The European Economic Community 1957–1986

As chapter two suggested, the UK's accession to the European Economic Community[1] markedly affected traditional constitutional understandings; especially, but not exclusively, regarding parliamentary sovereignty. This chapter and the next will not examine developments in the EEC's institutional structure in detail;[2] our primary concern is to chart the way in which this country's membership of the Community has prompted changes in the domestic constitutional order. It is nevertheless essential broadly to understand the EEC's history to appreciate its importance to modern British constitutional theory and practice.

The pervasive historical theme revolves around the meaning of European 'federalism'. Madison's classical account of a federal constitution divides the ordinary structure of government both horizontally and vertically. Each governmental unit has particular powers, into which other units cannot intrude, prescribed by a higher form of law, and alterable only by a cumbersome, super-majoritarian law-making process. Federalism in its pure sense is thus a legal rather than conventional doctrine. But, 'federalism', like democracy or the rule of law, may take many forms: the governmental divisions which federal constitutions adopt vary enormously.

As we saw in discussing Madison's views on federalism as a legal rule, the conventional versions of the concept which influenced British central–local government relations between 1945 and 1975, and Canadian provincial–central relations prior to 1982, federalism is usually adopted for a particular 'democratic' purpose. That purpose is to provide an institutional means within a country's overall governmental structure to enable large sections of 'the people' whose favoured political party does not control the national legislature and/or executive to have a significant, if subsidiary influence on how their country is governed.

One of the questions presented by the creation of the EEC in the late 1950s was to what extent one could sensibly describe its objectives and structure as 'federal'. The Community came into being as the result of a

[1] There were technically three communities, the EEC, the ECSC, and Euratom, which 'merged' in 1965. These two chapters deal only with the EEC. Following the coming into force of the Treaty of Maastricht in 1994, the European Economic Community (EEC) was formally renamed the European Community (EC), and its Member States also established a body known as the European Union (EU).

[2] On which see successive editions of Craig P and de Burca G *EU law*.

treaty agreed between six sovereign nations. Countries had for many years signed treaties with each other, promising to respect particular undertakings. But treaties were traditionally seen as agreements between countries. They could not therefore create 'federal' legal orders in the strict sense. For constitutional theorists, the crucial questions raised by the EEC are: firstly, is its legal system 'different' from those created by all other treaties; secondly, what impact does the EEC's legal system have on its Member States' constitutions; and thirdly, is that impact sufficient to demand that we now attach a new meaning to the concept of 'federal' government?

I. **The Treaty of Rome 1: founding principles**

The European Economic Community was created in 1957 by six countries which signed the Treaty of Rome (West Germany, Italy, France, Holland, Belgium, and Luxembourg). The EEC's immediate origins can be traced to the foundation by the same six states of the European Coal and Steel Community (ECSC) under the Treaty of Paris in 1951. The most basic concern of the founders of the ECSC was to prevent another war between France, Germany, and Italy. The ECSC was intended to integrate its member countries' coal and steel industries so closely that war between the states would become impossible. The ECSC was also motivated by a belief among many politicians that co-ordinated rebuilding of these basic industries would hasten the Member States' economic recovery from the devastation inflicted by World War II. More amorphously, the ECSC offered a means for Italy and Germany to demonstrate that they could function as civilised, democratic societies.[3]

The Treaty of Rome appeared to be intended to push the idea of political co-operation through economic integration several steps further. The preamble to the Treaty began by asserting that the signatory States were; 'determined to lay the foundations of an ever closer union among the peoples of Europe'. The preamble continued by identifying a series of economic policy objectives which it was felt would promote that purpose. The Treaty's primary concern (outlined in Arts 2 and 3) was to create a 'common market' between the members of the European Economic Community. The common market would eventually require free movement of goods, workers, services, and capital across national boundaries; a common policy

[3] For an overview see Craig and de Burca (op cit) ch 1; Pinder J (2nd edn, 1995) *European Community* ch 1.

on agriculture; uniform rules governing competition law; and community rules regulating imports of goods from non-Member States. It seems plausible that the Treaty's architects envisaged that increased economic interdependence would slowly lead to some kind of political union, but quite how widely such sentiments were shared within the six original Member States is a matter for speculation.[4]

The organisation established by the Treaty of Rome was not a single country, and thus not 'federal' in the orthodox, de jure, sense. However, we have seen in previous chapters that constitutional behaviour may owe more to issues of practical politics than to legal theory. It may therefore be defensible to suggest that 'federalism' can be a de facto construct, and that specific allocations of powers between different organs of government might be of sufficient significance for us to conclude that a federal system has indeed emerged.

We will draw a fuller picture of the EC's substantive role in the next two chapters. At this introductory stage, there are five essentially procedural issues to address. These are: firstly, the various types of EEC law; secondly, the various types of law-making process within the EEC; thirdly, the status of EEC laws compared with the domestic laws of the six Member States; fourthly, the ways in which EEC laws are enforced; and, fifthly, the relationship between law and politics (or, to use familiar terminology, between legal and conventional rules) within the EEC's constitution.

The types of EEC law and law-making processes

This book has suggested that most modern democracies accept the principle that their constitutions should recognise a hierarchy of laws. The more important the political value at stake, the more difficult it should be for the value to be changed. That principle is clearly expressed within the Treaty of Rome.

The Treaty itself is the original source of EEC law. In the context of the EEC's own legal order, the Treaty is a constituent document. The various governmental organisations which the Treaty created are bodies of limited competence; they can only do those things the Treaty permits. There is no doctrine equivalent to parliamentary sovereignty available to any EEC institution. The 'sovereign law-maker' within the EEC was identified by Art 236 of the Treaty. Article 236 provided for a process through which the Treaty could be amended. Amendment entails cumbersome procedures, involving an Inter-Governmental Conference

[4] On which there is now a vast body of literature. For an introduction see Pinder op cit; Urwin D (1995) *The community of Europe: a history of integration.*

between the signatory nations, and their unanimous support in accordance with their respective constitutional amendment mechanisms for any changes. So there was no possibility of a tyranny of a majority, or even of an overwhelming majority, concerning the basic scope of EEC law. Even tiny Luxembourg had a power of veto on Treaty amendment. The terms of the Treaty are therefore deeply entrenched in a procedural sense. The Treaty is often referred to as 'primary legislation' within the EEC's legal order. From a British perspective, that label can be misleading. A better characterisation might be to describe the Treaty as the Community's 'fundamental law'.

Many of the Treaty's provisions are drafted in loose terms. The Treaty is a 'traite cadre' rather than a 'traite loi'. Its text contains broadly framed objectives and basic principles about institutional structures and law-making procedures, rather than precise rules detailing what the Community can do and exactly how it must do it. Consequently, most EEC law is made without the need for Treaty Amendment. But within the Treaty, there is a clear hierarchy (or, perhaps more accurately, heterogeneity) of laws.

The Council of Ministers

Most EEC laws are in formal terms made by a body called the Council of Ministers. Each Member State has one representative on the Council of Ministers. This is generally the Minister whose domestic responsibilities coincide with the issue the Council is addressing.[5] The Council was empowered (per Art 148) to make laws through three types of voting system. In some areas of EEC activity, the Treaty required unanimous Member State approval. In other fields, the Council may proceed by a qualified majority, in which each Member State's voting power is (crudely) adjusted according to its population size. Thirdly, the Treaty also permits some laws to be made by a simple majority system, which gives all Member States equal weight.

[5] This would obviously mean that the personnel on the Council would constantly be changing; or, in practical terms, that the 'Council' would always exist in a multiple form; see Pinder op cit, pp 30–31. To enable the Member States to maintain a 'permanent' presence on the Council, Art 151 allowed the Council to create a Committee of Representatives to perform whatever tasks the Council thought appropriate. The body established is known by the acronym COREPER. Each State's delegation to COREPER is staffed by domestic civil servants and headed by each country's Ambassador to the Community.

These differential voting systems illustrate a theme pervading the EEC's institutional structure; namely a tension between inter-nationalism and supra-nationalism. A purely inter-national Community, in which every action required the consent of all Member States, would permit short-term national interests (or temporary political pressures within a particular country) to frustrate achievement of Community policy. In contrast, too strong an emphasis on supra-national objectives and law-making processes might have dissuaded some countries from joining the EEC at all, or alternatively have convinced Member States that they could not adequately protect their national interests within the Community, and would therefore have to leave it.

In crude terms, we might conclude that the more important an issue was to the national interests of Member States, the more likely it was that the Treaty would require unanimous voting—the most inter-national law-making process. Qualified majority voting originally weighted the Member States' votes according to the following formula: Germany 4; France 4; Italy 4; Luxembourg 1; Netherlands 2; Belgium 2. Twelve votes were required to pass the law. This is a more supra-national process than unanimity, but nevertheless permitted one big state plus one other to invoke shared national interests to block integrationist legislation. Simple majority voting is clearly the most supra-national of the three processes—perhaps unsurprisingly it was rarely provided for in the EEC's initial development.

But the Treaty did not envisage that the inter/supra-national balance within the Council's voting process would be static. Its framers presumed that as the EEC became more firmly established as an essential part of each Member State's constitutional structure, national suspicion of supra-national sentiment would diminish, in turn permitting a gradual move from the unanimous voting system towards qualified majority and ultimately simple majority voting. Consequently, the Treaty set out several phases in the Community's development (transition periods) by which certain EEC objectives were to be achieved. At the expiry of these periods, unanimous voting would be replaced with either the qualified or simple majority system in certain areas of Community activity. This provided an incentive for Member States to reach unanimous agreement—a failure to legislate might mean a less desirable law would subsequently be imposed on a recalcitrant member. However, the complex balance of international and supra-national forces within the law-making processes sketched by the Treaty extends far beyond the Council's voting mechanisms. To

appreciate this point, we must consider the roles of two of the Community's three other main[6] institutions: the Commission, and the Parliament.

The Commission and the Parliament

Unlike the Council, the Commission was intended to be an avowedly supra-national body. It had nine members, not more than two of whom could be nationals of the same Member State. Per Art 158, Commissioners were appointed for four-year terms by the common accord of the Member States. One Commissioner, selected by the common accord of the Member States, would serve as President of the Commission. A 'convention' emerged that Member States would approve each other's nominees. The Treaty did not specify how the nominations should be made. However, per Art 157, Commissioners were to be 'chosen for their general competence and of indisputable independence.' This independence was presumably to be from national pressures—whether directly, or indirectly from the Council—for Art 157(2) provided that Commissioners 'shall not seek or accept instructions from any Government or other body.' Per Art 163, the Commission would act by a simple majority. It also adopted a principle of collective responsibility—arguments among Commissioners were not made public.[7]

Article 155 charged the Commission with various powers of promoting, implementing, and monitoring measures: 'with a view to ensuring the functioning and development of the Common Market.' It was also the Commission's task to introduce much of the legislation on which the Council would vote: the Council had little power of legislative innovation. Thus the supra/inter-national complexities of the Council's various voting systems would be applied to measures which had themselves passed through the supra-national filter of the Commission's collective decision-making process. The Commission was also endowed with a limited amount of autonomous legislative power which could be exercised without reference to the Council. Legislation of this sort clearly had a very supra-national character.

The Parliament (originally styled the 'Assembly') was composed of delegates chosen by each Member

[6] Since these chapters deal with the EEC only in broad terms, its minor institutions are not examined here.

[7] The 'reason' presumably being to stop the Council or Member States exploiting divisions among the Commissioners.

State from their own legislatures in approximate proportion to their population size.[8] It had few powers. Some parts of the Treaty specified that the Council had to consult the Parliament before enacting legislation, but the Treaty did not compel the Council to take any notice of the Assembly's opinions. The Parliament also had to be consulted by the Council over the Community's budgetary process, but again its views did not bind the Council's eventual decisions.[9]

Under Art 144, the Assembly could sack the entire Commission if two thirds of the members present so voted.[10] It could not, however, dismiss individual Commissioners, which further strengthens the presumption that the framers anticipated that the Commission should act as a collective body. The dismissal power was so crude an instrument that it was unlikely ever to be used.

The forms of EEC 'law': Article 189

The Treaty's sensitivity to supra- and inter-national tensions is further evidenced in Art 189, which empowers the EEC to produce various types of secondary legislation to fill in the gaps left by the Treaty's nature as a traite cadre. Article 189's text identified five types of 'law.'

'Regulations' would be made by the Council in response to a proposal from the Commission. Regulations were to be 'binding in their entirety.' They were also to have 'general application', a concept which presumably meant that they would bind not just governmental bodies in Member States, but also citizens and companies. Regulations were also 'directly applicable', a concept initially taken to mean both that they acquired legal force as soon as they emerged from the EEC's law-making process, and that Member States need take no steps to incorporate them into domestic law. These legal characteristics of 'universality' and

[8] Germany 36; France 36; Italy 36; Netherlands 14; Belgium 14; Luxembourg 6.

[9] Article 200 initially required the following contributions from the Member States to the EC budget: Germany 28%; France 28%; Italy 28%; Belgium 7.9%; Netherlands 7.9%; Luxembourg 0.2%. It was expected that the Community would eventually be self-financing from the tax revenues placed on imported goods; but initially, the budget was an area of potentially significant inter-state disagreement. Anticipating this problem, Art 203 provided that the budget could be approved by a qualified majority.

[10] And this comprised an absolute majority.

'completeness' suggest that regulations would be the most supra-national form of EEC legislation.[11]

The second form of secondary legislation—which Art 189 referred to as 'directives'—made more concessions to inter-national sentiment. Like regulations, directives would be enacted by the Council following a proposal from the Commission. Article 189 provided that directives would not be generally applicable, but could be addressed only to Member States. Directives would bind Member States, but only as to the result the EEC sought; the means of achieving that result would be left to each Member State's discretion. Article 189 does not expressly say that directives could be directly applicable. This suggests that the Treaty would permit Member States either simply to incorporate a directive verbatim into domestic law, or to 'translate' it through their own law-making processes into the form of a domestic legal instrument.

'Decisions' were to be more supra-national in character than directives. They were to bind their addressee, and were unlikely to give Member States any discretion in implementation. However unlike regulations, decisions would not be generally applicable: they would bind only the individual, company, or Member State to whom/which they were addressed.[12] Most of the Commission's autonomous legislative power was to be exercised in this way.

The Treaty's individual articles specified the type of legislation to be used for particular EEC objectives. If one links this heterogeneity with the Council's tripartite voting system and with the Commission's initiatory role and the Parliament's consultative powers, it is clear that the Treaty of Rome created a very elaborate law-making structure, with many checks and balances curbing the powers of the EEC's own institutions and of its Member States.

Since that elaborate structure could be amended only by the cumbersome Art 236 procedure, the EEC established a very complex separation of powers within its constitutional structure. But this separation does not comfortably correspond to orthodox British understandings of that concept. No part of any of the EEC's institutions was directly elected by the Member States' citizens, which clearly raises some questions as to

[11] See Winter J (1972) 'Direct effect and direct applicability: two distinct and different concepts . . .' *CML Rev* 425.

[12] Article 189 also identified two 'legislative' measures, recommendations and opinions, which, according to the text of the Treaty, were not to have binding effect.

the Community's democratic base. Such electoral control as citizens of Member States exercised on EEC law-making would pass through the indirect filter of their respective government's representative on the Council of Ministers, and their governments' nominees to the Commission and Assembly. But we should resist the temptation of adopting an over-simplistic definition of democracy. For in another sense, the EEC could be seen as bolstering democratic principles, by creating the possibility that citizens of a Member State who did not vote for their own government would find that other governments on the Council would more accurately reflect their own preferences on matters within the EEC's competence, and thereby block or dilute a national government's majoritarian or minoritarian preferences.

In British terms, the Commission appears to serve as the executive branch of the Community's government, but one should qualify this in several ways. As already noted, it has some legislative powers which it may exercise independently of the Council. More significantly, the Commission was (and remains) a small organisation and, consequently, could not realistically be involved in the detailed implementation of Community law. For that task, the EEC was to rely primarily on Member State governments.

The EEC Parliament was obviously not comparable to Parliament in the British sense. That it was not an elected body would seem of little import, given that it had no significant powers. But this perhaps raised the longer-term question of whether the EEC should contain a powerful, directly elected legislative branch. Quite where the Parliament would stand on the supra/inter-national axis was initially unclear. Its members' status as governmental appointees, rather than directly elected representatives, suggested it might simply reproduce inter-national tensions on the Council. But there was also the possibility that its members would form alliances according to political ideology rather than national origin, so that it might evolve into a pan-European forum. Article 138(3) required the Parliament to draw up proposals for an electoral system to choose its members. The proposals had to be approved unanimously by the Council, which seemed in no hurry to do so.[13] This is perhaps unsurprising, since endowing the Parliament with elected status may have enhanced its legitimacy in democratic terms, and thereby strengthened the case for increasing its powers, and so shifting the institutional balance within the Community firmly in a supra-national direction.

[13] Lasok D and Bridge J (1991) *Law and institutions of the European Communities* pp 246–253.

The roles of the European Court of Justice (ECJ)

As stressed earlier, the Treaty is a constituent document. It was thus necessary that its framers devise some mechanism to ensure; firstly that the substance of the laws made via Art 189 and the processes by which those laws were made respected the limits imposed by the Treaty; and secondly that all the other activities of the EEC's institutions had a defensible legal base, either in the Treaty's text, or in secondary legislation lawfully passed under its authority.

