdom statute been found by the court not to conform to European law. It would be unconstitutional for a court in the United Kingdom to order either the Secretary of State or Parliament to fulfil obligations under European law, or to make any declaration to that effect. The function of the court was limited to setting out the enforceable rights and obligations of the parties before it under the law which presently applied within the United Kingdom. As Nolan LJ stated: [69]

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69. *ibid.* p 561

> "It is plain enough that Section 2 of the [European Communities] Act 1972 alters the traditional relationship between the Courts and Parliament in this country in that it obliges the courts to disregard the laws made by Parliament in so far as they conflict with directly enforceable Community law. Further than that it does not go. Domestic legislation remains a matter for Parliament, not for the Courts. ... Rights and duties which have become part of English law by virtue of Section 2 of the 1972 Act, or by virtue of subordinate legislation made under that section are matters for us; the obligations of the United Kingdom under the EEC Treaty are not."

The judges in EOC still showed a certain half-heartedness in carrying out their duty to review legislation under Community law. With the EOC case it has become clear that apparently indirectly discriminatory legislation is to be applied only insofar as considered justified by the court. There is therefore presumption that certain legislation is illegal, unless it can be shown to be justified. However, the judges in EOC appeared to operated under an equally strong presumption that legislation is to be considered justified if the Secretary of State says that it is justified. This also appears to point to a certain constitutional confusion: the executive is called upon to justify a law which has,

in fact, been enacted by Parliament. In the absence of Parliamentary representatives being convened before the court to explain and justify the law (an idea which was, indeed, canvassed but not pursued at the hearing) the executive appears to be given the last word on the Act's purpose.

In concluding that legislation is justified if supported by the executive in this way, the judges failed to carry out the whole new series of duties imposed upon them under the proportionality test. Where national legislation is challenged under Community law, the courts now have to check its aim, verify its proportionality, weigh the overall good achieved by it and think of less restrictive alternatives to the present arrangement. The judges in EOC appeared only to consider whether the aims of the legislation were legitimate and failed to carry out the other tests required by the proportionality doctrine.

7. CONCLUSION

In both the Sunday trading cases and the EOC case, the validity or "Euro-constitutionality" of legislation is now to be established by the judges alone assessing whether or not the policy choices of the Secretary of State and/or of Parliament are objectively justified and proportionate in their implementation. As a result the courts in the United Kingdom are forced to adopt a teleological approach to the interpretation of certain

national legislation. Such broad purposive readings of Acts of Parliament contradicts the traditional techniques of close analysis of the final texts of Acts of Parliament (specifically excluding any reference to such Parliamentary debates as preceded and led up to the law's formal enactment) which has characterised the approach, to date, of the United Kingdom courts to national statutes. [70]

It is clear that the United Kingdom courts have experienced difficulty in adopting the new approaches required by Community law. In particular, the principle of proportionality does not yet appear to have been properly appreciated or applied by the courts in the United Kingdom. The reception of the doctrine is not yet complete, but it is clear, given the way in which Community law has developed of itself and as regards proportionality that there doctrine will have to be accepted and applied by the national courts in matters covered by Community law.

The interesting question then become whether or not the doctrine will be accepted and applied by the United Kingdom courts in areas in which Community law does not yet apply. It is to that question that we turn in the next chapter.

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70. See Bankowski and MacCormick "Statutory Interpretation in the United Kingdom" in MacCormick and Summers (eds) Interpreting Statutes: a comparative study, 1991; Twining and Miers How to do things with rules, 1982, 334; R. Cross Statutory Interpretation, 1976, p 42.

CHAPTER 4

BRIND AND THE INDIRECT RECEPTION OF COMMUNITY LAW

BRIND AND THE INDIRECT RECEPTION OF COMMUNITY LAW

1. THE IDEA OF THE INDIRECT RECEPTION OF LAW

In the previous chapter we have looked at the way in which Community law has required courts in the United Kingdom to apply concepts derived from Community law, in particular the principle of proportionality, to provisions of national law. This phenomenon might be termed the direct reception of Community law doctrines, in that it has occurred as a direct result of the acceptance by the United Kingdom courts of the supremacy of European law over conflicting national law provisions.

In this chapter I intend to examine whether or not there is any evidence in the case law of the United Kingdom courts for what might be termed the "indirect" influence and reception of Community law doctrines. The matter to be examined is whether or not the influence of Community law over the national system has become so strong as to have a "spillover effect" into areas of national law which are not, as yet, specifically covered by any Community legislation.

