PARLIAMENTARY SOVEREIGNTY AND THE CHALLENGE OF EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM

by

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The omnipotence of Parliament is one of the cardinal features of the British Constitution. It has traditionally been believed to consist of the dual propositions that there is no subject on which the Queen-in-Parliament may not legislate and, that no Parliament may bind a successor. Despite periodical challenges, the doctrine had crystallized into orthodoxy by the 19th century. Inasmuch as anything in British constitutional law is definite, the existence of the doctrine of parliamentary sovereignty seems secure. However, this apparent security masks a vigorous debate among commentators over what the doctrine actually means today. The debate has been fuelled by the implications arising out of Britain's accession to the European Community (EC), which views its own legal order as overriding any conflicting laws of its constituent member states. Some two centuries after becoming established as orthodoxy, the doctrine of parliamentary sovereignty is now facing its greatest test. The current legal situation created by Britain's membership in the EC poses the greatest threat to the doctrine's theoretical usefulness in explaining the British constitution as it actually operates today. It is argued that the present doctrine of parliamentary sovereignty, in light of the EC, means no more than that the United Kingdom retains the right of total withdrawal from the EC and that this right is vested in the Queen-in-Parliament as a result of Britain's constitutional history. The traditional notion of parliamentary sovereignty, which encompassed far more than a simple equivalence of parliamentary and national sovereignty, has been overtaken by new political and legal facts.
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<tr>
<td>A.C.</td>
<td>Law Reports Appeal Cases</td>
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<tr>
<td>All E.R.</td>
<td>All England Law Reports</td>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<td>C.A.</td>
<td>Court of Appeal</td>
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<td>Ch.</td>
<td>Chancery Division of the High Court</td>
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<td>C.L.</td>
<td>Current Law</td>
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<td>C.L.J.</td>
<td>Cambridge Law Journal</td>
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<td>C.L.R.</td>
<td>Commonwealth Law Reports</td>
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<td>C.L.Y.</td>
<td>Current Law Yearbook</td>
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<td>C.M.L.R.</td>
<td>Common Market Law Reports</td>
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<td>Cmd.</td>
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<td>Co. Rep.</td>
<td>Coke’s King’s Bench Reports</td>
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<td>Cranch.</td>
<td>Cranch’s United States Supreme Court Reports</td>
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<td>D.L.R.</td>
<td>Dominion Law Reports</td>
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<tr>
<td>E.C.R.</td>
<td>European Court Reports</td>
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<td>E.J.I.L.</td>
<td>European Journal of International Law</td>
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<td>E.L. Rev.</td>
<td>European Law Review</td>
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<td>F.O.</td>
<td>Foreign Office</td>
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<td>H.C. Deb.</td>
<td>House of Commons Debates</td>
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<td>H.L.</td>
<td>House of Lords</td>
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<td>H.L. Deb.</td>
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<tr>
<td>I.C.J. Rep.</td>
<td>International Court of Justice Reports</td>
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<td>I.C.L. Q.</td>
<td>International and Comparative Law Quarterly</td>
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<tr>
<td>J.P.</td>
<td>Justice of the Peace (Weekly Cases)</td>
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<td>K.B.</td>
<td>Kings Bench</td>
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<td>Lloyd’s Rep.</td>
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<td>L.Q. Rev.</td>
<td>Law Quarterly Review</td>
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<tr>
<td>M.L.R.</td>
<td>Modern Law Review</td>
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<td>N.I.L.Q.</td>
<td>Northern Ireland Law Quarterly</td>
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<td>N.L.J.</td>
<td>New Law Journal</td>
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<td>O.J.</td>
<td>Official Journal of the European Communities</td>
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<td>Q.B.</td>
<td>Queen’s Bench Division of the High Court</td>
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<td>S.A.</td>
<td>South African Law Reports</td>
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<td>The Times</td>
<td>The Times of London</td>
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<td>W.L.R.</td>
<td>Weekly Law Reports</td>
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<td>Y.E.L.</td>
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The [EEC] Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.¹

-- Lord Denning

Introduction

The omnipotence of Parliament, or parliamentary sovereignty², is one of the cardinal features of the British constitution.³ The sovereignty of Parliament as a doctrine of constitutional law means that there are no legally enforceable limits to the legislative authority of the Westminster Parliament. The courts interpret and apply Acts of Parliament, but, in the absence of any written constitution for the United Kingdom to impose limits upon Parliament’s

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² In this thesis, the terms ‘parliamentary sovereignty’ and ‘parliamentary supremacy’ are used synonymously.

³ The British constitution is usually considered as consisting of both the unwritten conventions on the workings of government that have developed over the centuries, and of certain written documents of great importance, such as the Magna Carta of 1215, and the Bill of Rights of 1688. The precise contemporary composition of the constitution, however, is impossible to determine authoritatively. As the late Conservative Prime Minister Stanley Baldwin once said:

The historian can tell you probably perfectly clearly what the constitutional practice was at any given period in the past, but it would be very difficult for a living writer to tell you at any given period in his lifetime what the constitution of the country is in all respects, and for this reason...there may be one practice called "constitutional" which is falling into desuetude, and there may be another practice which is creeping into use but is not yet constitutional.

powers, they may not review the validity of legislation. The law relating to the powers of Parliament derives from *obiter dicta* of judges⁴ and the writing of jurists and, hence, the relevant rules are usually classified as rules of 'common law'. In reality they are *sui generis*; it is by no means conceded that Parliament can alter these rules as it can other rules of the common law and it would only exacerbate the confusion about the nature of parliamentary supremacy if any importance is attached to the fact that these rules are classified as part of the 'common law'⁵.