Under Art 164, the ECJ was to ensure that 'in the interpretation and application of this Treaty the law is observed'. The ECJ initially had seven judges. They were (like Commissioners) to be people whose 'independence is beyond doubt', and who would be eligible for high judicial office in their own countries or were eminent legal scholars. The judges were to be appointed by common accord of the Member States for six-year terms. The Court would be assisted by officials known as Advocates-General, who would offer the judges a non-binding opinion on the merits of the cases brought before them.

The Treaty appeared to give the ECJ two distinct jurisdictions. The first might be styled as 'internal': its concern being to ensure that the Community's institutions and officials acted within the boundaries of the powers given to them by the Treaty. The second jurisdiction is best characterised as having an 'external' character; its focus was on the question of whether Member States and their respective domestic legal systems were giving proper effect to their Community obligations.

The internal jurisdiction had two main elements. The most important arose under Art 173. Article 173 empowered the ECJ—as a court of first instance[14]—to review the legality of acts of the Council or Commission at the instigation of the Council, Commission, or a Member State. Article 173 also seemed to enable individuals in certain circumstances to initiate such proceedings. The grounds of illegality against which the acts of the EEC's institutions should be measured were also laid out in Art 173. Per Art 174, the ECJ could declare illegal acts void. This is obviously consistent with the notion that the Treaty should be regarded as 'fundamental law', and that the EEC's institutions could exercise only those powers granted to them by the Treaty. The second element of the internal jurisdiction arose under Art 215. This empowered the ECJ to impose tortious liability on the Community's institutions or officials for losses they caused to

[14] And of final instance as well, as the Treaty did not subject ECJ judgments to any appellate jurisdiction.

individuals or companies.

The Court's 'external' jurisdiction also had two elements. Articles 169–170 empowered the ECJ, if requested by the Commission or a Member State respectively, to determine if a Member State had breached its Treaty obligations. Such a power would in itself appear rather confrontational. The potential for conflict was softened by requiring the Commission to seek a negotiated settlement before passing the matter to the ECJ, and by the absence of any measure forcing an errant state to comply with a judgment against it. Any conclusion that the ECJ reached would have only declaratory status. The judgment's efficacy as a means to ensure that the relevant Member State complied with EEC law would be wholly dependent on the Member State being willing to do so. Neither Arts 169–170 nor any other provision of the Treaty empowered the ECJ to quash domestic legislation or executive action.

The second element of the Court's external jurisdiction was less clearly spelled out. Article 177 indicated that some role would be played by national courts to litigation which raised questions as to the meaning of EEC law. Article 177 granted to the ECJ alone the power to interpret the Treaty or to decide upon the meaning or validity of any EEC secondary legislation; (and so by implication denied any such power to national courts). Article 177 also indicated that national courts and tribunals could in certain circumstances ask 'questions' of the ECJ concerning issues of EEC law, relating to the meaning of a treaty provision or the validity and meaning of secondary legislation, which arose in the course of domestic proceedings. This 'preliminary reference' procedure did not, de jure, present the ECJ as exercising an appellate jurisdiction over national courts. The procedure evidently envisaged that a domestic court would suspend or adjourn its proceedings pending the ECJ answering the question raised, whereupon the domestic legal proceedings would resume. Quite what effect and impact Art 177 was intended to have was far from clear; neither Art 177 nor any other Treaty provision revealed what should happen if the 'preliminary reference' procedure produced an answer which suggested EEC law was incompatible with domestic law.

The status of EC law within the legal systems of the Member States

The Art 169–170 jurisdiction replicated what was then regarded as an orthodox international law dispute settlement mechanism. A treaty creates a set of laws operating in the sphere of international law. Many treaties also create a specialised forum—again operating in the sphere of international law—for the

resolution of disputes; and grants to signatory States or specially created enforcement bodies the power to initiate proceedings. To state the matter very simply, international law is taken to create legal relationships between countries but not within them. A treaty's terms are not presumptively enforceable in the domestic courts of a signatory State by or between individuals. Signatory States might wish a particular treaty to have such an internal legal effect. This would entail them making such an intention clear in the terms of the treaty which they create; and/or organising their own constitutions in a fashion which automatically gave international law an enforceable status within their respective territories.

To frame the matter more simply still, the dominant view at the time that the Treaty of Rome was created was that the status of international law within the legal system of a nation state was a matter for each nation state to determine.[15] Within this notion of the domestic 'status' of international law, three essential questions arise.

'Accessibility', 'hierarchy', and 'interpretive competence'

The first might be classed as one of 'accessibility'; and is itself divisible into several component parts. Which domestic courts would be competent to apply international law norms to control legal relationships within the domestic territory? Who (or what) would be permitted to invoke international law rules before national courts; ie who could be a claimant? And whom (or what) could those rules be invoked against; ie who could be a defendant?

The second question is one of 'hierarchy'. Assuming that some or all domestic courts can apply all or parts of a particular body of international law in domestic litigation, which rule of law should a domestic court apply if it finds that international law and domestic rules demand different solutions to the case before it?

The third question—which perhaps logically precedes the first two—might be styled as one of 'interpretive competence.' Which body has the power to give authoritative answers to questions concerning the accessibility and hierarchical position of international law within a country's domestic legal system?

[15] For a helpful introduction to a topic far more contentious than suggested here, see inter alia, Brownlie I (4th edn, 1990) *Principles of public international law* ch 2: Jackson J (1992) 'Status of treaties in domestic legal systems' *American Journal of International Law* 310.

It is readily defensible to conclude that in 1957 most politicians and lawyers in the six founding States of the EEC (indeed in all western nations) would have concluded that the answer to the third question was: 'Whichever body is given such power by the respective constitution of each signatory State'. But while one might find widespread transnational agreement on that issue of legal competence, the ways in which individual States used that competence to answer questions relating to the accessibility and hierarchal position of international law within their particular constitutional order were remarkably variegated. Even among the six founding States of the EEC, constitutional orthodoxies as to the domestic status of international law were profoundly different.[16]

In 1957, the constitution of the Netherlands[17] afforded an extremely high status to international law agreements to which the Netherlands was a party. If an international law rule protected the rights of an individual, the Dutch constitution provided both that the rule had a higher status than any rule of domestic law and that the rule was automatically and immediately enforceable by any claimant against any defendant in any national court.

The then extant Belgian constitution granted international law a much lowlier internal status. A treaty's provisions became accessible in domestic courts only to the extent to which they were expressly incorporated by an Act of the Belgian Parliament. It would be for the Belgian Parliament to determine by whom, against whom, and in which domestic courts the incorporated Treaty provisions could be invoked, and what other provisions of domestic law the incorporated terms would override. The Belgian Parliament

[16] And of course could be altered at any time in accordance with whichever amendment procedure the relevant constitution required. Furthermore, a country's constitution might also provide that different treaties (or parts thereof) could have different internal legal effects.

[17] Articles 65–66 of the Constitution, as amended in 1953. See Claes M and DeWitte (1998) B 'Report on the Netherlands', in Slaughter A, Stone Sweet A and Weiler J (eds) *The European courts and national courts*. For present purposes, it suffices to say that the Dutch constitution was framed on an American model, with the constitution operating as a fundamental law which limited the competence of the national legislature and executive.

had no power however to entrench any such incorporating statute against future repeal.[18]

The other four Member States each had different constitutional arrangements.[19] If the Treaty of Rome was simply an orthodox instrument of international law, the legal status of its provisions in the legal systems of Member States would vary substantially from one country to another, as no explicit steps were taken by the six Member States when the Treaty came into force to modify their constitutional arrangements to give EEC law an identical (and entrenched) status within the respective domestic legal systems.

The answers offered by a constitution to questions concerning the internal legal status of international law have profound implications for the allocation of that country's law-making powers. These implications operate in both a trans-national and an intra-national sense. And those implications may acquire an extremely tangled character if either or both of the international law and domestic law arenas contain complicated law-making structures and internal legal hierarchies. This is an issue perhaps better illustrated by a series of concrete examples than by abstract hypothesis, and so it will be returned to at various points later in the chapter.

For the present, we might note that the text of the Treaty of Rome was virtually silent on each of the three 'status' questions. This silence is ostensibly surprising. It must have been appreciated by the framers of the Treaty that—even if all Member State legislatures and governments consistently made bona fide attempts to ensure that national law was compatible with EEC law—numerous occasions would arise when the two sources of law were mutually inconsistent. And one would have had to have been remarkably naïve not to have assumed that in some situations Member State governments or legislatures might wilfully seek to contravene EEC law norms.

Almost 200 years earlier, such concerns about inconsistencies between rules of law emanating from different spheres of government had much exercised the minds of the framers of the United States' Constitution. As noted in chapter one, substantial (and potentially overlapping) powers were given by the Constitution to the various branches of the national government and to the States. To Madison and his contemporaries, it was 'self-evident' that conflict would arise between provisions of the Constitution itself,

[18] Bribosia H (1998) 'Report on Belgium', in Slaughter et al op cit.

[19] See generally the collection of essays in Slaughter et al op cit.

laws enacted by Congress, and laws produced by the States. It was equally evident that the Constitution itself should give clear instructions as to according to what hierarchical criteria and in which fora such conflicts should be addressed. Article VI of the Constitution thus provided that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Article VI lays out a clear hierarchy of legal norms: the Constitution is superior to laws enacted by Congress, which in turn, if consistent with the Constitution, are superior to any laws produced by a State. Article VI also addresses questions of accessibility; all judges—and thus every court in the country—are bound by the enunciated hierarchy of laws. That principle necessarily entails that litigants in all State courts can invoke and rely upon the Constitution and Congressional legislation to override any inconsistent State law. Article VI is concerned to ensure both the *uniform impact* and the *ready enforceability* of the Constitution and Acts of Congress throughout the United States. No State may 'opt out' of any provision of the Constitution and Acts of Congress. Relatedly, by providing for the enforcement of those legal norms in all courts, Art VI provides individual citizens en masse with a vast number of local and familiar fora in which to protect their entitlements.

Use of the United States' Constitution as a comparator against which to analyse the Treaty of Rome is necessarily of limited utility. The American framers were seeking to create a country. The politicians who designed the Treaty of Rome ostensibly had no such grand ambitions. But both were much concerned with dividing law-making powers between different spheres of government, and—one would assume—with ensuring that the proposed divisions were effective in practice. Why then did the Treaty of Rome not address the three status issues in clear terms? Three explanations might be advanced.

The first is that the framers of the Treaty did not expect EEC law to operate as anything other than international law, and thus pinned their hopes for its uniform and effective application throughout the six Member States on the political goodwill of the countries' respective legislatures and governments. Some support for that presumption is found in Art 5 of the Treaty:

> Member States shall take all . . . measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims. . . . They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

Article 5 makes no express references to domestic legal systems, nor domestic courts, nor to the hierarchical relationship of EEC and domestic law. It appears no more than a declaration of political good faith.

The second—and perhaps the least likely—hypothesis is that the presumptions that EEC law should be hierarchically superior to all domestic law and immediately enforceable in domestic courts were so obviously essential to the effective creation of a 'common market' that there was no need to express them explicitly. They were instead 'taken for granted' principles.

A third explanation is that the framers of the Treaty appreciated the importance of those presumptions, but were unwilling to articulate them clearly in the Treaty for fear that political or public opinion in the intended Member States would find such ideas so unacceptable that support for joining the Community would evaporate. Their hope or expectation may have been that such principles could be expressly accepted by a subsequent amendment to the Treaty and the Member States' respective constitutions, or that the principles might be found to be already present, albeit in hidden and fragmentary form, in the original Treaty itself.

At this point, a further reference to the way in which the United States' Constitution addresses the issue of the status of the country's various types of law is perhaps apposite. Article VI deals with questions of hierarchy and accessibility. It does not broach the issue of interpretive competence: which governmental body had the authority to determine if an Act of Congress conflicted with the Constitution; or if a State law was inconsistent either with the Constitution or an Act of Congress?

Article III of the Constitution provides, inter alia, that: 'the judicial power of the United States shall rest in one Supreme Court. . . .' As noted in chapter one, Alexander Hamilton in *The Federalist Papers No 78* had argued that the Court should have the power to invalidate national or State laws which were inconsistent with the Constitution. There is however no express statement in the text of the Constitution to the effect that the 'judicial power' entitles the Supreme Court to invalidate Acts of Congress or State laws if it considers them to breach the Constitution. The Court itself concluded in a series of cases decided in the early-

nineteenth century that the Constitution implicitly granted it such powers,[20] and the 'correctness' of that conclusion was never subject to serious political or legal challenge. Observers of the development of the EEC did not have to wait long to see the European Court of Justice embarking upon a similar jurisprudential journey.

Questions of accessibility 1: the 'direct effect' of treaty articles

The Court's initial response to the question of the accessibility of EEC law within domestic legal systems was to conclude that parts of the Treaty possessed a status which the ECJ termed 'direct effect'. The ECJ first articulated the principle in 1962.

***Van Gend en Loos* (1962)**

Article 12 of the Treaty forbade Member States from increasing customs duties on goods imported from other EEC countries. Dutch legislation subsequently redesignated certain chemicals into an already existing tax band which imposed a higher duty. Van Gend challenged the legality of this redesignation before a Dutch court, asking that the court refuse to apply the Dutch law because it amounted to a new tax contravening Art 12. The Dutch court invoked Art 177 to refer two questions to the ECJ. The first concerned the substantive issue of the Netherlands' government's claim that the reclassification was not a tax increase. Unsurprisingly, the ECJ decided against the Netherlands on that point.[21]

The second, more significant issue, was the jurisdictional question of whether the Dutch court could entertain the action at all. As a matter of Dutch constitutional law, the Dutch court could do so if Art 12 created 'rights' for individuals. The ECJ concluded on that point that Art 12 did create individual rights. Although Art 12 was framed in terms of a restraint on governmental power, the corollary of that restraint was an individual entitlement. If governmental authorities cannot levy a new tax, the targeted taxpayer has a right not to pay any such tax.

From the viewpoint of the Dutch court, these answers were all that were required for it to resolve the case before it. As a result of the way in which the Dutch constitution treated international law, Art 12

[20] *Marbury v Madison* (1803) 1 Cranch 137: *Fletcher v Peck* (1810) 109 US 87: *Martin v Hunters Lessee* (1816) 14 US 304: *Cohens v Virginia* (1821) 19 US 264.

[21] Case 26/62: [1963] ECR 1.

immediately overrode the inconsistent provision of the domestic statute. The ECJ's primary concern was, however, with a quite different issue. Manifestly, the Dutch constitutional rule that Art 12 was accessible in Dutch courts would be of no significance in Germany or Italy or any other Member State. The ECJ's concern was therefore whether or not Art 12 of the Treaty was accessible in the domestic courts of all of the Member States simply and solely because of rules of EEC law? This question would seem in turn to raise two issues. Did EEC law require Art 12 to have that characteristic of pan-Community accessibility? And if so, did EEC law override any domestic legal rule to the contrary?

A new legal order?

The ECJ answered the first question in the affirmative. The crucial element of its reasoning for this conclusion was an assertion that the Treaty of Rome was not 'international law' in the orthodox sense:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[22]

Several Member State governments had intervened in the ECJ proceedings to argue that the Treaty created only one mechanism to assess the compatibility of domestic legislation with EEC law; that mechanism being an action before the ECJ via Art 169 or 170. The ECJ did not however regard this as a sufficient remedy.[23] It

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[22] Ibid, at 12.

[23] There would be several disadvantages to accepting Arts 169–170 as the only way to challenge the compatibility of domestic laws with EEC law. The first (logistical) problem is that there was only one ECJ, so it could handle only a very limited workload. Secondly, Arts 169–170 only permit actions to be brought by the Commission or another Member State; they do not allow litigation by individual citizens or private companies. Since the Commission and Member States would constantly be co-operating with each other in the EEC's legislative process, it would be plausible to suggest that some breaches of EEC law would be 'overlooked' in order to maintain harmonious political relations. See the incisive article by Craig P (1992) 'Once upon a time in the west: direct effect and the federalisation of EEC law' *Oxford Journal of Legal*

reasoned that to restrict legal challenges against Member States to Arts 169–170 actions 'would remove all direct legal protection of the individual rights of [EEC] nationals.'[24] If EEC law was to be effectively enforced, the national courts would have to serve as fora where the conformity of a Member State's laws with the Treaty could be gauged at the instigation of individuals; only domestic courts were sufficiently numerous and proximate and familiar to citizens. As well as acting in defence of their own EEC entitlements, citizens invoking direct effect would police Member States' compliance with EEC law.