In M v. Home Office [1] the Court of Appeal considered the question as to whether or not a Minister of the Crown, in

1. [1992] 2 WLR 73

this instance the Home Secretary, could be found guilty of contempt of court. The High Court had ordered the Home Secretary to procure the return of an applicant for political asylum to the High Court's jurisdiction so that his application for judicial review of the refusal of political asylum could be given due consideration. The question of possible contempt of court arose from the fact that the Home Secretary had, on legal advice, decided not to comply with this order of the High Court but instead to challenge it as irregular on the grounds that it purported to grant a mandatory interim injunction against an officer of the Crown, contrary to Section 21 of the Crown Proceedings Act 1947 and the decision of the House of Lords in the Factortame 1. [2]

The Court of Appeal held that orders of the High Court fell to be complied with unless and until they had been set aside and that deliberate and wilful failure by ministers of the Crown and civil servants to comply with such order might constitute contempt of court. Lord Donaldson MR went on, however as follows: [3]

> "It is anomalous, and in my judgment wrong in principle, that whereas the law gives the courts comprehensive power to preserve rights and to "hold the ring" pending a final decision

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2. R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 1) [1990] 2 AC 85. See *infra* Chapter 2 for a discussion of this case.

3. *Ibid.* pp 99-100

> in a dispute between citizens (including companies) or between citizens and local authorities, its powers where central government is involved are more circumscribed. It is even more anomalous that as a result of R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 2) (Case C-213/89) 1 AC 603 and the operation of European Community law, they now have comprehensive powers even where central government is involved, but only in relation to rights under Community law."

Lord Donaldson's remarks ("anomalous and wrong in principle") appear to show the inherent instability of the existence of two separate paradigms of legal reasoning and two distinct sets of rights and remedies within the same legal structure. However, his remarks do not show that any spillover has yet taken place, but merely point to the existence of tendencies which might promote such indirect influence of Community law principles and approaches.

2. ADMINISTRATIVE LAW IN THE UNITED KINGDOM AND IN THE EUROPEAN COMMUNITY

If there is indeed spillover or indirect reception it would appear most likely to be in the area of administrative law. Administrative law covers the area of the relationship between public bodies and persons,

whether real or corporate. In that it deals primarily with matters relating to the internal organisation of the State and apart from agricultural matters does not have, in general, any intra-Community implications, [4] it is an area which, at the present phase of Community law, remains in the province of the national legislature and is relatively autonomous of Community law which has its own developed system.

The European Court of Justice has developed a system of administrative law, inspired by both French and German law, and characterized by the application of the general principles of law noted in Chapter 3 as part of its duty [5] under article 164 to ensure that in the interpretation and application of the Treaty the law is observed. The European Court is charged with the task of seeing that both the Member States and the institutions of the Community respect the Community treaties and therefore

4. Certain administrative decisions, for example the granting of export licences as in R. v. Minister of Agriculture, Fisheries and Food, ex parte Roberts and others [1991] 1 CMLR 555 or the designation of licensed ports for particular imports in R. v. Minister of Agriculture, Fisheries and Food, ex parte Bell Lines Ltd. and another [1984] 2 CMLR 502 might have implications for Community trade and could therefore come within the field where Community administrative law doctrines fall to be applied.

5. See Akehurst "The Application of General Principles of Law by the Court of Justice of the European Communities" 1982 British Yearbook of International Law 29 at 38; Vacca: "L'integrazione dell'Ordinamento Communitario col diritto degli stati membri e con i principi generali di diritto." (1991) Rivista di Diritto Europeo 339-349. For a magisterial survey of administrative law throughout the Community see Schwarze European Administrative Law, 1992.

seeks to ensure the proper administration of the Community order within a legal framework. Thus, one of the Court's fundamental concerns has always been to guarantee the proper exercise of the powers of the various central Community institutions and to protect the rights and interests of persons, whether natural or corporate, affected by them. [6]

By contrast with the Community systems, administrative law in the United Kingdom is at an early stage of development. The legal systems of Scotland, Ireland and England all developed without reference to the trend toward systematization and codification which was common to the legal systems of west continental Europe during and after Napoleon. In particular in none of those legal systems, which for convenience we might call Anglo-Celtic, did there grow up a separate judicial hierarchy for the review of administrative acts. Without the separate systems of courts a body of administrative, law distinct from the remedies provided for in private law, was slow in developing. As the Scottish judge. Lord Reid stated in 1964 in a House of Lords case relating to the dismissal of a Chief Constable without the benefit of a hearing: [7]

"[W]e do not have a developed system of

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6. See Schwarze "Tendencies towards a common administrative law in Europe" [1991] European Law Review 3 at 5-14 for a full survey of the European Court's development of Community administrative law.

7. Ridge v. Baldwin [1964] A.C. 40 at 72

> administrative law - perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed to deal with."