The ultimate rule of the British constitution is that the supreme legislative power rests in the "Queen-in-Parliament", comprised of the House of Commons, House of Lords and the Queen, theoretically sitting together⁶ but in fact sitting separately. The doctrine of parliamentary sovereignty has traditionally been believed to consist of the dual propositions that there is no subject on which the Queen-in-Parliament may not legislate, except that no Parliament may bind a successor. Although by no means unchallenged historically,⁷ the doctrine had crystallized into orthodoxy by the nineteenth century. It was most recently reaffirmed in 1974, in *British Railway Board v. Pickin*⁸. In that case, Lord Simon of Glaisdale,

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in concurring with the majority opinion of the House of Lords⁹, stated:

The system by which, in this country, those liable to be affected by general political decisions have some control over the decision-making is Parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament. This involves that, contrary to what was asserted sometime before the eighteenth century, and in contra-distinction to some other democratic systems, the courts in this country have no power to declare enacted law to be invalid.¹⁰

British Commentators have universally interpreted this case as a strong reaffirmation by the House of Lords of the traditional doctrine of parliamentary sovereignty. Current British textbooks on constitutional law invariably cite Pickin as authority for the proposition that parliamentary sovereignty remains a cornerstone of the British constitutional structure.¹¹

Thus, inasmuch as anything in British constitutional law is definite, the existence of the doctrine of parliamentary sovereignty seems secure. However, this security masks a vigorous

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⁹ In a judicial context, the House of Lords refers to the nine English and two Scottish Lords of Appeal, popularly known as Law Lords, who serve as the final court of appeal for the decisions of most British courts. The Law Lords hear cases in panels of five and decide about fifty cases a year. Although the remaining 1100-odd Lords retain the nominal right to participate in judicial proceedings, they refrain from doing so by longstanding convention.

The other important courts in the English judicial hierarchy are the High Court, the Crown Courts, and the Court of Appeal, Civil and Criminal Divisions. The High Court hears civil cases involving sums higher that the County Courts are competent to hear, and is divided into three divisions - the Queen’s Bench Division, the Chancery Division and the Family Division. The Crown Courts deal with serious criminal offenses. The Court of Appeal receives appeals from all these courts in its relevant Division. The High Court and the Court of Appeal are collectively known as the Supreme Court of Judicature. Separate court systems exist in Scotland and Northern Ireland which converge with the English system at the House of Lords level. See, S.H. Bailey and M.J. Gunn, The Modern English Legal System, (London: Sweet and Maxwell, 1991), c.2.

¹⁰ Pickin, loc. cit. at 798.

debate among commentators over what the doctrine actually means today. This debate has been fueled by the implications arising out of Britain’s accession to the European Community (EC), an organization that views its own legal order as overriding any conflicting laws of its constituent member states.

British membership in the European Community makes it inevitable that Britain, like her co-members, must squarely face the prospect of Community law prevailing over inconsistent domestic legislation. The constitutional issues raised by the United Kingdom’s membership in the European Community remain unresolved. This makes timely a reconsideration of the nature of the British constitution. This thesis assesses the impact of the United Kingdom’s membership of the European Community on the fundamental British constitutional doctrine of parliamentary sovereignty. More specifically, the aim of this essay is to examine how, and to what extent, primacy is accorded to Community law and to see if the words of reassurance given in 1972 proved to be correct, that "nothing in the European Communities Act 1972" abridges the ultimate sovereignty of Parliament, or whether we are witnessing the complete or partial demise of what A.V. Dicey termed as the "very keystone" of constitutional law and politics. It is argued in this thesis that the vigour of the traditional doctrine of parliamentary sovereignty

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12 European Communities Act 1972. The Preamble states:

An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar.

The Act gave legal effect to the treaty obligations of membership in the European Community in United Kingdom courts. See, infra, chapter 4.

13 Sir G. Rippon, 831 H.C. Deb. (15 February, 1972) at 278.

has been considerably vitiated by the effects of the United Kingdom’s accession to the European Community. Further, it is suggested that the sovereignty of Parliament is not immutable and that the doctrine will be increasingly called into question as European integration develops further.

Understanding how the United Kingdom’s membership in the European Community affects the doctrine of parliamentary sovereignty requires an understanding of Britain’s position within the context of the EC. Accordingly, Chapter 2 examines the primary forces which lay behind the impetus for European integration and Britain’s eventual accession to the EC, and provides an overview of the institutional organs of the European Community which have been so vital to the Community’s continued existence. Chapter 3 completes the picture by providing an overview of the new Community legal order that has emerged. Specifically, the sources of Community law and the twin pillars of the Community legal order -- the doctrine of ‘primacy’ and the twin doctrines of ‘direct applicability’ and ‘direct effect’ -- are examined. Chapter 4 investigates the impact that Community law has had in the United Kingdom as a result of Britain’s membership in the EC. Here, the European Communities Act is examined and the issue of supremacy arising from the 1972 Act, and its implications for the idea of parliamentary sovereignty, are discussed. Subsequently, in an analysis of recent British case law on the subject, most notably in the Factortame litigation, it will be illustrated that the British courts have shown a considerable degree of willingness to move away from the traditional formulation of parliamentary sovereignty. Chapter 5 moves beyond the traditional legalistic principle of parliamentary sovereignty and explores the wider dimensions of the doctrine as an issue in British politics today. In light of the above chapters, the Conclusion speculates on the doctrine’s
theoretical usefulness in explaining the British constitution as it actually operates today.

Like other doctrines of the Common law, the British constitutional rules, have, at all stages of their development, reflected the practical political realities in the Kingdom.\textsuperscript{15} It is therefore appropriate that our analysis should begin with a brief treatment of the history of the evolution of the rule of parliamentary supremacy. Accordingly, I now turn, in Chapter 1, to the theoretical and institutional foundations of the sovereignty of the United Kingdom Parliament.