A teleological interpretive technique

The Treaty has no obvious textual basis to support the existence of the direct effect principle. The Court made two rather unconvincing references to particular provisions in the Treaty's text to buttress its conclusion. The first noted the reference in the preamble to the 'peoples' of the Member States as well as to their respective governments.[25] The second referred to Art 177, and suggested that the very presence of that provision in the Treaty indicated that national courts were expected to have the capacity to apply EEC law.[26]

The ECJ found the primary justification for its conclusion in what it termed the 'spirit, scheme, and general wording' of the Treaty. The Court's search for the meaning of EEC law was premised on the assumption that the Treaty should be construed in a 'teleological' or 'purposive' manner. The absence of any explicit statement in the Treaty to the effect that some or all EEC law would be accessible in domestic

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Studies 453. Since the United Kingdom was not a founding member of the EEC, one should be cautious about using ideas drawn from the Anglo-American legal tradition as tools to analyse the ECJ's initial jurisprudence. It is nonetheless helpful to suggest that exclusive reliance on the Arts 169–170 mechanism to resolve disputes as to the compatibility of EEC and domestic law would not satisfy a 'red light', Diceyan model of the rule of law, in which citizens may challenge the legality of government action before the 'ordinary courts of the land', nor even Jones' greenishly-tinged 'meaningful day in court'; see ch 3.

[24] [1963] ECR 1 at 13.

[25] The ECJ did not however note that the great majority of principles laid out in the preamble made no overt reference to individuals.

[26] A more modest interpretation would be that Art 177 does no more than indicate that the preliminary reference procedure would be available to those Member States which wished to use it.

courts was not an insuperable barrier to the conclusion that the Treaty did actually contain that requirement. Such an interpretive strategy was quite foreign to then accepted principles of statutory interpretation within Britain's constitutional tradition,[27] but it was not uncommon in the contexts of either the constitutional law of continental European countries or dominant tenets of international law.

At the core of the ECJ's judgment lies the assumption that the effectiveness ('l'effet utile') of EEC law was substantially dependent upon there being a multiplicity of mechanisms and fora through which the law might be enforced. Legal rules which were impossible or very difficult to enforce would be of little value to the persons/organisations who/which were presumptively supposed to benefit from or be controlled by them.

A principle of limited or wide scope?

The principle of direct effect initially seemed to have limited scope. *Van Gend* itself concerned a Treaty article, rather than secondary legislation produced under Art 189. Thus it might sensibly have been assumed that direct effect would only apply to the Treaty itself, and not to Art 189 measures. The ECJ also implied that a Treaty article would only be directly effective if it had certain characteristics:

> The wording of Article 12 contains an unconditional prohibition, which is not a positive but a negative obligation. This obligation is not qualified by any reservation on the part of states which make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effect in the legal relationship between Member States and their subjects.[28]

These criteria seem to establish a form of justiciability test—a concept we met in the British context in *GCHQ*. As noted in chapter four, 'justiciability' is a vague concept; it would have been rash in 1962 to predict how the ECJ would use it. A broad construction of *Van Gend* would suggest that all EEC law—both Treaty articles and the various types of secondary legislation produced under Art 189—had the capacity to be directly effective if it possessed a sufficiently justiciable character.

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[27] See the discussion of *Magor and St Mellens RDC* at 'Purposive (or "teleological") interpretation', ch 3, pp 68–69.

[28] [1963] ECR 1 at 13.

EEC law as an autonomous legal force

But perhaps the most significant element of the *Van Gend* judgment is one that can easily be missed on a first reading. The ECJ asserted that Art 12 acquired its status as directly effective law '*independently of the legislation*[29] of Member States' (emphasis added). In other words, the status of EC law within national legal systems was a matter for EEC law to determine. National constitutional rules as to the domestic status of 'international law' would apparently not apply to EEC law. The law of the Community, throughout the Community, was an autonomous legal force.

Shortly after *Van Gend* was decided, the ECJ underlined its view that EEC law was a quite distinct creature from ordinary international law. Its judgment in *Commission v Luxembourg and Belgium (Dairy Products)*[30]—an Art 169 action—concluded that the public international law principle of reciprocity had no place in EEC law. The reciprocity principle provides that a State's breach of an international law rule vis-à-vis another State is excusable if that other State is also in breach. In *Dairy Products*, the ECJ indicated that this concept had no general application in the EEC law context.[31]

Questions of hierarchy 1: the 'precedence' or 'supremacy' of treaty articles over domestic legislation

It would seem sensible to suggest that if the Treaty of Rome was to create a 'common market' among the six Member States, then Community law (whether it be in the form of Treaty articles or secondary legislation)

[29] Ibid, at 12. The term 'legislation' here is perhaps best construed as referring to law in a generic sense (ie any law) rather than to a statute as we would understand that term in the context of the hierarchy of laws within the United Kingdom's constitution.

[30] Case 90, 91/63 [1964] ECR 625.

[31] 'In fact, the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs': ibid, at 629.

on such matters as free movement of goods and persons and on agricultural policy—indeed on all areas of Community activity—would have to override any incompatible domestic laws. As noted earlier, the constitutions of the Member States adopted varying responses to that question of hierarchy. Thus if the question of 'hierarchy' remained one for Member States' own constitutions to determine, EEC law would not have uniform impact throughout the community. If a Member State could apply its own understanding of the hierarchical relationship between (some or all) EEC law and (some or all) domestic law, it could 'opt out' of EEC law and maintain its own laws in areas where the Treaty gave powers to the EEC. The practical basis of a 'common market' would therefore be substantially undermined. And if one Member State could do this, presumably all the others could as well.

That a Treaty article might be 'directly effective' in the domestic legal systems did not in itself address this problem. Direct effect is concerned with accessibility, not with hierarchy. If a domestic court could apply a provision of EEC law, but that provision was—according to the given Member State's own constitution—of inferior hierarchical status to an inconsistent domestic law, then the EEC law would clearly not determine the outcome of the proceedings.

The question of hierarchy was thus of enormous importance to the functioning of Community law. Yet the text of the Treaty did not make any express statement as to the hierarchical relationship within domestic legal systems of the various provisions of EEC and national law. The nearest literal support within the Treaty for that proposition is found in Art 5. As suggested earlier, it is difficult to extract from this text any strong argument that provisions of EEC law—be they Treaty articles or secondary legislation—were to be regarded as normatively superior to incompatible provisions of domestic law. Nor had the ECJ been prepared squarely to address this matter in *Van Gend*. In that judgment, the Court offered at best an oblique hint that (certain types of) EEC law might be superior to (certain types of) domestic law in its observation that; 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields.'[32] Some two years later, the ECJ took a clearer position on this essential question.

[32] [1963] ECR 1 at 12. Under Dutch law, of course, Art 12 automatically took precedence over the inconsistent national legislation.

***Costa v ENEL* (1964)**

Signor Costa was a political activist in Italy who was much opposed to recent Italian legislation which had brought Italy's electricity supply industry under direct government control. The opponents of the legislation had invoked various political and legal challenges to the policy. Signor Costa's part in the episode involved a refusal to pay a trifling sum of his electricity bill on the basis that: firstly, the relevant legislation was incompatible with various Treaty articles; secondly, the articles concerned were directly effective; and thirdly, that the articles possessed a superior status in domestic law to the legislation. If these three propositions were correct, the outcome would be that the Italian courts would be obliged to refuse to apply the Italian legislation to the extent that it was consistent with EEC law.

That outcome was not required by Italian constitutional law at the time. As a matter of Italian law, the Treaty of Rome had the status of an ordinary statute passed by the national legislature. While it would override pre-existing statutes and lesser forms of domestic law, it was in turn inferior both to provisions of the Italian constitution and to subsequently enacted statutes. The Italian Constitutional Court had held in Signor Costa's case that the Treaty of Rome had not altered this basic principle of domestic law.[33] Both the accessibility of the Treaty articles concerned and their hierarchical status were matters for Italian law to determine. And as a matter of Italian law, the Treaty articles simply did not exist in the domestic legal system if they were inconsistent with subsequently enacted Italian legislation:

> There is no doubt that the State is bound to honour its obligations, just as there is no doubt that an international treaty is fully effective in so far as a Law has given execution to it. But with regard to such Law, there must remain inviolate the prevalence of subsequent laws in accordance with the principles governing the succession of laws in time; it follows that any conflict between the one and the other cannot give rise to any constitutional matter. From the foregoing we reach the conclusion that for present purposes there is no point in dealing with the character of the EEC.'[34]

[33] The Constitutional Court's judgment is reproduced with the judgment of the ECJ in [1964] CMLR 425. For a detailed treatment see Ruggeri Laderchi P (1998) 'Report on Italy', in Slaughter et al op cit.

[34] [1964] ECR 585 at 593.

The irrelevance of national law

Following the position it had laid out in *Van Gend*, the ECJ, in contrast, evidently proceeded on the basis that there was 'no point in dealing with the character of Italian law'; the requirements of Italian constitutional law were irrelevant to the question of the status of EC law in the Member States:

> . . . 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.[35]

The ECJ then turned to consider the nature of that 'independent source of law':

> The transfer by the States from their domestic legal systems to the Community legal system of 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.[36]

The reason that such 'subsequent unilateral acts' could not prevail over Community law had an obvious, teleological, basis. If Member States were able to 'opt out' of Community laws which they found unpalatable, there would be no 'common market' in a legal sense. A common market would require that Community law had uniform effect throughout the Community: 'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the

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[35] Ibid. An alternative way of framing this point—which leads to the same substantive result—is that the creation of the Community automatically and invisibly amended the constitutional laws of all of the Member States and, more importantly, thereafter prevented the Member States from amending their respective constitutions in a way that rejected the primacy of community law.

[36] Ibid. The ECJ's reference to 'permanency' is obviously problematic. It perhaps meant that the limitation applies while the country remained in the EEC, not that a Member State must stay in the EEC forever. The Treaty made no explicit arrangements for a country to leave the Community. That result could have been 'legally' achieved through the Art 236 amendment process. But it might be thought that the 'ultimate political fact' was that a Member State could leave unilaterally if it wished.

attainment of the objectives of the Treaty.'[37]

> The ECJ also offered a textual basis for this assertion, which it found in Art 189 of the Treaty:
>
> The precedence of Community law is confirmed by Art 189, whereby a regulation 'shall be binding and directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.[38]

The Court concluded with the observation that if its reasoning on this point was rejected, the Community simply could not exist in any meaningful sense:

> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[39]

A principle of limited or wide scope?

The facts of *Costa* produced an apparent conflict between Treaty articles (ie the highest form of Community law) and domestic Italian legislation (ie a form of domestic law inferior to the provisions of the Italian constitution). If narrowly construed, the ECJ's judgment might be taken to hold only that Treaty articles took precedence over national legislation. From such a perspective, it might be thought that a Treaty article did not take precedence over a national constitutional provision; nor that EEC secondary legislation would take precedence over domestic legislation or constitutional provisions. However, the ECJ's judgment did not—and one assumes by design rather than accident—draw any distinction between different types of Community law or national law. Broadly construed, *Costa* asserts the blanket principle that *all* EEC law takes precedence over *all* national law, regardless of the various laws' respective positions in their own internal normative hierarchy. Given the ECJ's evident concern with ensuring the uniform substantive impact of Community law, and given the heterogeneity of normative legal hierarchies within the domestic legal

[37] Ibid.

[38] Ibid, at 594.

[39] Ibid.

systems of the Member States, adopting a blanket approach to the precedence of Community law would make obvious sense.

The judgment did not however seem to require that domestic law incompatible with Community law be quashed or invalidated. The ECJ deployed rather less forceful terminology in identifying the practical way in which the precedence doctrine would be expressed. We are told that the domestic law 'cannot prevail', or that EEC law 'cannot be overridden' by the domestic law. This form of words might have been chosen in part for practical reasons. The ECJ presumably accepted that domestic laws which affected both EC nationals and people or organisations which did not derive any rights from the Treaty could properly be enforced by domestic courts against those non-EC nationals. It also seems likely that the ECJ was searching for a legal formula which—at least in symbolic terms—presented a less blunt challenge to the primacy of national law.

The 'revolutionary' implications of *Van Gend* and *Costa*

This latter point might be of considerable significance when one notes that the principle of precedence would be intimately linked with the principle of direct effect. If EEC law took precedence over domestic law *and* the EEC law in issue was directly effective then—in the ECJ's view—the responsibility for not allowing domestic law to 'prevail' over EEC law would rest with the domestic courts. This would not cause any domestic constitutional difficulties in the Netherlands, where the constitution already mandated such a result. But in a country such as Italy, the interactive effect of the precedence and direct effect principles on the facts of a case such as *Costa* were utterly irreconcilable with orthodox constitutional understandings.

The trial judge in *Costa* was presented with a decision of her national Constitutional Court which essentially told her that the EC law in issue was of no effect, while the judgment of the ECJ told her that the national law could not be applied if it was inconsistent with directly effective Community law. The ECJ is telling the trial judge that domestic constitutional law hierarchies are irrelevant to EC law, while the Italian Constitutional Court is saying that EC law doctrine is irrelevant to national law. One might credibly assume that only a very bold judge in a low-level domestic court would follow the rulings of the recently established

and 'foreign' ECJ rather than those of her own country's highest court.[40]

That observation highlights in a prosaic sense a point of much broader significance. In practical terms, *Van Gend* and *Costa* were simply declaratory statements of abstract legal principle. The ECJ's judgments were not backed by any coercive force. If the principles laid out in those cases were to be effective determinants of legal relationships within the Community, those principles would have to be applied by national courts, either with the approval of, or in the face of, opposition from other governmental actors within the various Member States' respective constitutional systems. In the mid-1960s, informed observers might well have doubted that such approval would be forthcoming.

Laws, conventions, and 'ultimate political facts': the 'empty chair crisis' and the Luxembourg accords

The doctrines of precedence and direct effect evidently surprised several Member State governments. *Van Gend* and *Costa* also appeared just as the supra-national acceleration built into the Treaty, in the form of a move towards greater use of majority voting in the Council's legislative process, became an imminent rather than distant reality. For the then French government, headed by General de Gaulle, this supra-national shift represented an unacceptable surrender of national autonomy to France's partner states within the Community. De Gaulle's government was particularly concerned by the prospect of losing its right of veto in the Council of Ministers over certain aspects of the Community's agricultural policy regime. The possibility obviously arose that other Member State governments' Ministers on the Council acting by qualified majority would enact regulations or directives on agricultural issues which the French government opposed.

The unhappy consequences, from De Gaulle's perspective, of this occurring were exacerbated by the

[40] The ECJ was presumably alert to this possibility and was anxious to avoid it becoming a reality. A point sometimes overlooked in respect of the *Costa* judgment is that of the four Treaty articles in issue, the ECJ held two not to be directly effective, lent the third a meaning that was essentially irrelevant to the argument Signor Costa raised, and held that the fourth granted the domestic court an extremely wide interpretive discretion. The case could thus be resolved on its facts in a way that accommodated the views of both the ECJ and the Italian Constitutional Court.

additional possibility—albeit remote—that French courts might accept that *Van Gend* and *Costa* required them to give precedence in the domestic legal system to such EEC secondary legislation even if that legislation conflicted with French law. Formally, the French constitution then in force accorded superior hierarchical status to treaties to which France was a party than to domestic law. That formal position had no basis in reality however. It appeared to be an accepted political fact within the French constitutional tradition that no court would ever invalidate or refuse to apply domestic legislation on the basis that it contradicted provisions of international law to which France was a party.[41]

In 1965, in what has become known as 'the empty chair crisis', the French government simply withdrew from the Council, and declined to take part in the Community's legislative process. The French government's wish was that even in respect of issues where the Treaty provided for the replacement of unanimous voting by majority processes, the Council should act only on the basis of unanimity in matters where a Member State's 'vital interests' were at stake.

France's absence from the Council obviously prevented the passage of any EEC legislation requiring unanimous approval. As a matter of EEC law, the other Member States could have continued to pass legislation which required only qualified majority or simple majority support. There would however have been little political point in them doing so if the French government was unwilling for that EEC law to have any effect in France. And even if French courts were to accept, in opposition to the likely view of the French government, that the implication of *Van Gend* and *Costa* was that any such directly effective law should be accorded precedence in domestic law, it would have seemed most unlikely that other Member States would have wished to provoke such internal constitutional conflict in France. It also seems that France's withdrawal from the Council would have breached Art 5, which could in turn have led to an Art 169 or 170 action. Again, however, this would not have been a practical course to pursue: its likely consequence would have been France's departure from the Community.

The French government's position amounted in effect to a denial of the legal basis of the Community and thus of the autonomous force of Community law. The 'empty chair' tactic indicated that the then French government regarded the Community merely as a form of political agreement which could simply be

[41] See Plotner J (1998) 'Report on France', in Slaughter et al op cit.

ignored whenever a Member State government found particular Community policies unpalatable.

The crisis was resolved in 1966 in a fashion which suggested that the other Member State governments accepted and approved this anti-legal perception of the nature of the EEC. The solution was laid out in the so-called 'Luxembourg Accords.' These 'reforms' to the Council's voting system were not introduced via a Treaty amendment per Art 236. Rather they were agreed by the Member States entirely outside the Treaty's legal structure, and were quite inconsistent with its terms. The nub of the Accords was an agreement that the Council would not invoke qualified or simple majority procedures on matters affecting a Member State's vital interests, but would delay adoption of any Commission recommendation until such time as unanimity could be achieved. The Accords did not clearly define what a 'vital' interest was; nor specify a timescale in which unanimity had to be achieved.[42]

It is tempting to see the Accords as a 'convention' in the British sense.[43] Whether one can unproblematically apply such terminology is questionable. Yet they clearly amounted to a fundamentally important, but non-legal rule within the EEC's constitutional structure. Equally clearly, they refute the argument that the Treaty initially functioned as a de facto federal construct. France's action indicated that, contrary to the ECJ's statement in *Costa*, it had not 'surrendered' its sovereignty in any meaningful sense. It also suggested that 'sovereignty' might more sensibly be regarded as a political, rather than legal concept. Perhaps more accurately, it might be suggested that by the mid-1960s two distinct visions of the Community existed side by side. One vision, propounded by the ECJ, was of a community of law existing above matters of politics. The other, exemplified by the Luxembourg Accords, was of a community of politics for which law was no more than an optional and dispensable tool.