It is a commonplace that in the last thirty years in the United Kingdom, notwithstanding the lack of any specialised administrative law tribunals, there has been an exponential growth in the development of a separate body of administrative law with its own remedies principles and doctrines, distinct from those which apply to the sphere of private law. [8]

In the absence of a separate judicial hierarchy for administrative law, what has been developed in both England and Scotland have been new legal procedures, distinct from the procedures which apply to ordinary private law actions. The new English procedure for judicial review, known as Order 53, was introduced by the courts in England in 1977 [9] and was given statutory backing by Sections 29 and 31 of the Supreme Court Act

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8. See Woolf C.J., Protection of the Public - a new challenge The Hamlyn Lectures, 41st series (1990)

9. S.I. 1977 No. 1955

1981. [10] In Scotland the simplified judicial review procedure was created by a 1985 Act of Sederunt and is now contained in Rule of Court 260B. Under these new procedures the High Court in England and the Court of Session in Scotland can more readily and expeditiously exercise their existing supervisory jurisdiction over the proceedings and decisions of lower courts, (quasi)-judicial tribunals and of any other bodies charged, in England, with the performance of public acts and duties or, in Scotland, to which jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument. [11]

These new procedures have encouraged an rapid growth in the applications to the courts for judicial review. [12] As a result of this explosive growth in applications for judicial review, the law itself has developed markedly. [13] The development of this new body of law has been

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10. See Louis Blom-Cooper Q.C. "The New Face of Judicial Review: Administrative Changes in Order 53" 1982 Public Law 250.

11. In Scotland, in apparent contrast to the position in England, the competency of an application for judicial review does not rest on any supposed distinction between public and private law. On this see the decision of the Inner House in West v. Scottish Prison Service, unreported 6 May 1992. See also Himsworth "Public Employment and the Supervisory Jurisdiction" (1992) Scots Law Times 123.

12. From 1981 to 1985 there was a doubling in the number of applications made annually to the English High Court under Order 53. See Woolf L.J. "Public Law - Private Law: Why the Divide ? A Personal View" [1986] Public Law 220 at 222.

13. For surveys of developments to date and proposals for future development see Jowell and Lester "Beyond

judge led, rather than by any act of the national legislature in the United Kingdom. [14] As a result the developing body of law is extraordinarily open to outside influences, particularly from other jurisdictions which have had a longer period in which to develop and refine their notions of administrative law [15]. Given the predominant influence that Community law has already exercised in areas of national law which fall within the scope of Community law, it is to be expected that the system of administrative law of the European Community would be particularly influential also in this area. [16]

Wednesbury: substantive principles of administrative law" [1987] Public Law 368; Oliver "Is the *ultra vires* rule the basis of judicial review ?" 1987 Public Law 543

14. See Lord Scarman "The Development of Administrative Law: obstacles and opportunities" [1990] Public Law 490 at 491:

> "[A]dministrative law has to be a developing legal science which it is the duty of judges aided by practitioners and scholars to keep abreast with the pace of change in public administration."

15. See generally the essays in Jowell & Oliver (eds.) New Directions in Judicial Review, London 1988

16. See Slynn "But in England there is no ..." Festschrift fuer Wolfgang Zeidler, 1987 Vol 1, 397; Lord Mackenzie-Stuart "Recent Developments in English Administrative Law - the impact of Europe ?" in F. Capotorti *et al.* (eds.) Du droit international au droit de l'integration: Liber Amicorum P. Pescatore 1987, 411

3. PROPORTIONALITY AS A GROUND FOR JUDICIAL REVIEW - THE INFLUENCE OF COMMUNITY ADMINISTRATIVE LAW

(i) Proportionality: a door left open

In Council of Civil Service Unions v. Minister for the Civil Service [17] Lord Diplock re-classified the principles of administrative law which were then accepted by the courts in the United Kingdom as grounds for challenging executive acts. Lord Diplock stated that an executive act might be susceptible to judicial review on the following grounds: its "illegality", that is to say that the decision maker did not correctly understand the law that regulated his decision making power and/or did not give effect thereto; its "procedural impropriety" where there was failure by the executive or administrative tribunal to observe the appropriate procedural norms; and its "irrationality", if the decision which was so outrageous as to be outwith the bounds of the rational.

Lord Diplock accepted that future cases might lead to further development of the grounds upon which an administrative action might be subject to judicial review.

> "I have in mind particularly the possible adoption in the future of the principle of

17. [1985] A.C. 374

> 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community." [18]

In leaving the door open to further development in this way, Lord Diplock would appear to have been responding to calls made in academic literature for the notion of proportionality to be accepted by the courts and taken up as an independent ground for judicial review. [19]

(ii) Proportionality: already implicit in U.K. law ?