'The sovereignty of Parliament' is an evocative phrase. In an important but imprecise way, it may be thought to express the democratic ideal - that the Palace of Westminster, and in particular the debating chamber of the House of Commons, should exercise greater public authority than other centres of governmental and political power. Only the House of Commons consists of elected representatives: election thus gives legitimacy to the legislative process and to the whole structure of government. Now, whether Parliament today occupies this central place in the structure of government is a different matter. But from a constitutional perspective, the doctrine of the sovereignty of Parliament has a much more specific meaning, which provides a formal base to the system by which laws are made and applied.

Since the publication in 1885 of A.V. Dicey's *The Law of the Constitution*, the sovereignty of Parliament has been accepted as one of the fundamental doctrines of constitutional law in the United Kingdom. The purpose of this chapter is to examine the theoretical and institutional foundations of the doctrine. Discussion in this chapter will be confined to the legal doctrine of sovereignty. No attempt will be made to answer the question of where 'political' sovereignty lies, if indeed that question is one that can be answered with precision. The doctrine of legislative sovereignty does not in itself imply any particular degree of democracy in the parliamentary structure, or any particular electoral system.

**Theoretical Foundations: Alternative Views of Parliamentary Sovereignty**

As with many other features of British constitutional law, parliamentary sovereignty is
derived from the dicta of judges and the writings of jurists, especially jurists connected with Oxford University.\footnote{R.F.V. Heuston, \textit{Essays in Constitutional Law}, 2nd ed., (London: Steven and Sons, 1964) at 1.} Chief among these jurists was the late nineteenth century Vinerian Professor of Law, A.V. Dicey. Professor Dicey’s formulation of the doctrine of parliamentary sovereignty can be found in his authoritative \textit{Law of the Constitution}. Having defined Parliament as the Queen, the House of Lords and the House of Commons "acting together", he said that "Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever, and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."\footnote{A.V. Dicey, \textit{loc.cit.} at 39-40.} In other words, there are no legal limits to the legislative authority of Parliament. When that authority is exercised in the form of an Act of Parliament, no court or other body has power to hold such an Act to be void or invalid or in any respect lacking in legal effect.

For Dicey, a necessary corollary of this definition is that a Parliament cannot bind its successors in any manner, whether procedural or substantive.\footnote{Although it seems clear that Dicey was primarily concerned with the absence of any judicially enforceable \textit{substantive} limitations on the power of the British Parliament, rather than the absence of any judicially enforceable \textit{procedural} limitations on its power, his formulation of the doctrine has generally been taken to cover both.} As he notes "A sovereign power cannot, whilst retaining its sovereign character, restrict its own powers by any particular enactment…‘Limited sovereignty’, in short, is in the case of a Parliamentary as of every other sovereign, a contradiction in terms."\footnote{Ibid., p. 73.} In this view, then, the provisions of a later act, insofar
as they are inconsistent with an earlier act, must prevail.

Professor H.W.R. Wade, in his well-known treatise *The Basis of Legal Sovereignty*, defends Diceyan orthodoxy, maintaining that the "United Kingdom Parliament is, in the eyes of the English courts, a continuously sovereign legislature which cannot bind its successors as to 'manner and form' or anything else". The truth, he asserts, is that there is an 'ultimate legal principle' or 'grundnorm' that judges will obey statutes and that Acts of Parliament have force of law. No statute can establish that rule; equally no statute can alter or abolish that rule.

Dicey's formulation of the doctrine has come under challenge from a number of constitutional scholars, particularly in the last half of this century. But it has to this day always been the preferred formulation of the courts in the United Kingdom. Although challenges to the validity of legislation enacted by the Parliament of the United Kingdom have been few and far between, the courts have consistently rejected those that have been brought.

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20 The term 'manner and form' appears to have its origins in section 5 of the *Colonial Laws Validity Act*, 1865 (U.K.) which authorized colonial legislatures to amend their constitutions but stipulated that such amendments had to be made "in such manner and form as may from time to time be required" by any Act of Parliament...for the time being in force in the said colony" (emphasis added). The effect of section 5 was to condition the validity of such amendments on the observance by the colonial legislature of requirements relating to both the manner (or procedure) by which and the form in which such amendments were to be made. The term refers to the procedures by which legislation is enacted rather than to the content (substance) of the legislation itself.


A good example is the decision in Manuel v. Attorney General, which arose out of the patriation of Canada's constitution in the early 1980s. The challenge in that case was to the validity of the Canada Act 1982 and was based on the contention that section 4 of the Statute of Westminster imposed on the Parliament of the United Kingdom a binding requirement that, before it enacted legislation intended to apply in Canada, it had to have the consent of the aboriginal peoples of Canada, whose consent in this instance had been lacking. That contention was summarily rejected by Lord Justice Megarry who said that "from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires. It is fundamental of the English constitution that Parliament is supreme." In 1974, Lord Morris summarized the reasons for this view in the well known Pickin case:

It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on

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25 (U.K.), 1982, c.11.

26 (U.K.), 22 Geo. 4 c.4. Section 4 provides as follows:
No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

27 They argued that at least insofar as Canada was concerned, "Dominion" should be read to include inter alia the Indian nations of Canada.

28 Manuel, loc.cit. at 89.
the statute book at all.\textsuperscript{29}

In contrast to the 'traditional' conception of Parliamentary sovereignty formulated by Dicey and the neo-Diceyans, a more modern rationale of the doctrine, often referred to as the 'new view', can be seen in the writings of Jennings, Heuston, Mitchell and de Smith.\textsuperscript{30} On this view, while Parliament cannot impose limits on the content of legislation of future Parliaments, it can change the manner and form in which it legislates so that future Parliaments are bound by a "manner and form" requirement.