Questions of accessibility and hierarchy 2: the direct effect and precedence of decisions, regulations, and directives

The 'empty chair' crisis did not seem to have any immediate impact on the ECJ's evidently supra-national perception of its constitutional role. We may recall that in *GCHQ* the House of Lords concluded that the

[42] See Nicol W (1984) 'The Luxembourg compromise' *Journal of Common Market Studies* 35.

[43] The 'reason' for it presumably being that without it France would leave the EEC, and the Community would collapse if it lost such an important member.

amenability of a government power to full judicial review should depend on its nature, not on its source.[44] We can see a similar rationale in the ECJ's subsequent expansion of the reach of direct effect. In cases decided in the late-1960s and early-1970s, the ECJ confirmed in express terms the proposition that *Van Gend* identified a principle of broad application: if a provision of EEC law was 'clear and unconditional' in its nature, then its source was irrelevant to the question of its direct effect.

***Politi* (1971)—the direct effect and precedence of regulations**

In *Politi*,[45] the ECJ held that if regulations created clearly defined individual rights, a citizen could invoke such rights before her own country's courts. The ECJ did not rely on the 'effet utile' doctrine, or any other aspect of the controversial teleological interpretive strategy. Rather it simply pointed to the text of Art 189. This provided that regulations were to be 'directly applicable' in the Member States. One might wonder if 'direct applicability' means the same as 'direct effect'. This is a complex legal point, but it need not detain us here, since most courts (including the ECJ) and commentators use the concepts interchangeably.[46] Notwithstanding this technical question, one can readily see why the ECJ might invoke a literalist approach to Treaty interpretation: it is less controversial, from an orthodox separation of powers perspective, for the Court to give a meaning to the Treaty's precise words than to conjure a legal principle from its 'spirit, scheme, and general wording'.

The ECJ also intimated—although in less than perfectly clear terms—that a regulation was a hierarchically superior form of law relative to any domestic legal provision: 'The effect of a regulation, as provided for in Art 189, is therefore to prevent the implementation of any legislative measure, even if it is enacted subsequently, which is incompatible with its provisions.'[47] The ECJ's reference to 'any legislative measure' was presumably intended to embrace laws enacted by national or sub-national legislatures. But

[44] See 'III. Full reviewability—the GCHQ case (1983)', ch 4, pp 107–109.

[45] Case 43/71: [1971] ECR 1039.

[46] See Winter J (1972) 'Direct applicability and direct effect: two distinct and different concepts in Community law' *Common Market Law Review* 425; Pescatore P (1983) 'The doctrine of direct effect: an infant disease of Community law' *European Law Review* 155.

[47] [1971] ECR 1039 at para 9.

would it extend also to the fundamental constitutional laws of the Member States?

As in *Costa*, the Court in *Politi* eschewed the language of 'invalidation' or 'quashing' of domestic law when describing the obligation which was imposed by EEC law on domestic courts. The responsibility of the domestic court would be to refuse to implement the domestic legislation to the extent of its inconsistency with directly effective EEC law.

***Grad* (1970)—the direct effect of decisions**

The Treaty text was less helpful in establishing the directly effective potential of decisions. Article 189 did not identify decisions as being directly applicable. Nevertheless, in its 1970 judgment in *Grad*, the ECJ reverted to a teleological form of reasoning to hold a decision could be directly effective:

> It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ('l'effet utile') of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.[48]

***SACE SpA* (1970)—the direct effect of directives**

At the same time, the ECJ turned its attention to the question of whether a directive could have direct effect. The text of Art 189 did not obviously support that conclusion. Article 189 expressly provides that Member States would have discretion in choosing how to achieve the directive's intended result, which implied that *Van Gend's* criteria of negativity, precision, and unconditionality could not apply to this type of law. Yet in *SACE SpA*,[49] the ECJ answered the question before it in distinctly teleological terms. In deciding if a directive could be directly effective: 'it is necessary to consider not only the form of the measure at issue, but also its substance and its function in the system of the Treaty.'[50] The directive at issue in *SACE SpA*

[48] Case 9/70: [1970] ECR 825.

[49] Case 33/70: [1970] ECR 1213.

[50] Ibid, at 1233.

identified a date by which certain (clear and unconditional) Treaty obligations had to be fulfilled. The Court held that once that time limit expired, the directive's 'result' element became binding on the Member States to which it was addressed. If that result met the criteria of unconditionality and certainty, it could be directly effective. It did not matter that its source was a directive rather than a regulation or a Treaty article.

Cases like *Grad* and *SACE SpA* further illustrate the ECJ's teleological approach to its task. As well as confirming the 'nature not source' test, *SACE SpA* demonstrated the 'nature' a law must have to be directly effective was not fixed, since the 'result to be achieved' there required positive action by the Member States (ie abolishing all customs duties) rather than simply as in *Van Gend*, the negative restraint of not introducing new customs duties.

The precedence of decisions and directives?

In contrast to the position adopted in *Politi*, the ECJ in *Grad* offered little guidance on the question of whether a decision was hierarchically superior to any or all inconsistent domestic law. The ECJ said no more than that domestic courts should be able 'to take into consideration'[51] the provisions of the decision in issue. Such phraseology certainly does not connote that the decision was hierarchically superior to domestic law. The Court was similarly evasive in *SACE SpA*, couching its conclusion on the point in minimalist and obscure terms, observing only that the directive concerned conferred 'rights' which the national courts must protect.

Ending the uncertainty; the precedence of all EEC law over all domestic law?

While there was little scope for ambiguity in the ECJ's conclusion that regulations, directives, and decisions were capable of having direct effect, the Court was remarkably inconclusive on the question of whether EEC law also required such EEC measures to possess a superior hierarchical status to some (or all) provisions of domestic law. This abstract jurisprudential question was one of profound political significance. Could it really be the case that EEC law demanded that national courts were required to grant precedence to any directly effective provision of EEC law if that provision was incompatible with a rule of domestic law? To pose the question more starkly: did EEC law require that even a piece of EEC secondary legislation—which a Member State may have opposed in Council, or which (in the case of a decision) might have been created

[51] [1970] ECR 825 at para 5.

solely by the Commission—overrode even a deeply entrenched provision of a Member State's constitution? The ECJ finally offered an answer to that question in 1970 as it encountered an acute conflict between its own effet utile jurisprudence and the provisions of the German constitution.

The German constitution had been radically remodelled after World War II. The country's system of governance was structured on a federal basis, with power divided between a bi-cameral national legislature and executive and a sub-national level of government (the *Lande*). Within the national governmental system, the government would be formed by the political party(ies) which commanded majority support in the lower house (*Bundestag*) of the legislature. As noted in chapter seven, the electoral system adopted for the *Bundestag* guaranteed a high level of congruence between a political party's electoral popularity and its representation in the *Bundestag*. The federal basis of the governmental system was substantively entrenched in the new constitution. The constitution also procedurally entrenched a series of basic human rights norms (the Basic Law) which could not be interfered with by either the national or *Lande* governments acting by simple majority. Such values could be overridden by a two-thirds majority in the national legislature. Echoing the position in the United States, the German constitution created a Federal Constitutional Court which was empowered to invalidate any executive or legislative measure which contravened the provisions of the Basic Law.

The *Internationale Handelsgesellschaft* litigation threw up a conflict between an EEC regulation controlling flour exports, and individual rights protected in Germany's 'Basic Law'. A Frankfurt court refused to enforce the regulations—which were accepted to be directly effective—because it considered them 'unconstitutional' under German law. In an Art 177 reference, the Frankfurt Court asked if it was obliged under EEC law to give precedence to the regulations even if they were inconsistent with the Basic Law. The ECJ's response was a forthright 'Yes':

> Recourse to the legal rules of concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as

> Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principle of a national constitutional structure.[52]

The ECJ softened its judgment by observing that 'the law' it was charged to uphold by Art 164 included respect for fundamental human rights, implying it would invalidate any EEC secondary legislation which transgressed such principles.[53] This in itself is an innovative conclusion. It has an obvious political basis; Member States would be unlikely to remain in a Community in which other members could require them (through majority voting) to enforce laws violating their basic constitutional values. As such, it might be thought to be an essential part of the effet utile strategy. But its legal roots are obscure. There was no express textual human rights code within the Treaty of Rome against which the legality of regulations, directives, or decisions could be measured. Article 119 prohibited gender discrimination in employment, while Art 7 prohibited discrimination based on national origins. However such 'fundamental rights' as freedom of speech, freedom of assembly, or the prohibition of racial discrimination did not feature in the Treaty's text. Given the EEC's initially limited 'common market' focus, the omission is perhaps unsurprising: the community was not (initially) competent in such 'political' matters. For countries such as Germany, whose constitutions safeguarded basic political values from their own legislatures or governments, this was a worrisome lacuna, as some EEC powers might cut across their own 'fundamental rights'.

Member State judicial reaction to the direct effect and precedence of EEC law

The ECJ's judgment in *Internationale* essentially told German courts that they were required by EEC law to refuse to give effect to the German Basic Law whenever that law contradicted a directly effective provision

[52] Case 11/70: [1970] ECR 1125 at para 3.

[53] This idea had first appeared in a 1969 ECJ judgment, *Stauder v City of Ulm* (Case 29/69) [1969] ECR 419 paras 25–27. The initiative has been attributed to a (prescient) concern in the ECJ that unease among the German judiciary about the lack of any human rights constraints on the actions of Community institutions would lead German courts to reject the direct effect and precedence doctrines; see Pescatore P (1972) 'The protection of human rights in the European Communities' *CML Rev* 73.

of Community law. More broadly, the judgment told all national courts—and all national governments and legislatures—that even their most deeply-entrenched constitutional values 'could not prevail' over any provision of EEC law. This forceful statement attracted a variety of responses from the courts of the Member States.

The German (judicial) reaction

When the *Internationale* case returned to Germany, the German Federal Constitutional Court[54] (FCC) accepted that the interpretation given by the ECJ to the regulations in issue meant that the regulations did not contravene Germany's Basic Law. But, more import-antly, the FCC refused to accept the ECJ's conclusion of legal principle that any EEC law automatically took precedence over any domestic law. The FCC did not rule out the possibility that this principle could at some future date be consistent with the requirements of the German constitution. For the time being however, the Community's own constitutional order had two deficiencies which prevented the ECJ's ruling in *Internationale* being accepted by German courts:

> [23] In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Constitution with regard to fundamental rights . . .

The FCC claimed it retained the power to evaluate EEC laws against Germany's Basic Law, clearly implying it would not allow inferior German courts to give automatic precedence to EEC laws until the 'fundamental human rights' and 'democratically elected parliament' principles were firmly established

[54] [1974] 2 CMLR 540.

within the EEC's own internal constitutional order.[55] (The judgment is widely referred to as '*Solange No 1*': 'so long as' the Community lacks an effective judicial mechanism to ensure that secondary legislation complies with human rights norms and lacks an obviously 'democratic' legislative process, German law will not afford precedence to EEC secondary legislation which appeared to contradict the Basic Law.)

It is important to stress that the FCC was only going so far as to indicate that it might be prepared to allow all EEC law to be directly effective (ie the accessibility issue) in Germany and to take precedence (ie the hierarchy issue) over any inconsistent national law. The FCC was certainly not prepared to accept the ECJ's position on the third element of the domestic law status of EEC law question—namely the location of interpretive competence. If EEC law in Germany was to be directly effective and superior to domestic law it would be so as a matter of German constitutional law, not—as the ECJ maintained—simply because it was EEC law.

The German court's refusal to accept the autonomous effect of EEC law within Germany may be explained in part by a concern that the precedence principle betokened an unacceptable loss of German national sovereignty to the institutions of the Community. But the implications of the precedence and direct effect doctrines for orthodox understandings of sovereignty within Member States are also profound. A second explanation for the German court's conclusion is that if the ECJ's views were correct, the German government, acting through the mechanism of EC secondary legislation, would be able to achieve legally defensible political objectives that were beyond its power as a matter of domestic constitutional law. Relatedly, a government supported by a simple legislative majority might achieve results which the constitution reserved to a two thirds legislative majority. Further, and this point was perhaps of especial concern to the FCC, that court would also lose its status as the ultimate determinant of the meaning of the law in Germany whenever the matter in issue had an EEC dimension. To put the matter simply, EEC accession had significant implications not just for the locus of legal sovereignty in a *trans-national* sense (ie flowing from a country to the Community), but also in an *intra-national* sense (ie from one branch of

[55] This account is necessarily simplistic. For detailed consideration of a fascinating story see Alter K (2001) *Establishing the supremacy of European law* ch 3 (Oxford: Clarendon Press); Klott J (1998) 'Report on Germany', in Slaughter et al op cit.

national government to other branches).

The Belgian (judicial) reaction

The differential impact of the ECJ's effet utile jurisprudence on Member States as a result of the variegated constitutional structures within the six countries is neatly illustrated by comparing the reception afforded to the *Internationale* principle by Germany's Federal Constitutional Court with the contemporaneous response made by Belgium's *Cour de Cassation*. At that point, the orthodox understanding of the relationship between domestic law and international law under Belgium's constitutional arrangements was that international law would be enforceable in domestic courts only if the relevant treaty had been incorporated by legislation. The treaty would then—qua statute—override any previously enacted domestic legislation, but would in turn itself be overridden by any subsequently enacted statute.[56]

The EEC Treaty had been so incorporated by Belgian legislation. The issue before the *Cour de Cassation* in *Minister for Economic Affairs v SA Fromagerie Franco-Suisse 'Le Ski'*,[57] was whether—as orthodox domestic constitutional theory seemed to demand—Belgian courts should accept that directly effective EEC law was overridden by subsequently enacted and inconsistent Belgian legislation. In *Le-Ski*, the *Cour de Cassation* turned this traditional understanding on its head:

> [8] The rule that a statute repeals a previous statute in so far as there is a conflict between the two, does not apply in the case of a conflict between a treaty and a statute.
>
> [9] In the event of a conflict between a norm of domestic law and a norm of international law which produces direct effects in the internal legal system, the rule established by the treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law.
>
> [10] This is a fortiori the case when a conflict exists, as in the present case, between a norm of internal law and a 'norm' of Community law. The reason is that the treaties which have created Community law have instituted a new legal system in whose favour the member States have restricted the exercise of their sovereign powers in the areas determined by those treaties . . .
>
> [12] It follows from all these considerations that it was the duty of the judge to set aside the application

[56] See generally Bribosia H (1998) 'Report on Belgium' in Slaughter et al op cit.

[57] [1972] CMLR 330.

of provisions of domestic law that are contrary to this Treaty provision.

The *Cour de Cassation's* judgment—which in textual terms clearly drew heavily on *Van Gend* and *Costa*—might initially seem surprising, given that it betokened a substantial transfer of sovereign legal power on a trans-national basis from Belgium's Parliament to the Community. But it also entailed a substantial transfer of power in the intra-national sense, in that the Belgian courts were now claiming to be empowered to refuse to apply certain provisions of domestic legislation; an authority that the Belgian judiciary, in contrast to the powers enjoyed by the FCC in Germany, had previously not possessed.[58] The *Cour de Cassation* was undoubtedly taking something of a risk in domestic political terms by effectively amending the constitution in this way. It seems however that the *Cour* could justifiably have concluded that its initiative would not be much opposed by other governmental institutions.[59]

The French (judicial) reaction

The judicial strands of France's constitutional tapestry produced a further complication for any attempts to explain in general terms the impact of the ECJ's effet utile jurisprudence. The French constitution recognises a functional and institutional split between the legislative, executive, and judicial branches of the governmental system. But the French judicial system has long been institutionally fragmented, divided between public law courts (topped by the *Conseil d'Etat*) and private law courts (topped by the *Cour de Cassation*). That institutional fragmentation had never been, in ideological terms, a happy one. To put the matter crudely, the *Conseil d'Etat* was (as were the public law courts generally) widely regarded—and certainly by its own members—as a far more important and prestigious organisation than the *Cour de Cassation* (and the private law courts generally)[60] The *Conseil d'Etat* also claimed the ultimate jurisdiction to decide if a particular matter raised a public law or private law issue. That jurisdiction in effect placed the *Conseil d'Etat* in a superior constitutional position to the *Cour de Cassation*.

As noted earlier, Art 55 of the French constitution notionally empowered the *Conseil d'Etat* to give

[58] Albeit of course that this would entail an acceptance by the Belgian courts of their subordination to the ECJ in respect of community law issues.

[59] See Bribosia op cit at pp 18–21.

[60] See generally Neville-Brown L and Bell J (5th edn, 1997) *French administrative law* ch 4.

precedence to international law over domestic legislation. This seemed however to be a power that would never be exercised for political reasons. And the *Conseil d'Etat* initially showed no inclination to accept that such a result was required in respect of EEC law as a result of France's membership of the Community.