In a useful short survey of European law on proportionality, [20] Jowell and Lester suggest that the principle of proportionality has already been implicitly accepted in English law, and cite a number of authorities from 1911 onward in which the notion that a punishment or benefit awarded by a body should be in proportion to the wrong or good done in order to be upheld by the Court. They argue that the time is ripe for the explicit recognition of proportionality as a general principle of English administrative law in the interests of greater legal certainty.

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18. *Op. cit.* at 410

19. For an example of such academic advocacy, see Jowell and Lester "Beyond Wednesbury: substantive principles of administrative law" (1987) Public Law 368

20. Jowell and Lester "Proportionality: neither novel or dangerous" in Jowell and Oliver (eds.) New Directions in Judicial Review (1988).

The explicit acceptance of the doctrine of proportionality is seen as an important symbol, being understood as part of a general "Europeanisation" of the national laws of the United Kingdom. The idea is that there will in time develop a common law of Europe by osmosis. The model is one of the mutual influence and a natural tendency toward integration of the legal systems of the member states of the European Community. [21] Given the already noted openness of administrative law in the United Kingdom to judicial development, it would appear to be in this area that any signs of the beginnings of such organic integration would be most likely to be detected. Proportionality has thus become a touchstone of the extent to which the legal systems of the United Kingdom are becoming more "European".

(iii) Proportionality: the case for explicit adoption

The case in favour of the adoption of proportionality as a separate ground of judicial review of administrative action proceeds by way of a series of arguments. The first step is to present proportionality as something commonsensical, and as no more than a specific application of existing standards applied in

21. See in particular Koopmans "The Birth of European Law at the Crossroads of Legal Traditions" (1991) 39 American Journal of Comparative Law 493; Koopmans "European Public Law: Reality and Prospects" (1991) Public Law 53; Grossfeld "The Internal Dynamics of European Community Law" (1992) 26 The International Lawyer 125

administrative law. Thus Jowell and Lester have stated [22]:

> "It seems so characteristically English to require that the means employed by the decision maker must be no more than is reasonably necessary to achieve his legitimate ends ... that there should be no difficulty in absorbing the concept of proportionality into the English judicial process."

On this argument, proportionality would seem to be nothing more than a particular application of standards contained in the broad notion of "Wednesbury unreasonableness" [23], whereby the courts will strike down a decision which they consider to be so utterly unreasonable that it could not have been taken by any reasonable authority acting in good faith.

The second stage of the argument in favour of proportionality's adoption is to point out that the existing category of "Wednesbury unreasonableness" already allows the courts to look at the substance of a

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22. Jowell and Lester "Beyond Wednesbury: substantive principles of administrative law" (1987) Public Law 368 at 375-6

23. Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 at 230. In R v. Birmingham City Council, ex parte Wesson, Queen's Bench Division (Crown Office List) CO/546/91, unreported 16 December 1991 proportionality was argued to be synonymous with "Wednesbury unreasonableness". This argument was rejected by the Court.

decision, and not simply at the decision making process. However the test of "Wednesbury unreasonableness", it is claimed, is not really suitable for the task of reviewing the merits of a decision. It is unrealistically high, imprecise and self-referential. It is not so much an objective test of the decision itself as a test which looks to the subjective reactions of the judges to the decision. If the judges describe a decision as "so absurd that no sensible person could ever dream that it lay within the powers of the authority" [24] or "so wrong that no reasonable person could sensibly take that view" [25] or "so outrageous in defiance of logic or of accepted moral standards that no sensible person ... could have arrived at it" [26] they are doing no more than stating their strong disapproval of the decisions in question, without giving reasons for this. Words like "absurd", "outrageous" are seen as simply emotive words of disapproval as contrasted with the approbation expressed in the use of the words "reasonable" and "sensible".

The third step in the argument is to contrast the emotivism of "Wednesbury unreasonableness" with the apparently cool and dispassionate objectivity of determining the suitability of means to ends, implicit in

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24. Wednesbury [1948] 1 KB 223 at 229 per Lord Greene MR

25. Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014, 1026 per Lord Denning MR

26. CCSU [1985] AC 374 at 410 per Lord Diplock

the proportionality test. Further, the standards by which decisions are to be measured are made explicit in the proportionality test. They are public standards of a scientific rationality which can be understood and adhered to by administrators. Indeed, in comparison to "Wednesbury unreasonableness", proportionality actually renders the judiciary more accountable, given that it involves them in an explicit process of comparison of means and ends, of weighing and balancing of different objectives. No longer will decisions be struck down on the basis of non-articulated judicial prejudices, hidden in such catch-all phrases "absurd" or "outrageous".

Given these arguments, the conclusion in favour of the adoption of proportionality as a substantive and independent principle of judicial review appears to follow irresistibly. Surprisingly, however, despite Lord Diplock's openness to the idea, there has been some judicial resistance to the principle of proportionality.