One of the first constitutional scholars to challenge Dicey's formulation of the doctrine was Sir Ivor Jennings. At the heart of his critique was the contention that Dicey's formulation left unanswered the question of what constituted a valid expression of the will of Parliament. When one did answer it, one was driven to conclude that the doctrine as Dicey had formulated it was unacceptable. The reason that was so was that, for Jennings, that question was a question of law and, as such, was one over which Parliament itself had control. He expressed the revised doctrine of parliamentary sovereignty to which this reasoning led him on the following terms:

'Legal sovereignty' is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, "with the advice and consent of the Lords spiritual and temporal, and Commons in the present Parliament assembled, and by the authority of the same" will be recognised by the courts, including a rule which alters this law itself. If this is so, the 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.... The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911. But, Parliament may, if it pleases, provide another

\textsuperscript{29} See Pickin, \textit{loc.cit.} at 789.

\textsuperscript{30} \textit{Loc.cit.}, \textit{supra}.
manner and form. Suppose, for instance, that the present Parliament enacted that
the House of Lords should not be abolished except after a majority of electors had
expressly agreed to it, and that no Act repealing that Act should be passed except
after a similar referendum. There is no law to appeal to except that Act. The
Act provides a new manner and form which must be followed unless it can be
said that at the time of its passing that Act was void or of no effect.31

Professor Heuston, writing in the early 1960s, summarized Jennings 'New View' of
parliamentary sovereignty, to which he subscribed, in the following terms:

(1) Sovereignty is a legal concept: the rules which identify the sovereign and
prescribe its composition and functions are logically prior to it.
(2) There is a distinction between rules which govern, on the one hand, (a) the
composition, and (b) the procedure and, on the other hand (c) the areas of power,
of a sovereign legislature.
(3) The courts have jurisdiction to question the validity of an alleged Act of
Parliament on grounds 2(a) and 2(b), but not on ground 2(c).32

In support of this alternative formulation of the doctrine of parliamentary supremacy,
both Heuston and Jennings relied on the decision of the Privy Council Attorney General, New
South Wales v. Trethowan,33 in which the legislature of New South Wales was held to be
bound by a self-imposed manner and form requirement.34 The fact that the decision appeared
to have been based on a provision of the Colonial Laws Validity Act, 1865, a statute to which
the Parliament of the United Kingdom was not subject, was in their view, of little concern. But

31 Jennings, loc.cit. at 147-149.

32 Heuston, loc.cit. at 6-7.


34 The requirement in that case stipulated that no bill to abolish the upper house of the state
legislature could be presented for Royal Assent without first being approved in a public
referendum. To protect that requirement from repeal by simple majority vote, the legislation
also stipulated that a bill repealing it had to be approved in a referendum. The case arose when
a future legislature purported both to repeal the legislation embodying the requirements and to
abolish the upper house without holding referenda.
it is clear from both Jenning's and Heuston's discussion of this issue that their preference for this revised formulation of the doctrine lay not in the fact that there was a decision of the Privy Council that appeared to support it, but in the simple and highly appealing logic upon which it was based.

Regardless of which of the views of parliamentary sovereignty one subscribes to, the fundamental relationship that exists between the courts and the legislature (namely, that the courts must accept as law any Act of Parliament) presents a strong contrast with those countries in which a written constitution imposes limitations upon the powers of the legislature, and where such limitations may be enforced by the courts. In 1803 this power of judicial review of legislation was declared to be a fundamental rule of the United States Constitution by the Supreme Court in a famous and influential decision. Marbury v. Madison. As Chief Justice Marshall said then:

The constitution is either a superior paramount law, unchallengeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall be pleased to alter it. If the former part of the alternative is true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

It was, Marshall continued "emphatically the province and duty of the judicial department to say what the law is." Therefore, it was for the court where necessary to hold that an Act of Congress was void should it conflict with the terms of the constitution.

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35 Two other cases Harris v. Minister of Interior, [1952] 2 S.A. 428 and Bribery Commissioner v. Ranasinghe [1965] A.C. 172, provided further judicial support for the logic of the 'new view'. However, like Trethowan, both cases concerned matters that the U.K. Parliament was not subject to.

36 [1803] Cranch. 103 at 177.
In many other countries where there is a written constitution, the same approach applies and either the ordinary courts or a special constitutional court have the function of upholding the constitution, if necessary even against acts of the legislature. These countries include Canada, Australia and Germany.

We have seen that where there is a written constitution, its terms may prevail over acts of the legislature. In the absence of a written constitution, it is theoretically possible that the judges could exercise a power to review legislation, based for example on principles of natural justice and fundamental human rights. But the practice of British judges for several centuries has been to deny that they have any such role. Their duties extend to the application and interpretation of legislation, but stop short of a power to review Acts of Parliament.


In the absence of a written constitution for the United Kingdom, where is the source of the legal rule that there are no limits on the legislative capacity and that courts may not review the validity of legislation? For reasons of logic, one should not expect to find this rule created by an Act of Parliament. As was said by the jurist Salmond, "No statute can confer this power upon Parliament, for this would be to assume and act on the very power to be conferred." In fact the United Kingdom Parliament has never expressly attempted to confer upon itself legislative omnipotence. So, for the reason stated by Salmond, it is to the decisions of the courts that we must look to discover propositions about the legislative powers of Parliament.

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Whatever may have been the earlier position, since 1700 the weight of judicial authority has given support to the doctrine of legislative omnipotence. Thus, in 1872 the court said, "There is no judicial body in the country by which the validity of an Act of Parliament can be questioned. An act of the Legislature is superior in authority to any court of law...and no court could pronounce a judgement as to the validity of an Act of Parliament." And in 1906, the High Court of Justiciary in Edinburgh said, "For us an Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to its terms." We may thus conclude that there is a rule of law that the courts have no authority to review the validity of Acts of Parliament. One question remains, however, how is it that this rule of law came to be? Like other doctrines of the common law, the British constitutional rules have, at all stages of their development, reflected the practical political realities in the United Kingdom. The history of the evolution of the rule of parliamentary supremacy is, in fact, the history of the doctrine of the Rule of Law in England.