The issue raised before the *Conseil d'Etat* in *Syndicat Generale des Fabricants de Semoules*[61] was stark and simple. Should the French courts refuse to apply a French statute that was inconsistent with a directly effective EEC regulation? *Semoules* was argued early in 1968, so pre-dated the ECJ's secondary legislation effet utile judgments in *Politi*, *Grad*, and *SACE SpA*. But both *Van Gend* and *Costa* had been decided by this point.

The advisory opinion of the *Comissaire du Gouvernement*[62] focused briefly on the evident inconsistency between the theory and practice of the constitution in respect of the domestic status of international law:

> To be sure, under Article 55 of the Constitution a treaty which has been duly ratified has, as from its publication, an authority superior to that of statutes. The Constitution thus affirms a pre-eminence of international law over internal law and numerous voices (nearly all of the academic writers) have been raised to say that a provision which makes our Constitution one of the most receptive to an international legal order should not remain a dead letter.
>
> But the administrative court cannot make the effort which is asked of it without altering, by its mere will, its institutional position.
>
> It may neither criticise nor misconstrue a statute. That consideration has always led it to refuse to examine grounds based on the constitutional invalidity of a statute . . .

The opinion then concluded that the *Conseil* should not depart from its previous practice. The *Conseil* itself endorsed this position, holding simply and briefly that the French legislation at issue was a valid law.

Both the *Commissaire* and the *Conseil* reached their respective conclusions without making any reference *at all* to either *Van Gend* or *Costa*. The ECJ's effet utile jurisprudence was, it seemed, not just unpersuasive in determining the domestic status of EEC law in France; it was completely irrelevant.

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[61] [1970] CMLR 395.

[62] An officer of the *Conseil* whose function is analogous to that of the Advocate-General before the ECJ; See Neville-Brown and Bell op cit pp 104–105.

A quite different attitude to EEC law was however taken by the *Cour de Cassation* in *Administration des Douaines v Societe Cafes Jacques Vebre*.[63] The question raised was whether a domestic court should decline to apply a French statute placing a discriminatory tax on coffee imported from Holland, which tax was apparently inconsistent with the provisions of Art 95 of the Treaty.[64] In complete contrast to the position adopted by the *Conseil d'Etat* in *Semoules*, the *Cour de Cassation* upheld the judgment of a lower (private law) court which had given practical effect to Art 55 of the constitution; namely that international law to which France was a party took precedence over contradictory domestic legislation.[65] The *Cour de Cassation* did not invoke any ECJ authority to sustain this proposition.

This might suggest that the *Cour de Cassation* was 'simply' adopting a different reading of the requirements of Art 55 of the constitution from that taken by the *Conseil d'Etat*. In domestic political terms, that would have been a boldly confrontational course for the *Cour de Cassation* to adopt, since it strikes at the superior constitutional position of the *Conseil d'Etat* and at the legislature's practical immunity from the formal requirements of Art 55.

However, the *Cour de Cassation* also intimated that it was minded to accept the autonomous force principle of EEC law. Article 55 of the French constitution conditioned the (theoretical) domestic precedence of international law on the principle of reciprocity. But the *Cour de Cassation* rejected the suggestion that the question of whether or not Holland was in compliance with Art 95 had any relevance to the status of Art 95 in France, in essence adopting—but not expressly citing—the reasoning offered by the

[63] [1975] 2 CMLR 336.

[64] Which the ECJ had held to be directly effective in *Lutticke* (Case 57/65) [1966] ECR 205.

[65] '[5] But the Treaty of 25 March 1957, which by virtue of the abovementioned Article of the Constitution has an authority greater than that of statutes, institutes a separate legal order integrated with that of the member-States. Because of that separateness, the legal order which it has created is directly applicable to the nationals of those States and is binding on their courts. Therefore the Cour d'Appel was correct and did not exceed its powers in deciding that Article 95 of the Treaty was to be applied in the instant case, and not section 265 of the Customs Code, even though the latter was later in date.'

ECJ over ten years earlier in *Dairy Products*:[66]

> [7] But in the Community legal order the failings of a member-State of the European Economic Community to comply with the obligations falling on it by virtue of the Treaty of 25 March 1957 are subject to the procedure laid down by Article 170 of that Treaty and so the plea of lack of reciprocity cannot be made before the national courts.

This element of the judgment raises the inference that the *Cour de Cassation* saw in the effet utile principle a means to call into question or even overcome its previously subordinate position within the French constitutional system vis-á-vis the *Conseil D'Etat*.[67]

The Italian (judicial) reaction

By this time, the Italian Constitutional Court was intimating that it had modified its own approach as laid out in *Costa* to the domestic status of EEC law. The issue before the Court in *Frontini v Ministero delle Finanze*[68] was whether—as a matter of domestic constitutional law—all EEC secondary legislation was to be regarded as of equivalent status to Italian legislation? The Court's answer to the question was a qualified 'Yes'. In contrast to the concerns raised by the German Federal Constitutional Court, the Italian Court considered that the law-making procedures of the Community and the ECJ's capacity to review the legality of secondary legislation were already sufficient robust to enable Italian law to extend what we might term a strong but rebuttable presumption of validity to EEC regulations, decisions, or directives.[69] The Court nonetheless stressed that this result arose as a matter of Italian law, not EEC law; and the judgment stressed that if it appeared that EEC secondary legislation was incompatible with fundamental values in the Italian constitution: '[T]his Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles.'[70] The judgment did not obviously resolve the question of the precedence

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[66] See 'EEC law as an autonomous legal force', p 349.

[67] And for the private law courts en masse to escape their presumed subordinacy to the public courts in general. See the discussion in Alter op cit ch 4; Plotner op cit.

[68] [1974] 2 CMLR 372.

[69] See in particular paras 16–19 of the judgment.

[70] Ibid, at para 21.

of EEC law vis-à-vis subsequently enacted domestic legislation. But the tone of the Court's reasoning perhaps suggested that when the *Costa* issue came before it again, its understanding of the domestic legal position would change.

Conclusion

These episodes serve as a useful corrective to misleadingly simplistic assertions that conflicts created by Community law simply and invariably pit the interests of an homogenous, monolithic EEC against a similarly homogenous, monolithic Member State. Such a bald dichotomy ignores the point that in both ideological and institutional terms the Community itself and its Member States are often likely to be highly fragmented constructs. In an ideological sense, it is entirely likely that major political parties within any given Member State will simultaneously hold quite different views on the desirability of Community intervention in certain fields. A change of government in a Member State may therefore produce a quite different domestic response to particular Community laws or policies. Similarly, in a country organised on a federal basis where the national and sub-national levels of government are controlled by different political parties, EEC initiatives might often attract both enthusiastic support and vociferous opposition from the various tiers of domestic government. And, perhaps most significantly from a constitutional lawyer's perspective, the ECJ's effet utile jurisprudence opened up the possibility of particular branches of a Member State's governmental system (most obviously but not exclusively the courts) stepping beyond the purely domestic constitutional constraints controlling their authority.

It would be equally misleading to assume that the Community can be regarded as a single entity, whether in structural or ideological terms. A diversity of political views is likely to exist between the various Member State governments when they sit as law-makers on the Council of Ministers. It is quite possible that a majority of Member State governments on the Council will disapprove of initiatives proposed by the Commission; that a majority of members of the Assembly/Parliament will take yet another view; and that the ECJ may conclude that any measure that does make its way through the Community's legislative process is unlawful.

It might be thought that these many complications were a readily discernible feature of the Community and Member States' political and legal landscapes in the early 1970s. But in the United Kingdom, where a

prolonged and vigorously fought political battle to take the country into the Community was nearing its end, there was no obvious evidence that these points had been taken on board by Ministers, or by legislators, or by the judiciary—and still less by the public at large.

II. **United Kingdom accession**

British governments tried to take the country into the EEC twice during the 1960s. However new states could only be admitted with the consent of all the existing members, and on both occasions the French government vetoed British entry. The then (Conservative) Prime Minister Harold Macmillan regarded membership as a central element of his government's foreign and economic policy, and had assigned Edward Heath the task of negotiating terms of entry. Macmillan and Heath were, however, thwarted by De Gaulle's firm belief that British entry would lead to Anglo-American domination of the Community.[71] The Labour Party at that time opposed entry; its then leader, Hugh Gaitskell, suggested membership would mean 'the end of a thousand years of history' of Britain as a sovereign state. Gaitskell's historical sense was rather bizarre, but although a significant minority of Labour MPs favoured accession, most (including the next leader, Harold Wilson) then shared his sentiments.[72] Wilson subsequently changed his mind, and his government (supported by many Conservative MPs and opposed by thirty-five Labour backbenchers) applied for entry in 1967. This too was vetoed by De Gaulle.

British opponents drew on two substantial political arguments against accession. The first related to Britain's world role. Opponents of EEC entry felt that Britain should align itself with the Commonwealth countries and the USA, linking those nations to the EEC, rather than risk merging into a 'European super-state'. The second argument focused on 'sovereignty'. The principles of precedence and direct effect alarmed a small number of British politicians. This faction feared that some of Parliament's powers would be irretrievably lost to Community institutions. Opponents of entry argued that such a transfer of political power was undesirable. But some also argued that it was constitutionally impossible for Britain to honour the obligations EEC membership entailed. We need here to recall two key elements of Diceyan theory: that Parliament cannot bind itself or its successors; and that no British court is competent to say that a statutory

[71] See Horne op cit pp 444–451.

[72] Pimlott op cit pp 245–248; Jenkins R (1991) *A life at the centre* pp 144–146.

provision is invalid.

If we translate *Costa* and *Internationale* into orthodox British constitutional language, we seem to say that Parliament could no longer pass legislation inconsistent with EEC law; that any Parliament which incorporated the Treaty into British law would bind itself and its successors not to breach EEC law in the future. The direct effect principle articulated in *Van Gend, Politi, Grad*, and *SACE SpA* is equally problematic from the viewpoint of orthodox, Diceyan theory. The principle demanded that if Parliament enacted a provision which contradicted a directly effective EEC provision, but which did not also withdraw Britain from the Community, a British court would have to refuse to apply that statutory term. Thus, the courts, via the medium of EEC law, would have a higher constitutional status than Parliament on EEC matters.[73] Furthermore, the ECJ's teleological approach to Treaty and legislative interpretation was incompatible with British courts' more literalist tradition; EEC membership would thus demand that the constitution abandon its traditional approach to the separation of powers.

EEC membership and parliamentary sovereignty: the legislators' views—and their votes

With the benefit of hindsight, the earliest efforts of British commentators to analyse the potential impact of EEC membership on the British constitution appear woefully inadequate.[74] By the late 1960s, such analyses were becoming more sophisticated. Professor de Smith produced a prescient article in 1971, identifying the EEC as 'an inchoate functional federation', which while not initially a federal state, was likely to evolve in a direction demanding the 'pooling' of sovereignty.[75] de Smith suggested national sovereignty need not be abandoned if the UK acceded to the Treaty, since it might always withdraw from the Community. Nevertheless, he also presumed (in terms reminiscent of Wade's seminal analysis of parliamentary

[73] It seems that few MPs grasped this point. Most viewed Parliament's 'sovereignty' as something which might be lost to the EC, not to the domestic courts; see Nicol D (1999) 'The legal constitution: United Kingdom Parliament and European Court of Justice' *Journal of Legislative Studies* 131.

[74] See Keenan P (1962) 'Some legal consequences of Britain's entry into the European Common Market' *Public Law* 327.

[75] de Smith S (1971) 'The constitution and the Common Market: a tentative appraisal' 34 *MLR* 597 at pp 597 and 614. Interestingly, the article made no reference at all to *Van Gend*.

sovereignty) that 'full recognition of the hierarchical superiority of Community law would entail a revolution in legal thought.'[76] de Smith expected that a 'reformulation' of traditional understandings would suffice to deal with the likely eventuality of unintended conflicts between EEC and domestic law, and that such reformulation might be achieved by the simple expedient of the domestic courts presuming that Parliament never intended to breach EEC law and interpreting domestic legislation accordingly. This 'solution' might of course demand that the notion of 'interpretation' would itself have to be reinterpreted in a manner quite inconsistent with dominant British understandings of the courts' proper constitutional role.

The courts' traditional approach to international law would be inadequate for these purposes. We saw in chapter two that unincorporated treaties have no binding force in domestic law. However, that does not mean they are entirely without legal effect. British courts will assume that Parliament does not intend accidentally to legislate in breach of the country's treaty obligations. Thus in circumstances where a statute's phraseology could bear more than one meaning, the courts will choose whichever meaning best corresponds to the international obligations. Similarly, if a treaty has been incorporated into domestic law, subsequent statutes will be construed, in so far as their language is ambiguous, in a manner consistent with the obligations enacted in the incorporating statute. This interpretive technique would be of no assistance when a later statute expressly repealed or was impliedly irreconcilable with the incorporating legislation. It would also seem incompatible with the ECJ's characterisation of the Treaty as a 'new legal order', quite unlike other international law.

Professor Wade recommended more radical steps. He suggested either that a standard clause be inserted into every domestic statute enacted after accession, providing that the legislation took effect subject to the precedence of EEC law. Alternatively, Parliament might annually enact (with retrospective effect) a statute reaffirming the precedence principle.[77]

Successive governments remained unconvinced of the need for such measures. Harold Wilson's 1966–

[76] Ibid, at 613.

[77] (1972) 'Sovereignty and the European Communities' 88 *LQR* 1. For a survey of other contemporaneous suggestions see Trinadade F (1972) 'Parliamentary sovereignty and the primacy of community law' 35 *MLR* 375.

1970 Labour government had made the extraordinary suggestion that all EEC measures would take effect in the United Kingdom as delegated legislation,[78] an analysis which betokens the subordinacy rather than precedence of Community law. Edward Heath's 1970–1974 administration, which eventually secured the UK's accession, seemed similarly confused. The government boldly stated that while it would introduce a Bill to incorporate the Treaty into domestic law, 'there is no question of any erosion of essential national sovereignty.'[79] The distinction between 'essential' and (presumably) 'non-essential' sovereignty is a novel one, and was replaced when the aforesaid Bill was before the Commons by a different but equally legally nonsensical proposition. MPs were informed by a government spokesman that nothing in the Bill undermined the 'ultimate' sovereignty of Parliament. What might happen to Parliament's penultimate or anti-penultimate sovereignty (whatever those strange creatures might be) was unclear! Neither of the main parties seemed willing to accept that it was either desirable or possible to entrench the precedence principle. The 1967 government had seemed to accept the inevitability of the Diceyan perspective, observing that if the UK was to honour its EEC obligations, 'Parliament would have to refrain from passing fresh legislation inconsistent with [Community] law.'[80]

That is, however, not a legal solution. It may be that politicians of both parties adopted such equivocal positions because they feared that candid recognition of the *Costa, Van Gend,* and *Internationale* principles would further harden internal opposition to accession, which, as we see later, already presented a threat to the government's European ambitions. Equally plausibly, it may be that they simply did not properly understand the legal significance of the step they were about to take.[81]

The European Communities Act 1972—the passage

The political question as to the desirability of EC membership exposed some unusual divisions in the, by then, firmly established split between the Labour and Conservative parties. Both the Labour left and

[78] (1967) *Legal and constitutional implications of United Kingdom membership of the European Communities* para 22 (Cmnd 3301).

[79] (1971) *The United Kingdom and the European Communities* para 29 (Cmnd 4715).

[80] Quoted in Wade 1972 op cit at pp 2–3.

[81] Cf Nicol D (1999) op cit.

Conservative right wings opposed the idea. Both factions disliked the partial 'loss' of sovereignty they assumed accession would entail, since that would reduce their capacity (should they ever form a Commons majority) to promote legislation favouring their respective (very different) political ideologies. The support for membership of some more centrist MPs in both parties depended on the entry terms (especially Britain's budget contribution) that the government negotiated. We will return to these divisions on several occasions, but we might gain an initial appreciation of the EEC's capacity to cut across party lines by examining the Commons' vote on the 1971 Bill.

Accession would have two domestic phases: a Commons vote on whether to accept the entry terms which, if successful, would be followed by the Bill 'incorporating' the Treaty into domestic law. At the 1970 election the Conservatives had won 330 seats, Labour 287, and the small parties 13. A rebellion by fewer than twenty anti-EEC Conservatives could have deprived the Heath government of a majority. Heath himself was passionately pro-accession: most Conservative MPs supported him, but forty announced they would not approve the terms.

Labour was more deeply split. As Prime Minister in the late 1960s, Wilson had supported EEC membership, reversing his previous opposition. In 1971, he and most of his Shadow Cabinet again opposed it. The 1971 Labour Party Conference voted overwhelmingly against membership, and Wilson authorised a three line whip instructing Labour MPs to vote against the terms. Sixty-nine Labour MPs, led by the Shadow Chancellor Roy Jenkins, defied the whip and voted with the government; a further twenty abstained. The government majority was 112. Had the whip been respected, the terms would have been rejected. This would probably not have been regarded as a resigning issue, as Heath had allowed Conservative MPs a free vote.