(iv) Proportionality: the case for explicit rejection

The, principally, judicial arguments against proportionality would appear to be the following. Firstly, the idea that proportionality is already implicit within the doctrine of "Wednesbury unreasonableness" is accepted and while lack of proportionality would not of itself render a decision unlawful, extreme disproportionality might be one factor

pointing to the decision being so perverse as could not have been taken by any reasonable authority. [27]

As regards the attack of "Wednesbury unreasonableness", the test is presented as checking only "abuse or misuse of power" and "excesses in the exercise of discretion". It is not a general mode for reviewing the merits of a decision but comes into play only in exceptional circumstances when a decision can only be described as utterly unreasonable, despite seeming to have been taken in accordance with the applicable procedures and without violating the relevant regulations. The Wednesbury test is set at a high level to preserve the idea that the courts are doing no more than supervising the administration's exercise of power and are not seeking to replace it. In applying the Wednesbury tests the courts are not referring to any general standard of what the reasonable man might have done. It is decidedly not a *carte blanche* for the judiciary to substitute their own opinion for that of the decision maker if they should happen to disagree with him or her. [28]

Finally, the idea the proportionality test itself is rejected outright precisely because it does involve a lowering in the standard of the Wednesbury test

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27. R. v. General Medical Council, ex parte Colman [1990] 1 All ER 489, 509 per Lord Donaldson MR

28. Brind v. Secretary of State for the Home Department [1991] 1 All ER 720, 737-8 per Lord Lowry.

"extraordinary unreasonableness" to considerations of "ordinary reasonableness". This is because proportionality requires judges to decide whether or not there existed any reasonable relation between a decision, its objectives and the circumstances in which the decision was applied in the particular case. It also requires judges to consider whether or not there were any significant alternative courses of action which might achieve the same end less oppressively. Accordingly, application of the proportionality test would mean that the judges applied their own standards of what they regarded as the reasonable thing to do in the circumstances and strike down any decision which did not accord with that.

4. JUDICIAL REVIEW AND SUBSTANTIVE APPEALS

The application of the proportionality tests would involve judges looking at the merits of every decision challenged on those grounds. However, it has been repeatedly emphasised that judicial review should not be seen as an appeal to the judges to consider the substantive merits of a decision anew [29]. For the courts to go beyond their general supervisory jurisdiction of ensuring that the law was respected by decision makers would be to usurp the functions of public

29. Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1115, 1173, per Lord Brightman

authorities. In any event, such involvement in administrative decision making would be highly inappropriate given the judges' lack of time, of experience and expertise, and of democratic accountability.

Once again, Community law may require such "undemocratic' behaviour on the part of the judiciary. Thus, in R. v. Minister of Agriculture, Fisheries and Food, ex parte Bell Lines Ltd. and another [30] a Ministerial decision to restrict the import of milk into the United Kingdom to certain specified ports was challenged in an action for judicial review. Prior to the Milk Ports Order, the only milk imported into the United Kingdom had been shipped from Ireland via two ports on the Irish Sea. The ministerial decision did not include these or any other ports on the Irish sea among the newly designated "milk ports". This decision was challenged on the grounds that it introduced an unreasonable restriction on intra-Community trade (contrary to Article 30 and unjustifiable under Article 36 of the Treaty of Rome) and a declaration was sought from the Court that the two Irish Sea ports also be designated ports of entry for milk. Article 36 falls to be interpreted in the light of the doctrine of proportionality. The declaration was granted by the Court The Court held that in considering

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30. [1984] 2 CMLR 502

the justifiability of the decision under Article 36 it was not limited to the criteria set out in Wednesbury, namely: whether the Minister had taken into account matter he should not have done; or failed to take into account matters he should have done; or whether the decision could be described as "utterly unreasonable". Rather, if it were plain to the court that the decision constituted, under Community law criteria, an impermissible (which is to say, disproportionate) restriction on Community trade it therefore contravened one party's rights arising from Community law, and it was open to the court to substitute its decision for that of the Minister.

5. BRIND - THE REJECTION OF PROPORTIONALITY

In R. v. Secretary of State for the Home Department, ex parte Brind and others [31] the House of Lords examined the validity of the British Government's ban on the broadcasting of the voices of members of certain political organisations, in particular Sinn Fein. Arguments were presented to the effect that the use of executive power in this regard was disproportionate to its proclaimed objective of "starving the terrorist of the oxygen of publicity". These arguments were given short shrift. Lord Ackner stated:

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31. [1991] 2 WLR 588, 609

> "Unless and until Parliament incorporates the [European] convention [on Human Rights and Fundamental Freedoms] into domestic law ... there appears to me to be at present no basis on which the proportionality doctrine applied by the European Court [of Human Rights] can be followed by the courts of this country."