The medieval conception of the Rule of Law was that the governmental institutions were created by the common law, and therefore, their powers were defined by it. To quote Bracton's classic dictum: "The King must not be under man but under God and under the law, because law

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38 Dr. Bonham's case, [1610] 8 Co. Rep. 113b ("When and Act of Parliament is against right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge that Act to be void").


40 Mortensen v. Peters, [1906], Fraser, Court of Session Cases (Scotland) 1898-1906 at 100.

41 J.D.B. Mitchell, loc.cit. at 70.
makes the King.\footnote{2 Holdsworth at 252.} The growth of royal power under the Tudors and Stuarts challenged this doctrine but the Courts generally reasserted it most significantly against Parliament in Dr. Bonham's case.

It is clear that even by 1610 the Rule of Law had generally come to mean rule of law as enacted by Parliament,\footnote{4 Holdsworth at 187.} at least where the Act was not contrary to scripture or some very basic conception of the constitution, such as Magna Carta.\footnote{2 Holdsworth at 444.} In the turbulent political atmosphere of the early seventeenth century, legal doctrine was frequently used to bolster a political argument. The conception of 'fundamental law' embodying the common law or the ancient liberties of Anglo-Saxon England, as embodied in Magna Carta, was employed by all sides of political controversies until the end of the eighteenth century.\footnote{For an excellent analysis of the history of 'fundamental law' in England, see J.W. Gough, Fundamental Law in English Constitutional History, (Oxford: Clarendon, 1955).} The idea that Parliament could not change certain principles of the common law was, however, soon seen to favour the Royalists, for the Royal Prerogative was clearly a major doctrine of the common law. Accordingly, the parliamentarians gained the support of the common lawyers who realised that if Royal claims were to be rejected by the law, the Rule of Law must come to mean rule of the law as enacted by Parliament, and not the rule of the ancient common law.\footnote{2 Holdsworth at 441-442; 4 Holdsworth at 187-189.} This alliance and mutual respect between Parliament and the common lawyers has had a profound effect on the
development of English law, particularly in judicial recognition of parliamentary supremacy\textsuperscript{47} and parliamentary acceptance of judicial independence.\textsuperscript{48} Thus, by the eighteenth century,\textsuperscript{49} and, for all practical purposes, by the time of the 'Glorious Revolution' of 1688, the sovereignty of Parliament was clearly established.

Three important themes must be acknowledged. First, the medieval Parliament was conceived of as a court, the highest in the realm, and was usually called the "High Court of Parliament."\textsuperscript{50} The rule that the ordinary courts lacked jurisdiction to review the validity of statutes was a natural consequence of this conception. It was only after 1688 that the role of Parliament in creating new law was understood but, even so, not until the nineteenth century was Parliament clearly seen as a body which not only could, but also should, reform the common law. Nevertheless, the influence of the notion of Parliament as the highest court long persisted, adding greatly to the arguments against judicial review of legislation.

Secondly, the sovereignty of Parliament was justified by the theory that because "the people" elected Parliament, its supremacy meant, in effect, the "sovereignty of the people."\textsuperscript{51} Of course, Parliament was not even remotely representative of "the people" until the Reform Act of 1832, the passage of which, accordingly, lent great support to the doctrine of parliamentary

\textsuperscript{47} For a discussion of the reconciliation of the Rule of Law with the sovereignty of Parliament see Dicey, \textit{Law of the Constitution}, 406-414.

\textsuperscript{48} Act of Settlement 1700, s. 3.

\textsuperscript{49} 10 \textit{Holdsworth} at 527.


Finally, there was the establishment of the monopoly of legislative power in Parliament, a monopoly in the sense that legislation emerges from Parliament or under its authority. The particular significance of this is the establishment of that monopoly against the Crown, reflected in the great seventeenth century struggles; but also in the attitude to treaties. Since the treaty-making power remained with the Crown, it followed that a treaty could not, of its own force, enter into United Kingdom law, unless its content were incorporated by statute: otherwise the delicate constitutional balance would have been at risk. This further reinforced the conception that Parliament’s will was supreme.

To conclude this chapter, then, the rule of parliamentary supremacy has evolved from the common law. The debate about the sovereignty of Parliament has revolved around one central question. Does Parliament’s power to legislate on any subject include the power to limit the area of competence of jurisdiction of future Parliaments? Diceyan orthodoxy suggests that each Parliament will have exactly the same powers as its predecessor; it will be able to legislate on every subject bar one - it will not be able to restrict the legislative competence of future Parliaments. The ‘new view’ scholars, most notably Jennings and Heuston, maintain that while Parliament may be unable to restrict the substantive power of future Parliaments, it may be able to impose procedural (manner and form) restrictions on them.

The ‘new view’ of parliamentary sovereignty has clearly become the preferred view amongst constitutional scholars. But, although Dicey’s formulation of the doctrine has come under challenge, it has to this day remained the preferred formulation of the courts of the United

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52 Mitchell, loc.cit. at 70.
Kingdom. While Manuel, Pickin, Ellen Street Estates and Vauxhall all reaffirm the legislative supremacy of Parliament as far as the judiciary are concerned, none of these cases raised any of the problems now at issue as a result of the European Communities Act 1972. Significantly, for Lord Justice Megarry in Manuel, "the simple rule of the duty of the court to apply every Act of Parliament" was subject to the caveat that he could leave aside the European Communities Act and all that flowed from it, judicial recognition of the difficulties raised, and the fact that a case with a European element is no longer answerable by application of a 'simple rule'. The question of whether any view of parliamentary sovereignty can be maintained since entry into the European Community remains open.