But while many Labour MPs approved the terms, they would not defy the whip on votes during the Bill's passage, in part because Heath had announced that he would treat the second reading as a confidence issue.[82] Only a few (Jenkins foremost among them) elevated what they saw as Britain's national interest in joining the EEC above questions of party loyalty. On the Bill's third reading, the government's majority was just seventeen. For the moment, at least, the UK had entered the EEC. What now fell to be determined was the

[82] Norton (1978) op cit pp 363–364.

constitutional adequacy of the legislation enacted.

The European Communities Act 1972—the terms

As we saw in chapter two,[83] a government cannot change British law by using its prerogative powers to sign a treaty. If a treaty's terms are to be effective in British law, they must be given domestic legal status of some sort by statute. Parliament sought to determine the domestic status of Community law in the European Communities Act 1972 (ECA 1972). Four sections of the Act merit attention here, in terms of their consistency both with orthodox British constitutional theory and the ECJ's principles of precedence and direct effect.

Section 1 listed the various treaties to which the Act would apply. It also provided that the government might add new treaties to the list by using Orders in Council. This could be seen as a form of Henry VIII clause, in so far as it effectively allowed the government (via its prerogative powers) to give domestic effect to treaties, which treaties would by virtue of the *lex posterior* principle override existing domestic legislation.

Section 2(1), while framed in ungainly language, seems to provide that all directly effective EEC law will be immediately enforceable in domestic courts:

> All such rights, powers, liabilities, obligations and restrictions from time to time arising by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect . . . in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly . . .

Section 2(2)(a) empowers the government, either through Orders in Council or statutory instruments, to 'translate' any non-directly effective EEC law into domestic law. Section 2(4) then provides that '. . . any enactment passed or to be passed . . . shall be construed and have effect subject to the forgoing provisions of this section.' Section 3(1) then states that:

> For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity meaning or effect of any Community instrument shall be . . . [determined] in accordance with the principles laid down by and any relevant decision of the European Court.

[83] See 'Inconsistency with international law', ch 2, pp 32–34.

There are several principles of startling constitutional significance in the ECA's few words. There is no constitutional difficulty in the ECA 1972 telling a court to give effect to EEC obligations even if there is a contradictory rule of common law. The ECA 1972 obviously overrides any inconsistent rule of common law. Nor would any problem arise if a directly effective measure of EEC law was inconsistent with a statutory provision which predated the coming into force of the ECA 1972. The ECA, as the later statute, would ensure that the EEC measure would prevail. But what would happen if the inconsistent British statutory provision was enacted after the ECA 1972 came into force?

The 'passed or to be passed' formula of s 2(4) seemed to instruct the courts that any such Act would not have domestic legal effect. As we saw in chapter two, Parliament had produced such forward-looking legislation before. The Treaty of Union was incorporated by an Act which said some of its provisions would endure forever.[84] But those provisions have been repealed. Similarly, the courts held that s 7(1) of the Acquisition of Land Act was impliedly repealed by an inconsistent later Act. Why should the ECA 1972 be any different? Indeed, how could it be any different? To recognise it as a 'special' statute would undermine the entire basis of the parliamentary sovereignty doctrine.

How the courts would respond to these novel instructions was a matter for speculation. Writing in an academic journal, prior to the ECA 1972 coming into force, Lord Diplock had argued:

> It is a consequence of the doctrine of [parliamentary sovereignty] that if a subsequent Act . . . were passed that was in conflict with any provision of the Treaty which is of direct application . . . the courts of the United Kingdom would be bound to give effect to the Act . . . notwithstanding any conflict.[85]

For Lord Diplock, it seemed, there could be nothing 'special' about the ECA 1972. Lord Denning was initially rather more equivocal.

Parliamentary sovereignty: a non-justiciable concept?

Opponents of accession had lost the political argument. In a last effort to prevent entry, they tried a legal

[84] This is to take a Diceyan view of the Treaty's status, rather than to see it as a 'constituent' document establishing the British state; see 'Is parliamentary sovereignty a British or English concept?' ff, ch 2, pp 43–46.

[85] (1972) 'The Common Market and the common law' *Law Teacher* 3 at p 8.

approach. In *Blackburn v A-G*,[86] Mr Blackburn asked the Court of Appeal to declare that it would be unconstitutional for the government to sign the Treaty of Rome, because to do so would amount to an irreversible surrender of parliamentary sovereignty.

In terms of domestic constitutional principle, this was an outlandish contention in two senses. Firstly, of course, orthodox constitutional theory wholly rejected the proposition that Parliament could limit its sovereignty, still less that the government could achieve this result. Secondly, for the government to sign the Treaty would require an exercise of the prerogative. In 1971, long before *GCHQ*, hardly any prerogative powers were subject to full judicial review. Even after *GCHQ*, treaty ratification is a non-justiciable prerogative power, within Lord Roskill's 'excluded categories'. Consequently, the Court of Appeal told Mr Blackburn that it could not intervene.

Mr Blackburn's argument was however quite consistent with the ECJ's judgments in *Van Gend, Costa*, and *Internationale*. At the risk of being repetitive, it might again be emphasised that those judgments did not simply assert the precedence and direct effect of EEC law; they also asserted that Member States did not have the legal capacity to control the domestic status of EEC law. According to the analysis offered by the ECJ in *Van Gend*, the Heath government's ratification of the Treaty of Accession would curtail the United Kingdom's (by which one means Parliament's) complete autonomy to control its constitution.

While the Court of Appeal did not appear to acknowledge this point in explicit terms, Lord Denning did make some interesting comments about the impact EEC membership would have on parliamentary sovereignty:

> We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality.[87]

At this point in his judgment, Lord Denning referred approvingly to Professor Wade's 1955 article on parliamentary sovereignty in which Wade had argued that the root of the parliamentary sovereignty principle lay in 'ultimate political facts'.[88] But what is not clear from *Blackburn* is whether Denning thought that

[86] [1971] 1 WLR 1037, [1971] 2 All ER 1380.

[87] [1971] 1 WLR 1037 at 1040.

[88] See 'Are Trethowan, Harris, and Ranasinghe relevant to the British situation?', ch 2, pp 40–42.

accession might entail the irrevoc-able surrender of sovereignty or merely the lending of it. The Court of Appeal assumed that Parliament would not legislate contrary to EEC obligations. If it did, what would the courts decide? Lord Denning was non-committal; 'We will consider that event when it happens.'[89] As one might expect, 'it' seemed to happen rather quickly. But in the interim, the ECJ had been continuing its teleological approach to EEC law, and the UK's political argument about membership had reawakened.

The 1975 referendum

Labour's two narrow election victories in 1974 brought into power a party deeply split over the desirability of EEC membership. Labour's 1974 manifestos had promised that voters would be given the opportunity to vote on continued membership by either another general election or a referendum. A third general election was not a plausible option, so a referendum seemed inevitable. The question which then arose was how the referendum should be conducted. Having renegotiated the UK's terms of membership, Prime Minister Wilson set off down a political path along which several constitutional principles fell by the wayside.

The first casualty was the convention of Cabinet unanimity. Wilson decided to 'suspend' the convention for the referendum campaign. His justification was that the question transcended party politics, although most commentators suggest his real motivation for both the referendum itself and the suspension was his assumption that there was no other way to keep his party together. The party's National Executive Committee had voted against remaining in the Community.[90] It was then announced that seven (identified) members of Wilson's Cabinet opposed continued membership, as did many backbench Labour MPs. A Commons motion approving the new terms was carried by a majority of 226; but only 137 of the 315 Labour MPs voted in favour. The success of government policy was entirely dependent on Conservative support. The second casualty was the Burkean notion of the MP as a representative law-maker rather than the delegate of her voters. Parliament had in effect chosen to divest itself of its sovereignty on membership, by allowing the people the unusual opportunity of expressing an opinion on a single matter, rather than, as in

[89] [1971] 1 WLR 1037 at 1040.

[90] Irving R (1975) 'The United Kingdom referendum, June 1975' *European Law Review* 3; Pimlott op cit pp 654–660 suggests that Wilson feared that, in a repeat of 1931, Roy Jenkins would play the MacDonald role and emerge as the Leader of a predominantly Conservative coalition government.

general elections, on a package of issues. Neither the government nor Parliament was legally bound to respect the outcome of the referendum, although one imagines it would have been impossible, as a matter of practical politics, to do otherwise.

The EEC thus brought to the forefront of British politics the fundamental question of the desirability of leaving all political issues to be determined by a bare parliamentary majority. Some commentators suggested the EEC referendum might have a 'ripple effect', in convincing Parliament that there were other issues on which the 'the people's' views should be directly ascertained. In the 1890s, Dicey had written approvingly of referendums as devices for 'the people' to express authoritative opinions on matters of great constitutional significance; although given his stunted perception of 'the people', it would be rash to see this approval as espousing an avowedly 'democratic' position.[91]

Such a conclusion is perhaps more justifiable in respect of the 1975 referendum. The campaign was not fought along traditional party lines, but might crudely be described as a contest in which right wing Conservatives and the left of the Labour party united in opposing membership, while the Labour centre-right and Conservative centre-left supported it. Both sides received substantial funds from the government to publicise their arguments. The question was very simple: 'Do you think that the United Kingdom should stay in the European Community (the Common Market)?'. The result was a resounding victory for the pro-EEC lobby; 67.2% to 32.8% on a 65% turnout.

Thereafter, constitutional orthodoxies promptly reasserted themselves. The anti-EEC members of Wilson's Cabinet re-embraced the unanimity convention, and traditional inter-party rivalries rapidly reappeared.[92] Nevertheless, the mere fact that a referendum was held, the peculiar political divisions which it exposed, and the overwhelming support it revealed for EEC membership, suggested that the Treaty of Rome was undoubtedly a 'special' ingredient in Britain's constitutional recipe. Yet while British politicians and British voters again raked over the old ground of even belonging to the Community, the ECJ was apparently still pursuing a federalist schemata of Treaty interpretation.

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[91] See Irving op cit.

[92] Lent a sharper edge by Thatcher's election as Leader of the Conservative Party.

III. **The Treaty of Rome 2: precedence and direct effect revisited**

We have seen examples of innovative common law decisions in earlier chapters. But judicial dynamicism is not a trait exclusive to the common law; it was also embraced by the ECJ. And in the mid-1970s the Court took the opportunity to root its effet utile jurisprudence more firmly in the Community's legal soil.

Confirming the direct effect of directives

Notwithstanding the ECJ's judgment in *SACE SpA*, governments in several Member States maintained that directives, irrespective of their substance, could never have direct effect. The argument invoked by proponents of this position was that since Art 189 made it clear that directives reserved discretion to the Member States they could not be 'clear and unconditional' per *Van Gend*. However, in 1974, the ECJ confirmed *SACE SpA* in forceful terms.

Van Duyn v Home Office (1974)

The secondary legislation at issue in *Van Duyn*[93] was Directive 64/221. The directive contained detailed implementing measures for Art 48, the provision establishing free movement of workers within the EEC. Article 48 was not framed in 'unconditional terms'; Member States may per Art 48(3) derogate from it for reasons of public policy, public health, or public security. Article 56 required the EEC to issue directives regulating Member States' use of the Art 48(3) derogations. Directive 64/221 Art 3 demanded that derogation be based solely on the 'personal conduct' of the individuals concerned.

The Home Office wanted to prevent Ms Van Duyn, a Dutch citizen, entering the country to work for the Church of Scientology, a cultish religion of which the government disapproved. She claimed that the government's action infringed Art 48, and challenged the Home Secretary's action before the British courts. In an Art 177 reference, the Court of Appeal asked the ECJ firstly if Art 3 of Directive 64/221 was directly effective, and secondly if membership of the Scientologists could be 'personal conduct' ?

The ECJ held Art 3 directly effective because it confined the discretion accorded to the Member States by Art 48(3) with sufficient precision to make it justiciable: a national court could easily ensure that decisions a Member State made on this question were indeed based on the individual's personal conduct. In language reminiscent of *Van Gend*, the ECJ confirmed that there was no principled reason to exclude the possibility

[93] Case 41/74: [1974] ECR 1337.

that directives (wholly or in part) could be directly effective:

> It is necessary to examine, in every case, whether the nature, scheme and general wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.[94]

But while the British government's arguments were rejected on this point, the ECJ also decided membership of the Scientologists could be 'personal conduct'. The British court could thus hold that Van Duyn's exclusion did not breach EEC law.

The ECJ's decision might be thought as much an exercise in diplomacy as law-making.[95] Judgment was delivered just before the UK's 1975 referendum. By permitting the Home Secretary to exclude Ms Van Duyn while simultaneously upholding *SACE SpA*, the Court reaffirmed a principle of long-term significance to efforts to enhance EEC law's 'effet utile', while handing British supporters of EEC membership a precedent to refute opponents' claims that remaining in the Community required surrendering control over such basic issues as excluding undesirable foreign citizens. One cannot gauge if *Van Duyn* did influence voting behaviour in the referendum, or ascertain if the ECJ was consciously (if covertly) pursuing an avowedly political agenda, but it would be rash to exclude either possibility.

The horizontal direct effect of treaty articles—*Walrave and Koch* (1974)

A common thread in all of the ECJ's effet utile case law discussed so far has been that the 'defendant' was a governmental body of some sort. A more complicated question presented itself to the ECJ in *Walrave and Koch v Union Cycliste Internationale*.[96] The defendant was a private sector organisation—the Union Cycliste International. The UCI was the governing body for the sport of cycle racing on roads. In formal terms, it had no governmental basis. One of the rules which it applied to cycle racing was that cyclists themselves and their motor-cycle pacemakers had to be of the same nationality. The rule was challenged by two Dutch pacemakers who wished to work for non-Dutch teams. Undoubtedly, if the rule had been

[94] Ibid, at para 12.

[95] For a searching analysis see Weiler J (1986) 'Eurocracy and mistrust . . .' *Washington Law Review* 1103.

[96] Case 36/74: [1974] ECR 1405.

imposed by a Member State law then the law would breach various directly effective Treaty provisions: the Art 7 prohibition on nationality-based discrimination; the Art 48 presumption of free movement of (employed) workers; and the Art 59 presumption of free movement of (self-employed) workers. (The ICU's rule would also breach the terms of an important piece of secondary legislation (Regulation 1612/68) which laid down detailed provisions concerning the free movement of workers.) In such circumstances, the Treaty articles and regulation could be said to be *vertically directly effective*; ie the legal action is upwards from a citizen against a government body. The question raised in *Walrave* was whether these provisions were also applicable in legal actions between individuals and/or companies; ie whether the provisions were *horizontally directly effective*. The ECJ considered that the Treaty articles and Regulation 1612/68 were directly effective in both vertical and horizontal planes:

> [17] Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.
>
> [18] The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community . . ., would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.
>
> [19] Since, moreover, working conditions in the various Member States are governed by means of provisions laid down in law or regulations and sometimes by agreements and other acts concluded by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.

The teleological basis for this conclusion is readily apparent. One such reason related to the fact that very substantial amounts of economic activity within the Community were carried out in the private sector. If all these activities were placed beyond the reach of directly effective EEC law, the substantive scope of the 'common market' would be very tightly constrained. A second reason for according horizontal direct effect to EEC law arose from the differential allocation among the Member States of particular types of economic

activity between the public and private sectors. If, for example, railways were run as a governmental concern in Member State A, then relevant EEC laws would affect the operation of the railway system in that country even if the EEC laws were only directly effective in the vertical plane. But if EEC law had only vertical direct effect, it would not affect the operation of railways in Member State B where railways were a private sector responsibility. A third—and obviously related—reason was to remove the possibility that some Member State governments might try to negate the impact of EEC law on some areas of economic activity by formally transferring responsibility for their conduct or supervision from public sector bodies to private sector organisations.

It is notable that the ECJ did not engage at all in *Walrave* with potentially tortuous arguments as to whether the ICU could be regarded as a 'governmental body' for the purposes of EEC law. One could readily offer a plausible rationale to sustain that conclusion; namely that the ICU controlled an important area of economic activity which would presumably have to be regulated by a government body if the ICU did not exist. Rather the ECJ concluded that the notion that non-governmental bodies were legitimate targets of Community law controls was uncontentious. This seems a logical extension of *Van Gend's* principle that the Treaty bestowed rights on individuals. If effective realisation of those rights depended on other individuals respecting reciprocal obligations, it seemed obvious that those individuals should resolve disputes as to the meaning of EEC law in their national courts. *Walrave* expressly identified horizontal direct effect as a characteristic of Treaty articles and regulations. And it would seem plausible to conclude on the basis of *Walrave* that any Commission decision that was addressed to a private sector organisation would also give rise to horizontal direct effect. If narrowly construed, *Walrave* is perhaps authority only for the proposition that horizontal direct effect reaches only certain private sector regulatory bodies, and not to individuals or companies. However, the ECJ wasted little time in confirming that horizontal direct effect could reach into the smallest nooks and crannies of private sector economic activity.

The justiciability test and the horizontal direct effect principle reaffirmed and expanded—

***Defrenne v SABENA* (1976)**

Just as the form which EEC legislation took could not preclude enforcement by national courts, neither does

it assure that end. We saw in *Chandler v DPP*[97] that putting a prerogative power into statutory form did not necessarily make it justiciable. In *Defrenne v SABENA,*[98] the ECJ drew a similar conclusion regarding direct effect.