Lord Lowry declared :

> "In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision maker has abused his power and into an area in which the courts will feel more at liberty to interfere ... [T]here is **no** authority for saying that proportionality in the sense in which the appellants have used it is part of English common law and a great deal of authority the other way. This, so far as I am concerned, is not a cause for regret..."

The idea of an organic reception of the doctrine of proportionality into the administrative law of the United Kingdom seems to have been decisively rejected by the Lords in Brind. The rejection of proportionality appears to be based on constitutional grounds, in particular on a view of the separation of powers which requires judges to show restraint before the decisions of

the executive.

Ironically however, as we have seen, Community law does already require the United Kingdom courts to apply the doctrine of proportionality in an even more sensitive constitutional area - namely the judicial review of legislation in the wake of Factortame 2. [32] As a result of the Lords decision in Brind in the absence of any Community law element the reasonableness of decisions of the executive and of administrative authorities can still only be challenged on the basis of "Wednesbury unreasonableness". Acts of Parliament against which a plausible "European defence" can however be challenged on the grounds that, *inter alia*, they could have been drafted less restrictively, which is to say in a more reasonable way. This latter is a test of "ordinary reasonableness".

6. PROPORTIONALITY AFTER BRIND

The anomaly of creating two paradigms of "reasonableness" in judicial review and, in particular, the fact that Community law requires that the relatively low standard of "ordinary reasonableness" be applied in the judicial review of Acts of Parliament does not seem to have been addressed (or perhaps realized ?) by their Lordships in

32. Factortame Ltd. v. Secretary of State for Transport (C-213/89) [1990] ECR 2433; [1990] 3 WLR 818

Brind. In the light of this constitutional anomaly that executive acts appear to receive greater judicial protection than legislative acts, it seems likely that pressure for the unequivocal acceptance of proportionality in the administrative law of the United Kingdom will continue.

Thus, in R v. Secretary of State for the Environment and Another, ex parte National and Local Government Officers Association (NALGO) [33] regulations which sought to restrict the political activities of officers and staff of local authorities were challenged as unlawful on the grounds, *inter alia*, of their lack of proportionality. It was argued that it was open to the judge to consider the proportionality test, notwithstanding the lack of any apparent Community element in the case and despite the rejection of proportionality in Brind.

The basis for this argument was that (it was claimed) a majority of the judges in Brind, while rejecting the applicability of proportionality in that case, still accepted Lord Diplock's expressed view in Council of Civil Service Unions v. Minister for the Civil Service to the effect that proportionality might some day be accepted in English administrative law. Perhaps unsurprisingly, the judge refused to accept this line of argument or to apply the proportionality doctrine

33. High Court, Queen's Bench Division, unreported judgment of 20 December 1991

stating:

> "Ex parte Brind [1991] 1 AC 696, [1991] 1 All ER 720 was decided only a few months ago. There is nothing in Lord Roskill's speech to suggest that he was encouraging judges to accept that there was now a sort of open season for them to introduce the doctrine of proportionality. Rather ... he was contemplating that, with the gradual encroachment of European law, a time might come when the courts of this country would feel that it was appropriate to adopt the principle. However fast or slowly that tide runs, it has not in my view risen perceptibly in the short interval since the decision in Ex parte Brind."

One development which had occurred in Community law between the decision of the House of Lords in Brind and that of High Court in NALGO has been the assertion by the European Court that national legislation may be assessed by that Court for its conformity with the fundamental rights recognized and protected under Community law. In Elleniki Radiophonia Tielorasi v. Dimotiki Etairia Pliroforissis [34] the European Court stated:

> "[A]s soon as any such legislation enters the field of application of Community law, the European Court, as sole arbiter in this matter,

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34. (C-260/89) [1991] ECR 2925 [Author's translation]

> must provide the national court with all the elements of interpretation which are necessary in order to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention on Human Rights - the observance of which the Court ensures."

From this it would appear arguable that Community law concepts, which would include the doctrine of proportionality as well as concern with fundamental rights, are to be applied in the assessment of national legislation not only in areas of the Community's exclusive competence or when there exist rules of Community which are directly relevant to the matter at hand, but also when national laws can be said to apply or to have effects in any field or area in which the Community has also (exercised) jurisdiction.

Thus in W Emmett & Son Ltd v The Commissioners of Customs and Excise [35] the argument was put forward that the fixed penalties provided for in Section 14 of the Finance Act 1985 were contrary to Community law in offending against, *inter alia*, the principle of proportionality. Notwithstanding the absence of any principle of proportionality in United Kingdom law, it was argued that the fact that the Community had issued various directives

35. London VAT Tribunal, LON/90/1316Z, unreported, 7 October 1991

in relation to the harmonisation of tax laws, specifically VAT throughout the Community meant that the general principles of Community law, including proportionality, should be employed in relation to the interpretation and application of the national laws implementing these directives.