Admittedly, the above analysis has been more legal that political in its approach. A more politically oriented inquiry would place much less emphasis on sovereignty when describing the political establishment and the way the constitution works. We all know that Parliament hardly 'legislates' at all and it is the Government which produces legislation for scrutiny and debate. Nevertheless, only an Act of Parliament has legislative effect, and if the 'will of Parliament' is an unreal concept, that of Parliament as the ultimate authority is not.

To such a constitutional framework, accession of the United Kingdom to the European Community posed a direct challenge. The assertion of the primacy of Community law over national law contradicts Dicey's formulation - the Community institutions are, as will be shown, clearly bodies which claim the right to override legislation of Parliament and to make laws which Parliament cannot, for all practical reasons, unmake. For the proponents of the 'new view' of sovereignty the challenge was more subtle. The assertion of Community law supremacy appeared an attempt to impose limits on the content of legislation - could this be met by
amending the 'manner and form' of legislation? Such a procedural change might be accommodated in the theory. Yet the issue is not just one of theory - but of how far the accession to the EC and developments since then have resulted in a weakening of Parliament as the ultimate constitutional authority.
Chapter 2: The Birth and Growth of the Community

Understanding how the United Kingdom's membership in the European Community affects the constitutional cornerstone of parliamentary sovereignty requires, to state the obvious, an understanding of Britain's position within the context of the EC. Accordingly, the present chapter examines the primary forces which lay behind the impetus for European integration and Britain's eventual accession to the EC, and provides an overview of the institutional organs of the European Community which have been so vital to the Community's continued existence. The subsequent chapter will complete the picture by examining the legal foundations of the new Community order.

The European Community is a result of an impulse towards solidarity spawned from post-war developments and of the conscious effort to create a form of unity in Western Europe. When political unification proved premature, as will be discussed below, the architects of the Community seized upon the economic advantages of collaborative inter-state relations. They built these economic elements into three 'Communities' (coal and steel, atomic energy, and a common economic market), so much so that today, within a somewhat vague though clearly emerging notion of a political community, we have three legally definable treaty-based 'Communities', with one in particular -- the European Economic Community (EEC) -- emerging into a European Federation of sorts.

Historical Development

Twice in the Twentieth Century and for ages previously, war has plagued the European...
continent. Although the yearning for peace after World War II was translated into a desire for a "United Europe"\textsuperscript{53}, as evidenced by the call of the 1948 Hague Congress for Western European economic and political union, the first concrete steps toward European integration were prompted by the spectre of Soviet expansion. Despite the United States defence commitment affirmed in the North Atlantic Treaty, Western Europe stood divided and vulnerable in the face of a Soviet Union whose wartime military potential had scarcely been diminished by demobilization, and whose political and economic influence had been enhanced by successful Communist Party coups in Bulgaria, Rumania, Poland and Czechoslovakia.\textsuperscript{54} It was in this context that Robert Schuman, the French Foreign Minister, made an historic proposal to a ministerial meeting in London on May 9, 1950.\textsuperscript{55} His proposal was for no less than the fusion of the coal and steel industries of France and Germany, and any other countries wishing to participate, under a supranational high authority. Not only would such a pooling of production make future conflict between France and Germany impossible, it would provide a sound base for economic expansion. The implications of the scheme were clearly far-reaching, constituting, as Schuman explained, "the first concrete foundation for a European Federation which is so indispensable for the preservation of peace".\textsuperscript{56}

The Schuman Plan was enthusiastically endorsed by the Benelux countries, France,


\textsuperscript{54} \textit{NATO - Facts and Figures}, (Brussels: NATO Information Service 1971), c.1.


\textsuperscript{56} \textit{Ibid}. 
Germany and Italy, but the United Kingdom declined to participate, refusing to accept the role of a projected supranational authority. The Treaty Establishing the European Coal and Steel Community (Treaty of Paris) was signed in Paris on April 18, 1951, and came into force on July 20, of the following year.\textsuperscript{57}

The Treaty of Paris defines the task of the Community as that of establishing a common market in coal and steel products, and prohibits duties, subsidies and restrictive practices as being incompatible with that aim.\textsuperscript{58} In order to carry out its allotted task, the Community enjoys a limited power of intervention in the economies of Member States. The Preamble of the Treaty emphasizes its political inspiration, recording the resolve of the signatory powers to:

\begin{quote}
...substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis of a broader and deeper Community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforth shared.
\end{quote}

The reference to common institutions is particularly significant, for as Mr. Schuman had pointed out, the Coal and Steel Community was to constitute the first stage of European Federation. In accordance with this aim, the Treaty establishes four institutions: a High Authority, a Special Council of Ministers, a Common Assembly and Court of Justice.\textsuperscript{59} Thus, it is in the Treaty of Paris that the four fundamental institutions of the European Communities today originate.

In June of 1955, a conference of the foreign ministers of the ECSC met at Messina and expressed the belief that the time had come to make another advance towards the building of

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\textsuperscript{58} Treaty of Paris, art. 44.

\textsuperscript{59} Treaty of Paris, art. 7.
\end{quotation}
Europe, and that this must be achieved first of all in the economic field. The twin objectives were agreed of developing atomic energy for peaceful purposes, and establishing a European common market. A committee under the chairmanship of the Belgian Foreign Minister, Paul-Henri Spaak, was entrusted with the task of making proposals to this end. The United Kingdom declined to participate in the work of the committee.