Article 119 required Member States to 'ensure and maintain the principle that men and women should receive equal pay for equal work.' Ms Defrenne worked as an air hostess for SABENA, a Belgian airline which was essentially owned and managed by the Belgian government. SABENA paid its hostesses less than male stewards for identical duties. While admitting discrimination, SABENA claimed Art 119 was not directly effective. SABENA contended that Art 119's principle was too complex an economic concept to be justiciable before national courts; more detailed legislation explaining the meaning of equal pay and equal work would be needed before Art 119's principle became 'unconditional'.

The ECJ was only partly convinced by this argument. It held that gender discrimination could take two forms: 'direct and overt' or 'indirect and disguised'. Direct discrimination arose where (as for Ms Defrenne) differing wages were paid for exactly the same job, or where discrimination was specifically permitted in legislation or collective labour agreements. Such inequality could be detected by: 'purely legal analysis . . . the court is in a position to establish all the facts which enable it to decide whether a woman is receiving lower pay than a male worker.'[99] However indirect discrimination, involving inequality between different jobs or industries could only be established against more detailed legislative criteria. Not until such legislation had been enacted could the prohibition on indirect discrimination become directly effective. Once again, the ECJ stressed that it is the nature, not the source, of the EEC law that determines its enforceability in domestic courts.

An equally important element of *Defrenne* was the ECJ's conclusion that Art 119's justiciable terms were enforceable in national courts in a very expansive horizontal sense. Given that SABENA was in formal terms a public sector body, the case could have been resolved on the basis that Ms Defrenne's action was vertical in nature. However as in *Walrave,* the ECJ rejected any need to find a 'governmental element' to

[97] See 'V. 'Justiciability' revisited—are all statutory powers subject to full review?', ch 4, pp 113–114.

[98] Case 43/75: [1976] ECR 455.

[99] Ibid, at paras 22–23.

SABENA's activities. Rather, the Court concluded that all economic activity—even to the level of contracts between individuals—was controlled by Art 119:

> [39] Since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

As we will subsequently see, the horizontal direct effect of directives proved a more contentious issue. But before that question was broached, the ECJ once again underscored the unambiguous nature of the precedence principle.

Immediate precedence: *Simmenthal* (1977)

As suggested earlier, the evident willingness of the Italian Constitutional Court in *Frontini* to reconstrue domestic constitutional principles in a fashion which mirrored the requirements of the effet utile jurisprudence did not immediately lead to a reversal of the Court's judgment in *Costa*. *Simmenthal*[100] concerned the compatibility of certain Italian laws regulating meat imports with EEC law. The Italian court hearing Simmenthal's claim referred two questions to the ECJ. The first related simply to the domestic law's substantive compatibility with the EEC regulations, and need not concern us here. The more important question concerned the consistency with EEC law of the Italian constitution's requirement that Italian legislation which breached international obligations could only be invalidated or disapplied by the Italian Constitutional Court. It could not be disapplied by an inferior court such as the one hearing Simmenthal's claim. Some considerable time would elapse before a case had made its way to the Constitutional Court, during which the Italian law in issue would remain in force.

The ECJ held that it was not enough that a Member State's courts give effect to the precedence of EEC law *eventually*: domestic courts had to do so *immediately*. It was the duty of *any* national court to 'disregard forthwith' any national law conflicting with EEC law: 'without waiting until those measures have been eliminated by action on the part of the national legislature concerned . . . or of other constitutional

[100] *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II)*: Case 106/77: [1978] ECR 629.

authorities.'[101]

Several more years passed before the Italian Constitutional Court refashioned Italy's domestic constitutional law principles to meet this ECJ requirement. In 1984 in *Granital SpA*, the Court—with some delicacy—held that its previous decisions had to be reconsidered. The gist of its conclusion was that, as a matter of Italian constitutional law, its previous holding in *Costa* was incorrect:

> . . . [O]n the basis of Article 11 of the Constitution—as stated above—the full and continuous application of Community law is guaranteed. Directly applicable EEC legal provisions enter and stay in force in Italy on the same basis, without their direct effect being impaired by any municipal statute. It is irrelevant, for this purpose, whether a statute was previously or subsequently enacted. A Community regulation is in any event paramount with regard to the matters it covers . . . [102]

In the meantime, a quite different attitude was struck by France's *Conseil d'Etat*. The *Conseil's* 1980 judgment in *Cohn-Bendit* offered a clear message that not only did it reject the ECJ's claim to have sole jurisdiction to determine the status of EEC law in domestic legal systems, but also that it was not even willing to allow French law to match the ECJ's requirements on the principles of precedence and direct effect. *Cohn-Bendit* bluntly refuted the ECJ's conclusion in *SACE SpA* and *Van Duyn* and held that an EEC directive could not be directly effective at all in certain situations.

Effet utile before the *Conseil d'etat:* the Cohn-Bendit controversy

In May 1968, student-led protests against the French government threatened the overthrow of the existing constitution. Daniel Cohn-Bendit, a German national studying in Paris, was a leader of the protest. 'Danny the Red', as he was popularly known, was subsequently deported and banned from re-entering France, on the obvious ground that he posed a threat to public order.

Ten years later, Cohn-Bendit's revolutionary fervour had dimmed, and he was offered a job in France. The entry ban was still however in place. He claimed before the French courts that the ban infringed his rights under Art 48, unless it was justified under the Art 48(3) derogations. As we saw in *Van Duyn*, Directive

[101] Ibid, at para 7.

[102] *Granital SpA v Amministrazione delle Finanze dello Stato* (Decision 170 of 8 June 1984) (1984) *CML Rev* 756 at 761–762—unofficial translation.

64/221 allowed those derogations to be invoked only if the threat to public order, public safety, or public health arose from the individual's personal conduct. Cohn-Bendit was in effect asking the French court to conclude that his personal conduct no longer threatened public order, and thence overturn the banning order.

The French court hearing the case tried to make a reference to the ECJ concerning the direct effect of Directive 64/221, but was forbidden to do so by the *Conseil d'Etat*. The French government had in the interim revoked the exclusion order, but it invited the *Conseil d'Etat* to rule whether, as a matter of French constitutional law, Directive 64/221 could be directly effective. The *Conseil d'Etat* simply concluded that directives could not have direct effect in these circumstances.[103] The Treaty's framers had stated in Art 189 that a regulation would be directly applicable and binding in its entirety; it could therefore be directly effective. That the framers had not said so about directives, but had specifically granted Member States discretion in implementing the law, must mean that they envisaged that directives would not have direct effect.

The *Conseil d'Etat* restricted its search for the meaning of EEC law solely to the Treaty's text, rejecting the ECJ's teleological approach to interpretation. From a narrowly legalistic perspective, the *Conseil's* conclusion has some merit, but it is utterly inconsistent with both the *Costa* and *Van Gend* principles. The *Conseil d'Etat's* judgment rejects the proposition that the interpretation of EEC law is ultimately a matter for the ECJ. If the courts in France could assert an unchallengeable jurisdiction to determine the meaning of EC law in France, no doubt other superior courts in other Member States could assert a similar power in respect of their own countries. In that event, the supremacy and direct effect principles would be completely undermined. One commentator describes *Cohn-Bendit* as: 'a clear and deliberate act of defiance . . . a blow at the foundations of the community.'[104]

It is impossible to gauge to what extent the *Conseil d'Etat* was following a nationalistic political agenda, and how far it was motivated by a genuine belief in the legal integrity of its conclusion. Much the same ambiguity seemingly pervades the UK courts' initial efforts to address the constitutional implications of

[103] *Minister of the Interior v Cohn-Bendit* [1980] 1 CMLR 543.

[104] Hartley T (1988) *The foundations of European Community law* p 232. Ch 8 of Hartley's book offers an interesting discussion of the various Member States' responses to the precedence and direct effect issues.

accession.

IV. **EEC law, parliamentary sovereignty, and the UK courts: phase one**

The UK judiciary's earliest encounters with EEC law suggested that the radical principles of *Van Gend*, *Costa*, and *Internationale*, and Parliament's evident attempt to enact those principles in the ECA 1972, would meet a trenchant restatement of orthodox Diceyan theory. Lord Denning's non-committal attitude in *Blackburn* was soon followed with a somewhat firmer view in *Felixstowe Dock and Railway Co v British Docks Board.*[105] The case raised the possibility that the provisions of a Bill shortly to be enacted would contravene Art 86's rules on competition law. However Lord Denning did not think that possibility raised a difficult constitutional issue:

> It seems to me that once the Bill is passed by Parliament and becomes a Statute, that will dispose of all this discussion about the Treaty. These courts will have to abide by the Statute without regard to the Treaty at all.[106]

It is not clear if Lord Denning felt that the ECA 1972 had not limited Parliament's sovereignty, or whether it simply could not do so. Nevertheless, in his view, the ECJ's 'new legal order' had apparently not taken root in British constitutional soil.

Lord Denning seemed to adopt a different approach in respect of the ECJ's adherence to teleological methods of treaty and legislative interpretation. In *H P Bulmer Ltd v J Bollinger SA*, he suggested British judges would have to forgo their traditional, literalist techniques, and:

> follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. . . . They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can.[107]

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[105] [1976] 2 CMLR 655, CA.

[106] Ibid, at 659.

[107] [1974] 3 WLR 202 at 216, CA.

Lord Denning's advice[108] extended however only to the Treaty and to EEC legislation, not to British statutes. Domestic legislation, it seemed, even if dealing with EC matters, would still be interpreted according to orthodox principles. It came therefore as a surprise when Lord Denning himself advocated a radical break with constitutional tradition some two years later.

The end of the doctrine of implied repeal? *Macarthys v Smith* (1979)

Macarthys Ltd v Smith[109] arose from an Art 119 dispute. Mrs Smith was employed at a lower wage by Macarthys than the man who previously did her job. She claimed this breached Art 119. Macarthys contended that the British courts should apply the relevant British legislation (the Equal Pay Act 1970 as amended by the Sex Discrimination Act 1975), which forbade discrimination only between men and women doing the same job for the same employer simultaneously. If Macarthys' interpretation of the domestic legislation was correct, the British courts faced a difficulty. For British purposes, Art 119 came into force in 1973. The Sex Discrimination Act was passed two years later. Should the later Act prevail, as Dicey's theory would suggest? Or should EEC law, per *Costa*, be regarded by the court as the superior form of law?

In the Court of Appeal, Lord Denning thought that a literal reading of the British legislation supported Macarthys' claim. However, following his own advice in *Bulmer*, he rejected a literalist approach. Rather, the Act should be construed subject to the 'overriding force' of the Treaty 'for that takes priority even over our own statute.'[110] Denning's own view of Art 119 was that its prohibition on unequal pay extended beyond 'same time' situations to successive employment.[111] Construing the Treaty and the 1975 legislation: 'as a harmonious whole . . . intended to eliminate discrimination against women',[112] Denning found in Mrs

[108] Reiterated, reinforced and also applied to other Treaties in *Jones Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] QB 208, CA.

[109] Case 129/79: [1979] 3 All ER 325, CA.

[110] Ibid, at 329.

[111] Ibid. Denning was in a minority on this point. The majority (Cumming-Bruce and Lawton LJJ) were uncertain as to Art 119's scope, and referred the question to the ECJ. They seemed to agree however with Denning's approach to the constitutional issue.

[112] Ibid.

Smith's favour.

Denning suggested he was obliged to adopt this expansive interpretive strategy because of the ECA 1972, s 2. That would in itself give the ECA a somewhat 'special' status, but Denning's argument went beyond technical questions of interpretation. He also concluded that s 2 had abolished the doctrine of implied repeal for British statutes affecting EEC matters. Domestic courts should assume that if ever a British statute was impliedly inconsistent with an EEC obligation the inconsistency arose because Parliament had erred in the language chosen: legislators could not have intended to achieve such a result, so the courts would save them from the consequences of their mistake by according precedence to EEC law.

This radical contention endows the ECA with a very 'special' constitutional status.[113] In effect, Denning's judgment in *Macarthys* recognised a weak 'manner and form' entrenchment of the precedence and direct effect of EEC law (the 'manner and form' in issue being a special form of words rather than an enhanced majority). These values were not however substantively entrenched, for:

> If the time should come when Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision of it . . . and says so in express terms then I should have thought it would be the duty of our Courts to follow the statute of our Parliament. I do not envisage any such situation. . . . Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.[114]

Denning did not explain how the 1972 Parliament had managed to bind itself and its successors in this (limited) way. There is, as we have repeatedly suggested, no obvious legal principle supporting such a conclusion. One must therefore conclude that Denning was recognising a new 'ultimate political fact'—that accession to the EEC had in some (evidently rather mysterious fashion) 'revolutionised' orthodox constitutional understandings.

This argument rests on the presumption that the political, economic, and foreign policy implications of acceding to the Treaty were so profound that the courts had to assume a new, protective role. The

[113] An excellent analysis is offered in Allan T (1983) 'Parliamentary sovereignty: Lord Denning's dexterous revolution' *OJLS* 22.

[114] [1979] 3 All ER 325 at 329, CA.

presumption operates on two levels. The first, itself controversial, is that Parliament should be protected from the adverse political consequences of unintended breaches of the United Kingdom's EEC obligations. The second, more controversial still, is that UK citizens should be protected from unwittingly incompetent or deceptive parliamentary efforts to renege on the UK's EEC commitments.

We might think that, as an exercise in constitution building, such protective devices would be desirable. But they are constituent rather than interpretive values, and as such, beyond conventional understandings of the judicial role. Despite its obscure roots, Denning's judgment staked out new constitutional ground. But the House of Lords showed itself reluctant to disapprove it.

A matter of interpretation? *Garland v British Rail* (1983)

The issue before their Lordships in *Garland*[115] was whether the Sex Discrimination Act 1975 prohibited gender discrimination in relation to concessionary travel facilities extended to British Rail's retired employees. Such discrimination seemed as though it might contravene Art 119, so the prospect again arose of a conflict between EEC law and a subsequent domestic statute.

Somewhat peculiarly, Lord Diplock (for a unanimous House) made an extensive reference to how he would approach the question if the EEC was an ordinary international law treaty:

> it is a principle of construction of United Kingdom statutes . . . that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom are to be construed, if . . . reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it.[116]

This technique would be incompatible with *Van Gend*'s 'new legal order' principle, and would thus breach the ECA 1972 s 3. It would be not 'irrelevant',[117] as one commentator put it, but legally indefensible from the ECJ's perspective.

Lord Diplock perhaps made this point to highlight the innovative nature of EEC law, for he did not decide

[115] [1983] 2 AC 751.

[116] Ibid, at 394–395.

[117] Hood-Phillips O (1982) 'A Garland for the Lords: Parliament and community law again' *LQR* 524–526.

the case on that basis. Rather he suggested that the ECA 1972 s 2 had introduced a new rule of statutory interpretation to which the courts were now subjected. A UK court should construe all domestic legislation in a manner respecting EEC obligations: 'however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency.'[118] In this case, the 1975 Act could be interpreted as compatible with EEC law 'without any undue straining of the ordinary meaning of the language used.'[119] In that respect, Diplock shared Denning's sentiment in *Macarthys*. He also agreed with Denning that UK courts must obey a statute breaching EEC law in 'express positive terms'. He was more circumspect about the doctrine of implied repeal: this was not an appropriate case to decide that question.

Barely ten years after accession, Lords Diplock and Denning had both moved considerably from their previously Diceyan position towards the EEC's constitutional impact. They had not gone far enough to satisfy *Van Gend* and *Costa*, but the dynamicism of their respective approaches to the issue of the impact of EC law on orthodox British constitutional theory is undeniable. Yet while British courts struggled to accommodate long established principles of EEC law, the ECJ was facing jurisprudential difficulties of its own.

V. **Direct effect—the saga continues**

As noted earlier, the ECJ had concluded that Treaty articles and regulations could be both vertically and horizontally directly effective. This characteristic of 'universal enforceability' of aspects of EEC law is an important part of the effet utile doctrine. But Art 189's text seemingly precluded the horizontal direct effect of directives; it stated they are binding only on the addressee Member State. As we have seen, the ECJ had not generally allowed textual considerations to constrain its articulation of 'the law'. We might therefore initially find its judgment in *Marshall* somewhat surprising.

[118] [1983] 2 AC 751 at 771.

[119] Ibid.

The horizontal and vertical direct effect of directives. *Marshall v Southampton and South West Hampshire Area Health Authority* (1986)

Marshall[120] returned to the adequacy of the UK's attempts to implement Art 119. Mrs Marshall's employer—which was part of the National Health Service—operated a discriminatory retirement age policy: men could work until sixty-five, women had to retire at sixty. This was lawful under the UK's sex discrimination legislation, but seemed incompatible with Directive 76/207.[121] The Court of Appeal asked the ECJ if the Directive precluded discriminatory retirement ages, and, if so, whether Mrs Marshall could enforce the directive against her employer in the national courts.

The ECJ answered both questions affirmatively. However it then made a more general point. Directives could only be directly effective against 'public authorities': they could not be enforced in national courts against private sector organisations or individual citizens. Mrs Marshall's employer was a public or governmental body for these purposes: had she worked for a private hospital, she could not have claimed her EEC entitlements until Parliament had implemented the directive by amending the domestic legislation.