The VAT tribunal held, however, that with the complete implementation of the relevant directives by and in national law and the fact that the article 22(8) of the Sixth VAT directive allowed the Member States to impose other obligations in relation to the correct levying and collection of the tax, the only relevant general principles in the interpretation and application of that law would be those which are already found in the domestic system. The Tribunal concluded that Article 5 of the Treaty of Rome allowed Member State to choose measures which they considered appropriate, including criminal sanctions to ensure the fulfilment of obligations arising from Community action. In any event, the Tribunal considered that for the Tribunal or courts to assess whether the penalty laid down by Parliament was either appropriate or strictly necessary would involve such detailed inquiry of administrative matters as to be unsuitable for courts and that, in any event to interfere with Parliament's discretion in the matter would be wholly unconstitutional.

7. CONCLUSION

It is clear that there exists strong pressure for the introduction of the principle of proportionality in areas of United Kingdom law which are not directly effected or covered by Community law. This pressure results, in part, from academic writers seeking the general harmonisation of laws throughout the member states of the Community. Pressure also exists from the fact that judges in the United Kingdom are increasingly being required to apply the principle of proportionality to national legislation which, potentially conflict with Community law norms. The dynamic of the law tends to the introduction of the concept.

The debate over the introduction of proportionality is particularly interesting from the point of view of the indirect reception of law precisely because of the strong judicial resistance to the concept. It shows that indirect reception is not necessarily judge led [36], but may have a dynamic of its own. Indeed the judges in Brind appear to be fighting a rear-guard action against proportionality. Their principal concern appears to be proportionality appears to require national courts to substitute their own judgment of what is needed to

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36. Though it can be judge led, as is the case for the reception of the concept of legitimate expectation in the administrative law of the United Kingdom. This was introduced by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374

achieve a particular objective for the judgment of the executive, or indeed the legislature. The spectre raised is that of the establishment of a "*gouvernement des juges*" [37] which is seen not only as alien to the traditions of the United Kingdom Constitution, but also as politically and morally undesirable because undemocratic.

37. See Davis "A Government of Judges: an historical review" (1987) 55 American Journal of Comparative Law 559 for a history of this phrase.

CONCLUSION

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1. TWO VISIONS OF THE RULE OF LAW

The European Court has stated that the Community is based on and governed by the Rule of Law. [1] However, it is clear that judges of the European Community have a different view of the rule of law from the traditional United Kingdom approach. They would appear to operate within a broad system of judicial review which looks into the merits of decisions and of legislation. They clearly do not regard the acts of national executives and legislatures with the same deference as that traditionally accorded by the judges of the United Kingdom. National legislative measures are subordinated to Community measures. National laws have to be interpreted in the light of Community law and, if necessary, disapplied. The primary concern of the European Court for the uniform application of Community law throughout the Community. The European Court has consistently held that it has a duty to ensure uniformity in the interpretation and application of Community law throughout the Community.

Thus, when acting in matters touched by Community law, the traditional deference shown by United Kingdom courts

1. Parti Ecologiste 'Les Verts' v. European Parliament 294/83 [1986] ECR 1357

to Acts of the United Kingdom Parliament should be transferred to the Acts of the central Community institutions. The European Court has declared that national courts of Member States have no competence to declare the acts of Community institutions invalid [2] except in cases of absolute necessity when a national court may suspend a Community measure *ad interim* pending a final decision on its validity by the European Court. [3] In considering the validity of Community measures as opposed to national measures, the European Court would seem to show these a certain deference. In FEDESA the European Court stated: [4]

> "[W]ith regard to the judicial review of compliance with those conditions [of proportionality] it must be stated that in matters concerning the Common Agricultural Policy the Community legislature has a discretionary power which corresponds to the

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2. Firma Foto-Frost v. Hauptzollamt Luebeck-Ost 314/85 [1987] E.C.R. 4199, [1988] C.M.L.R. 57, paras 15, 19. This is a ruling which stands contrary to the plain wording of Article 177 of the Treaty of Rome, although perhaps more faithful to earlier drafts of this provision which specifically stated that the Court of Justice alone was competent to decide questions of interpretation or validity. See Neri and Perl, eds. Travaux Preparatoires, Traite Institutant la CEE 376-77 Cour de Justice, Luxembourg, 1960.

3. See Zuckerfabrik Suederdithmarschen A.G. C-143/88, C-92/89, [1991] ECR unreported judgement of 21 February 1991, E.C.J.