The Spaak Report was published on April 21, 1956. It noted that the individual national markets in Europe were incapable of achieving the economies of scale achieved in the United States. It defined the object of a common market as the establishment of a large area with a common economic policy, establishing a powerful unit of production, which would allow continuous economic expansion, and the development of harmonious relations between the member states. The report examined, *inter alia*,

- the establishment of a customs union
- the free movement of persons, services and capital
- the establishment of a common agricultural policy
- the establishment of a Community competition regime
- the correction of market distortions arising out of divergent national legislation

In the committee's view it was impossible to establish a Common Market without institutional supervision of a transnational nature.

After the negotiations which followed the endorsement of the Spaak Report by the Governments of the Six, two treaties were signed at Rome on March 25, 1957 providing for the establishment of a European Economic Community (The Treaty of Rome), and a European

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60 Royal Institute of International Affairs, *Documents on International Affairs*, (1955), (London: Oxford University Press) at 163.


The Treaty of Rome and the EURATOM Treaty follow the institutional pattern of the Treaty of Paris. Each of these three treaties empowers a Council of Ministers, a Commission (called High Authority in the ECSC Treaty), a Parliament and a Court of Justice. This led to an unnecessary and confusing institutional structure which was remedied in part by merging the Court and Parliament in 1957 and later the Council and Commission by the so-called "Merger Treaty" of 1967. Since then, there has been one Council, one Commission, one Parliament and one Court, all staffed by the same people. Each of these institutions, however, derives its power and authority from the terms and conditions of whatever treaty it is acting under. In other words, the treaties were not merged, only their institutions. The three Communities

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remain legally distinct. Thus, when the Commission acts on coal and steel matters, the legality of its actions is measured by the Treaty of Paris. When the Council legislates on atomic energy, the EURATOM treaty controls, and so forth. Given the scope of the Treaty of Rome establishing the EEC, the institutions of the Community most often operate under its terms.

Largely in response to the creation of the EEC, Austria, Denmark, Norway, Sweden, Switzerland, Portugal and the United Kingdom signed the Stockholm Convention on January 4, 1960, and the European Free Trade Association (EFTA) came into being in May of that year. The primary object of the "outer Seven" was to offset any detrimental effects to their trade resulting from the progressive elimination of tariffs inside the Community by a similar reduction within the EFTA. To a certain extent, EFTA was regarded as a stepping stone to possible future membership of the EEC. Indeed, barely 14 months after the Stockholm Convention entered into force, the Macmillan Government applied for EEC membership. This was to be the first of two applications thwarted by the opposition of President Charles de Gaulle. After lengthy negotiations had taken place within the Six, the French President made it clear in January 1963 that he would not consent to British accession.

Applications in 1967 by the United Kingdom, Denmark, Ireland and Norway met with similar rebuff. Nevertheless, these four countries left their applications "tabled" and at the Hague Summit Conference at the Six in December 1969 it was agreed that:

The entry of other countries of the continent to the Communities...would undoubtedly help the Communities to grow to dimensions more in conformity with the present state of world economy and technology.... In so far as the applicant states accept the Treaties and their political objective...the Heads of State or Government have indicated their agreement to the opening of negotiations between the Community on the one hand and the applicant States on the other.\textsuperscript{64}

Negotiations formally opened on June 30, 1970, and in July the following year the British Government set out in a White Paper the terms agreed for membership and the economic and political case for going ahead.\(^{65}\) On January 1, 1973, the Treaty of Accession entered into force, and Denmark, Ireland and the United Kingdom became Members of the three Communities.\(^{66}\) In May 1979 Greece became a Member\(^{67}\) followed by Spain and Portugal in June 1985.\(^{68}\)

**Britain's Road to Accession**

The accession of the United Kingdom to the Communities is a story of indecision, hesitation, aborted applications and finally admission in an atmosphere devoid of the elation which such a significant historical event might have deserved.\(^{69}\) Instead of being one of the architects of the European Community, the United Kingdom, preoccupied with an Atlantic role

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\(^{67}\) Treaty of Accession 1979.

\(^{68}\) Treaty of Accession 1985.

and the leadership of the emerging Commonwealth, neglected its European role. Britain profited from Marshall Aid materially, but failed to anticipate its significance for European solidarity. Likewise, it played from the start a major part in the NATO military alliance, but did not aspire either to long-term leadership in the political arena or a collective participation in the economic reconstruction of Europe. Successive British governments adopted a sceptical if not a negative\(^70\) attitude towards the European unity movement and the proposed supranational structures. In the economic field, a less structured and less politicized form of co-operation was preferred. By the early 1970’s political and economic realities ensured that Britain, though reluctantly, became a member of the EEC in January 1973.

Unlike her neighbours on the continent, Britain emerged from World War Two with much glory and her Empire intact. In consequence the country managed to delude itself for a generation that it was in a special category, different from other European states and able to play a unique role in the Atlantic Alliance; to be of but not in Europe; and to exercise worldwide influence through her Commonwealth.

In the immediate post-war years on a variety of fronts, under the aegis of Foreign Secretary Ernest Bevin\(^71\), the United Kingdom pushed into an uncertain form of international leadership. In particular, Bevin sought to give Britain primacy in Western Europe in the aftermath of its occupation and economic collapse. However, precisely what kind of leadership this would be, or the very geographical extent of Western Europe, remained obscure.

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\(^70\) For instance, British Foreign Secretary Ernest Bevin (Labour), when asked for his opinion on British participation in European union, replied, "I don’t like it. I don’t like it. If you open that Pandora’s Box you will find it full of Trojan horses", (Robertson, loc.cit., at 6, n. 23).