Marshall is a very surprising judgment for several reasons. Firstly, there was no need for the ECJ to address the general question of whether a directive could have horizontal direct effect. Mrs Marshall's case would have been resolved simply on the basis of the conclusion that her employer was a governmental body. Secondly, the judgment is premised on a literalist rather than teleological construction of the Treaty. In *Marshall*, allusions to the 'spirit, scheme and general wording' of the Treaty are notably absent, while a reference to the explicit text of Art 189 (stressing that directives are addressed only to Member States and so cannot have horizontal effect) enjoys an unusually prominent position.

That in itself is somewhat unusual. It becomes more so when one appreciates that in teleological terms the *Marshall* principle appears to run counter to the whole thrust of the ECJ's previous effet utile case law. This takes us to the third reason. *Marshall* manifestly creates the problem of partial application of EEC law that the ECJ took such pains to avoid in *Walrave* and *Defrenne* in respect of Treaty articles. Within any Member

[120] Case 152/84: [1986] ECR 723.

[121] A piece of secondary legislation which addressed some aspects of the 'indirect and disguised' discrimination adverted to in *Defrenne*.

State where the same kind of economic activities were carried out in the public and private sectors, the very real possibility arose that its public sector employees would have easier access to EEC benefits than private sector workers.[122] Such partiality could also arise in a trans-national sense. In a Member State where, for example, health care services were provided entirely by the government, the substantive contents of directives would automatically be accessible in domestic law in respect of that area of economic activity. In a Member State where health care was largely a private sector activity, the availability of that substantive law would be contingent on the Member State having properly implemented the directive in domestic law. And it need hardly be said that the various Member States had very different traditions concerning allocation of particular economic activities to the public and private sectors.[123] These are hardly subtle points. It must have been apparent to the ECJ that its judgment would create these problems.

The fourth curiosity of *Marshall* is that it fits very unhappily with proposals then being refined by the Commission to invite the Member States to implement some major amendments to the original Treaty. It was evident by the early 1980s that the reality of a truly 'common market' among the Member States had yet to be achieved: a great many national law barriers to the free movement of goods, workers, and services remained in place. The amendments being floated by the Commission proposed that the Community embark upon a rigorous 'Single Market' program of legal harmonisation of Member States' laws.[124] The programme was to rely substantially on the use of directives. Its success could hardly be helped, and would more likely be markedly hindered, by the ECJ's conclusion in *Marshall*. This too is an obvious point. All in all, *Marshall*, if viewed in isolation, seems a quite extraordinary judgment.

Making sense of *Marshall*. The emergence of 'indirect effect'

We can perhaps begin to find a better explanation for *Marshall* by placing the case in a slightly broader

[122] See Curtin D (1990) 'The province of government: delimiting the direct effect of directives in the common law context' *European Law Review* 195; Arnull A (1987) 'The incoming tide: responding to *Marshall' Public Law* 383.

[123] *Marshall* might also provide Member States with an incentive to 'privatise' certain public sector activities in order to escape the automatic impact of unwelcome directives.

[124] The issue is discussed further in ch 13.

context. Consideration might firstly be given to a judgment delivered shortly before *Marshall* in the combined cases of *Von Colson* and *Harz*.[125] The cases presented the ECJ with blatant examples of gender discrimination; in *Von Colson* by a government employer, and in *Harz* by a private company. The ECJ suggested that the literal meaning of the German law passed to implement the relevant EC Directive (No 76/207) did not give adequate effect to the EC law's intentions. If—as the ECJ was soon to announce in *Marshall*—directives had only vertical direct effect, Ms Von Colson could have relied upon the directive itself, but Ms Harz could not. Rather than approve so patently discriminatory an outcome in the two cases, the ECJ opted for a strategy which allowed both claimants to enforce their EC rights in the same way. The principle which the ECJ uncovered (or created) in *Von Colson* has become known as 'indirect effect'. The nub of the ECJ's judgment was that the German courts hearing the *Von Colson* and *Harz* cases were obliged by EC law to interpret domestic law in a manner that facilitated the achievement of EC objectives. The duty of loyalty imposed by Art 5 of the Treaty bound not just national legislatures and governments, but embraced:

> . . . all the authorities of the Member states including . . . the courts. It follows that, in applying the national law and in particular the provisions of a national law introduced in order to implement Directive 76/207, national courts are required to interpret their national law in the light of the wording and purpose of the directive in order to achieve the result referred to in the third paragraph of Art 189. . . . in so far as they are given discretion to do so under national law.[126]

The above extract typifies the rather ambiguous nature of the ECJ's *Von Colson* judgment. Read superficially, *Von Colson* seems to suggest no more than the uncontroversial proposition that a domestic court interpret ambiguous domestic legislation in a manner that accords with its country's international law obligations. But once the judgment was placed in the context of the EC as a 'new legal order', several rather thorny questions arose.

A principle of limited or wide scope?

For example, did 'discretion under national law' include the precedence principle espoused by the ECJ in

[125] Case 14/83: [1984] ECR 1891; and Case 79/83: [1984] ECR 1921.

[126] Ibid, at paras 26 and 28.

Costa, *Internationale* and *Simmenthal*, or was it to be restricted to 'purely' domestic legal principles. Similarly, was the national courts' 'interpretive' technique to mirror the ECJ's own teleological, integrationist position, or remain loyal to less adventurous domestic principles? In a country with a literalist interpretive tradition, a narrow construction of the *Von Colson* principle on this point might render the principle quite useless. This obviously raises a 'uniformity' problem across the Member States.

Relatedly, was 'national law' to be interpreted as a concept entirely at large within the domestic legal system, or one limited solely to legislation introduced specifically to implement a directive? If the former view was taken, national courts could presumably scour all domestic laws for a suitable legal peg on which to hang the EEC law right, or even, in some legal systems, fashion a new law themselves with which to achieve the result sought by the directive. If the latter view prevailed, *Von Colson* would not assist citizens in Member States which had assumed that domestic legislation pre-dating the relevant directive fulfilled the EEC's objectives, or had not introduced any implementing legislation at all.

The implications of *Von Colson*

While providing a route round *Marshall* in some instances, *Von Colson* perhaps raised more questions than it solved. Yet in one sense the judgment might be seen as an extra-ordinarily clever exercise in supra-national judicial constitution-making, as the ECJ recast the problem of unimplemented directives from being a dispute between the Member State and the ECJ to a dispute between the Member State's government and/or legislature and its own courts.

There are two reasons—each flowing from considerations of domestic constitutional tradition—to assume that domestic courts might be more willing to accept the effet utile principle if it could be pursued through indirect rather than direct effect. Firstly, indirect effect merely enjoins domestic courts to 'interpret'. They are not asked to 'make' or 'impose' law. They are thus engaging in a much more obviously 'judicial' role. Secondly, national courts are required to interpret the Member State's own law, which law one assumes has been promoted by a government and enacted by a legislature[127] in order to give effect to the directive concerned. The national court is thus only giving legal effect to a political value which has already been

[127] It is of course possible that in some Member States the power to produce the 'laws' required might rest exclusively with the government.

accepted as legitimate by other governmental actors who have unwittingly failed properly to carry out the State's obligations.

Indirect and direct effect also have quite different implications for the nature of the relationship between the ECJ and national courts. Direct effect creates an ECJ/national court relationship which is in essence vertically hierarchical. Domestic courts are to all intents and purposes being told that they must simply apply laws whose meanings are determined exclusively by the ECJ. The national court is no more than an agent of the ECJ. Indirect effect accords much more authority and responsibility to national courts. The relationship the principle creates between the ECJ and the national might defensibly be portrayed as one of partnership rather than hierarchy; in which the ECJ is heavily dependent upon the creativity of national courts. *Von Colson* was perhaps intended to signal that the ECJ was radically rethinking the nature of its relationship with domestic courts. The ECJ perhaps further emphasised this point in *Johnston v Chief Constable of the Royal Ulster Constabulary*, when it held that a domestic court should invoke the direct effect of a directive against a government body only if it was unable to achieve the same result through creative interpretation of national law.[128]

This gives rise to the inference that the ECJ's judgment in *Marshall* may have been prompted in part by an ECJ concern—in the light of *Solange (No 1)* and *Cohn-Bendit*—to offer reassurance to national courts which were unwilling even to allow domestic law to mirror the requirements of the effet utile doctrine that the ECJ was sensitive to their concerns. The *Conseil d'Etat*'s judgment in *Cohn-Bendit* presented the ECJ with a profound strategic difficulty. For the ECJ to have expressly criticised the *Conseil d'Etat* would likely have triggered an escalation in the disagreement between the two courts. Yet the ECJ could hardly be expected to reverse its own conclusion in *Van Duyn*; to do so would compromise the effet utile principle, undermine the ECJ's own jurisprudential integrity in a general sense, and send an invitation to other national courts to challenge the content of ECJ jurisprudence. *Marshall*, *Von Colson*, and *Johnston* can be seen as an ingenious middle way between those two unpalatable and impractical alternatives. *Marshall* signals an end to the seemingly inexorable onward march of the direct effect principle, and thus to the de facto subordination of national courts to the ECJ. The judgment, rooted largely in a literalist interpretation of Art

[128] Case 222/84: [1986] ECR 1651 at paras 53–54.

189, makes a methodological nod to the *Conseil d'Etat*'s approach to Treaty construction in *Cohn-Bendit*. The obviously deleterious implications of *Marshall* for the uniform impact of EEC law are then partially ameliorated by *Von Colson*, in a fashion which enhances the role of national courts in determining the meaning of EEC law and offers national courts protection against domestic constitutional criticism. That enhancement is then promptly lent an extended reach in *Johnston*. Quite how this new phase of inter-judicial relationships would develop remained to be seen.

An analytical overview: 'normative' and 'decisional' supra-nationalism

The interplay of law and politics was a pervasive feature of the EEC's early constitutional development. In an influential critique in 1981, Joseph Weiler suggested that this process was best understood in terms of a distinction between what he termed 'normative' and 'decisional' supra-nationalism.[129]

Normative supra-nationalism concerned the formal status of EEC law vis-à-vis the domestic law of the Member States. In decisions such as *Van Gend*, *Costa*, *Internationale*, and *Simmenthal*, the ECJ had fashioned principles which indicated that 'the relationship between the legal order of the Community and that of the Member States has come to resemble increasingly a fully fledged (USA type) federal system.'[130] Yet Weiler suggested that just the opposite trend was evident in respect of decisional supra-nationalism, which concerned the characteristics of the practical reality of institutional relations within the Community's legislative and administrative processes. In this sphere, the EEC had become increasingly inter-governmental in nature. The Luxembourg Accords exemplified this trend; as did the emergence of a body known as the 'European Council', a forum for regular summit meetings of heads of government of the Member States, which (like the Luxembourg Accords) existed entirely outside the Treaty's legal structure, but manifestly had an important influence on the conduct of Community business in the Council of Ministers. Weiler also suggested that a similar, albeit not obviously 'unconstitutional' result was produced by the growing influence of COREPER[131] on the Commission's task of initiating legislation. The combined

[129] (1981) 'The Community system: the dual character of supra-nationalism' *Yearbook of European Law* 267.

[130] Ibid, at p 273.

[131] See fn 5, p 338.

effect of these developments was that the Council had become a forum for individual countries to engage in 'package deal decision-making' and 'high powered political horse-trading'.[132] Moreover, the Commission and Parliament were ill-equipped to counter this trend, in part at least because of the community's so-called 'democracy deficit.' Without an electoral mandate from 'the people' of the EEC, neither institution could forcefully assert an integrationist agenda against the nationalist wishes of (elected) Member State governments.

Although this normative/decisional divergence presented an apparent paradox, in that the EEC was in one sense increasingly coming to resemble a pure form of federal constitutionalism, while in another it seemed no more than a loose association of entirely autonomous sovereign states, Weiler suggested that, on further consideration, the EEC could not, in the short term, have survived in any other way. By pulling in opposite directions, these forces had created:

> an equilibrium which explains a seemingly irreconcilable equation: a large . . . and effective measure of transnational integration, coupled at the same time with the preservation of strong, unthreatened, national Member States.[133]

Weiler's argument is a contentious one, and since it lies in the realm of constitutional and political theory, cannot be 'correct' in any definitive sense. But for our purposes, it is more important for the questions it raises than any answer it might provide. For if the EEC was by then established as a unique form of governmental authority, if it was indeed unlike anything with which Britain's 300-year-old constitution had previously dealt, one might wonder if the stage had not been set for Professor Wade's legal revolution to make its long-awaited appearance? That is a question addressed in chapter twelve.

The reduction of the 'democratic deficit' and the emergence of human rights as general principles of EEC law

Some tentative steps had been taken to address the Community's 'democratic deficit' in the 1970s, primarily by altering the powers and composition of the Parliament. A Treaty amendment which became effective in

[132] (1981) op cit at 288.

[133] Ibid, at 292.

1975 greatly enhanced the Parliament's role in the budgetary process.[134] Perhaps more significantly, from 1979 onwards, the Parliament was to be composed of members directly elected by each nation's electorate, thereby providing it with a 'democratic' basis from which to argue that its powers within the Community's law-making process should be increased.[135]

In the same period, the ECJ also sought to reassure domestic courts as to the substantive legitimacy of EEC law through a more enthusiastic and explicit embrace of an implied doctrine of human rights protection within the Treaty, fleshing out the skeletal jurisprudence adverted to in *Internationale*. In *Nold*,[136] the ECJ suggested it would annul EEC secondary legislation which contravened fundamental constitutional principles common to the Member States, and also indicated it would draw on international human rights treaties for guidance as to what those principles might be. Subsequently, in *Hauer v Land Rheinland-Pfalz*,[137] the ECJ explicitly referred to the European Convention on Human Rights in gauging the 'constitutionality' of EEC secondary legislation. The ECJ did not go so far as announcing the Convention's de facto incorporation into EEC law, yet that seemed an implicit consequence of its judgment. That implication did appear to satisfy Germany's Federal Constitutional Court. That court had never in fact exercised its self-proclaimed power to prevent domestic enforcement of EEC measures which contravened

[134] Ehlermann C (1975) 'Applying the new budgetary procedure for the first time' *CML Rev* 325; Lasok and Bridge op cit pp 258–264.

[135] British Labour MPs opposed to any such increase 'persuaded' the Callaghan government in 1978 to introduce a bill providing that any Treaty enhancing the EP's powers could not be ratified by the government unless approved by an Act of Parliament. This measure, enacted as s 6 of the European Parliamentary Elections Act 1978, had two effects. The first was to qualify the government's power to incorporate new Treaties into domestic law via Orders in Council. The second, more generally, was to place a clear statutory limit on the government's foreign policy prerogatives. It was not however clear then, some seven years before *GCHQ*, if this statutory limit would prove justiciable.

[136] Case 4/73: [1974] ECR 491.

[137] Case 44/79: [1979] ECR 3727.

the Basic Law, but in *Wünsche-Handelsgesellschaft,*[138] it indicated that it was—in a manner similar to the position embraced a decade earlier by the Italian Constitutional Court in *Frontini* and reiterated in *Granital* in 1984—content to assume that the compatibility of EEC secondary legislation with basic human rights norms was now adequately policed by the ECJ.

Conclusion

The combined effects of the preliminary 'democratisation' of the Community's institutional structure and the ECJ's continued attachment to the effet utile strategy were not in themselves sufficient, as Weiler had predicted, to maintain the Community's integrationist momentum. The European Parliament had promoted a Draft Treaty on European Union (DTEU) in 1984, which advocated a radical overhaul of Community institutions and (unsurprisingly) a substantial extension of its own powers. The initiative, which seemed to entail significant political as well as economic integration, was not embraced by the Member States. But by the mid-1980s, it had become evident that even the level of economic integration initially envisaged by the Treaty's framers had yet to be achieved. The Commission consequently sought to re-energise the Community, proposing a wide range of measures (both normative and decisional in nature) which eventually led to the first major amendment to the Treaty of Rome, some thirty years after its birth, in the shape of the Single European Act.

Suggested further reading

Academic and political commentary

Jackson J (1992) 'Status of treaties in domestic legal systems . . .' *American Journal of International Law* 310

Weiler J (1981) 'The Community system: the dual character of supra-nationalism' *Yearbook of European Law* 267

Pescatore P (1983) 'The doctrine of direct effect: an infant disease of Community law' *European Law Review* 155

Allan T (1983) 'Parliamentary sovereignty: Lord Denning's dexterous revolution' *OJLS* 22

Craig P (1992) 'Once upon a time in the west: direct effect and the federalisation of EEC law' *Oxford*

[138] [1987] 3 CMLR 225.

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Nicol D (1999) 'The legal constitution: United Kingdom Parliament and European Court of Justice' *Journal of Legislative Studies* 131

Weiler J (1986) 'Eurocracy and mistrust . . .' *Washington Law Review* 1103

Case law and legislation

Van Gend en Loos [1963] ECR 1

Costa v ENEL [1964] ECR 585

Internationale Handelsgesellschaft [1970] ECR 1125

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Garland v British Rail Engineering Ltd [1983] 2 AC 751

Politi [1971] ECR 1039

Marshall v Southampton and South West Hampshire AHA [1986] ECR 723

Defrenne v SABENA [1976] ECR 455

Von Colson [1984] ECR 1891