4. R. v. Minister of Agriculture, Fisheries and Food and another, ex parte Federation Europeene de la Sante Animale (FEDESA) and others (C-331/88) [1990] ECR 4023; also reported in [1991] 1 CMLR 507 at para 13.

> political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions pursues. (see in particular case Schraeder (C-265/87) [1989] ECR 2237 paras 21-2)"

This reference to the test of proportionality applying only to what is "manifestly inappropriate" when considering is remarkably like Hoffman J.'s understanding in Stoke on Trent v. B & Q plc [5] of the application of the proportionality test when considering legislation in an area in which the national Parliament still retains discretionary power and political responsibility. However, in areas touched by Community law, national courts have to treat their own legislatures and executives as subordinate tribunals, whose acts should affecting matters concerning Community law should be treated with no more deference than the European court would show them.

The judicial review of national legislative action in the United Kingdom as imposed by Community law requires a fundamental revision of the understanding of the proper

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5. [1990] 3 CMLR 31. See Chapter 4 *infra*

relationship between judges and the legislature within the country. It seems clear that Hoffman J.'s understanding of the proportionality test is wrong, because it refuses to address the ordinary reasonableness test implicit in the concept of proportionality. However, as we have seen, standing the decision in Ex parte Brind [6] one is left with the paradoxical situation within the United Kingdom that whereas the high standard of "Wednesbury unreasonableness" continues to be applied to executive and administrative decisions, when considering the validity of legislation challenged under Community law the national courts are required by Community law to apply standards of ordinary reasonableness and to substitute their judgment for that of the democratic legislature when they think Community law requires it.

2. TOWARDS A COMMON EUROPEAN LAW

In acceding to the European Communities, the United Kingdom transferred its national courts to a distinct supra-national judicial hierarchy, under the authority of a Supreme court, European Court of Justice. National courts thereby became Community courts charged with implementing Community law in the national sphere. While the United Kingdom remains a member of the European

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6. [1991] 1 AC 696

Communities, and its courts consequently part of the European court system, the power (and sovereignty) of the national Parliament has been fettered in that it is unable to enforce or to enact legislation which is contrary to Community law, since such legislation will not be recognized by its own national courts. Since no man can serve two masters, it would appear that the more accurate statement of the primary duty of national courts in the United Kingdom is not to ensure the realization of Parliament's will, but rather to uphold the goals of the European Communities, as discovered in the Treaties and as interpreted by the European Court of Justice.

It is evident that in matters concerning Community law, the United Kingdom Courts are required to adopt the interpretative techniques and approaches to legislation which have been developed in the jurisprudence of the European Court. A number of these techniques, for example teleological reasoning and proportionality, involve the courts taking a quite new and for the United Kingdom legal systems totally alien approach to legislative enactments.

It would seem that there are then two paradigms for the United Kingdom courts' approach to legislation of the United Kingdom Parliament. In non-Community matters the courts should continue to take a classic legal positivist approach of strict interpretation and application of the authoritative texts enacted by Parliament. In matters

where questions of Community law arise, however, a more "natural law" approach would appear to have to be taken by the courts in that they are required to ascertain the purpose of national legislation and assess its compatibility in intention and effect with the ends of a higher law set out in the Treaties and the judgments of the European Court.

This would result in two models of law: one in which courts are supreme in matters of Community law, one in which the national legislature is supreme in matters untouched by European law.

Tendencies which would militate against the idea that two paradigms of law might be maintained include the ever-expanding remit of the Commission and the Court of Justice to apply Community law in new areas and the fact that there is no separate national court structure to apply Community law, such as formerly existed in England with the Common Law and Equity Courts and still exists in France with the distinction between Ordinary Courts and Administrative Court, which might allow two separate bodies of law to grow up within the same national jurisdiction.

Whereas the judicial review of administrative action is the preserve of specialist judges in the High Court of England and the Court of Session in Scotland, the judicial review of legislation is a matter for every

court in the Kingdom, from Magistrate's and District Courts upward to apply its standards of reasonableness to the actings of Parliament. Community law clearly requires the courts in the United Kingdom to take on the role of a *gouvernement des juges* and to articulate and apply policy in reviewing legislation.

It is equally clear that the judges in the United Kingdom are hostile to the idea that they should be required to make policy judgments and substitute their own assessments for that of administrators as well as of the executive and legislature. If and when the Community doctrine of proportionality is "indirectly" received into the administrative law of the United Kingdom, notwithstanding this judicial hostility, this will mark the clear acceptance of the idea of the permeation of Community law throughout the national legal system.

Such acceptance of the indirect influence of Community law must eventually mean that the European Court's vision of the rule of law, implicit within its specific judgments and the general approach, will come to dominate, and eventually to supplant the native traditions. In this way the law of the United Kingdom will be transformed and a common European law begun.

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