\(^71\) British Foreign Secretary, 1945-51. See, A. Bullock, Ernest Bevin: Foreign Secretary, (New York: Norton, 1983).
The signing of the Treaty of Dunkirk in March 1947 combined with Bevin's other moves at this time toward British and European commercial and currency collaboration, encouraged some to believe that an historic shift in Britain's self-perception was taking place. The United Kingdom, it was thought, might emerge as the head of some form of united Europe. The Americans were enthusiastic about this idea, as much on political as on economic grounds. They saw economic recovery in Europe as vital to the national security of the United States. Within the Labour Party, at least a hundred MPs were enthusiasts for the idea of a European 'third force', independent of the Soviet Union and the United States. It soon became evident, however, that Bevin himself, and indeed all the Labour Cabinet, had little sympathy with such a concept. Britain in a united Europe, it was declared, would go against "a thousand years of history". The historian Keith Middlemas summarizes the prevailing attitude of the Labour government at the time, saying:

The idea of a united Europe, especially a federation, would conflict with Britain's view of a multi-racial Commonwealth, and with its special relationship with the USA as well. Any surrender of British sovereignty would be unacceptable, especially to the labour movement intent on building up its own version of socialism in our time.

The United Kingdom, it was clear, would not collaborate in the interests of a united Europe. But it would take the lead in promoting a more flexible concept of European union. It did so in the form of the Organization of European Economic Recovery (OEEC) in the European Payments Union, and later in the European defence arrangements that resulted from...
the Brussels pact of March 1948. Until the new phase heralded by the French initiative of
the Schuman Plan in 1950, British policy-makers could be well pleased with a form of European
collaboration that protected the British national interests and the country’s identity. As Jonathan
Strachey remarks, "they had wrested the initiative from the hands of the theoretical federalists". Bevin sought a solution in which the United Kingdom led an expanded Western
European association, which had trade and other links with North America, but which did not
sacrifice the United Kingdom’s wider interests as a world banker and head of the
Commonwealth. Down to 1950, Bevin’s policy seemed to meet with success.

By the early 1950s, however, the potential of the British in exercising a permanent
control over the future development of Western Europe was increasingly challenged by other
European powers, the French especially, as they themselves began to recover from economic
devastation of the war. The British Foreign Office sought to undervalue growing continental
inclinations toward greater European unity. It was argued that the centuries of French-German
hostility, the internal divisions of Belgium over language, and the post-fascist weakness of Italy,
would ensure that all grand designs for closer unity would founder. A rude shock came in May
1950, therefore, when French Foreign Secretary Robert Schuman suddenly promoted the idea
of a European coal and steel community. Bevin rebuffed it angrily, complaining that he had
been given no public warning.

Britain argued that the Commonwealth relationship, her association with the United States

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75 See, A. Bullock, loc. cit. at 529.

76 J. Strachey, loc. cit. at 84.

77 Record of conversation between Bevin, Schuman and Dean Acheson (at the time U.S.
and the planning priorities of the nationalized British coal and steel industries, all opposed participation in the Schuman plan. But the plan went ahead anyway, without British participation, and by 1952 it was clearly visualized as the basis of a broader, more ambitious European commercial and industrial grouping. By now it was clear that European developments were outstripping Britain's capacity to control them. At the time of the downfall of the Atlee government in October 1951, it was widely believed that the immediate post-war phase of British leadership of a 'flexible' western union in Europe, through the agency of the OEEC, the Payments Union and the Brussels treaty, was coming to a rapid end. The United Kingdom's refusal in 1952 to join the Schuman Plan was a real beginning for Europe. Britain from then on was not involved in the early building of a united Europe.

The years of Conservative government throughout the 1950s saw a deliberate policy both of isolationism towards European collaboration and of wilful disinformation towards the real evidence of the continental powers themselves coming together in greater unity. As a member of Cabinet, Harold Macmillan, in early 1952, tried to encourage the creation of links with the Schuman Plan and the European Defence Force. He was sternly rebuked by Lord Salisbury who asserted:

We are not a continental nation but an island power with a Colonial Empire and unique relations with the independent members of the Commonwealth. Though we might maintain a close association with the continental nations of Europe, we could never merge our interests wholly with theirs. We must be with, but not in, any combination of European powers.

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78 Clement Atlee, Labour Prime Minister of Great Britain, 1945-51.

79 Conservative Prime Minister of Great Britain, 1957-63.

80 See, J. Frankel, loc.cit. at 110.

81 G. Arnold, loc.cit. at 57.
This view was still the prevailing one in Parliament. The consequence was that Britain drifted along in the 1950s quite detached from the Coal and Steel Community and other clear manifestations of a growing European presence.

It was under the leadership of Harold Macmillan that the United Kingdom first turned down the chance to become part of the European Economic Community from its inception. Britain then tried to combat its impact by proposing alternatives, finally realized that she ought not to remain excluded and applied to join. These three phases could well be interpreted as the learning process by which Macmillan and the British people came to terms with the European-centred nature of the country's future. It was a reluctant process. Macmillan, like Churchill82 before him, put the American alliance first and worked ceaselessly to maintain Britain’s ‘big power’ status.

The Messina Conference on common market possibilities, which began in 1955, was not taken sufficiently seriously by the British Foreign Office and the British were absent from the crucial negotiations which produced the Treaty of Rome. Britain did not believe that much in the way of substance would emerge from the discussions. At the time of the Conference real unity looked unlikely and Britain’s concern with the American alliance was based upon the fear that the USA might retreat into isolation again; her survival had twice depended upon the United States entering a world war on her side.

The miscalculations of this time were great, if understandable. What Britain found in 1958 was that she was excluded by her own choice from a Europe of the Six, which was potentially immensely powerful in economic and political terms. Over the preceding four centuries Britain had pursued the balance of power in Europe and had fought Spain, France and

82 Conservative Prime Minister of Great Britain, 1940-45; and 1951-55.
Germany in turn to prevent any of the nation-states from becoming too powerful and dominating the Continent. Now, by default, she had allowed a powerful European union to form over which she had no control.

Between 1957, when the Treaty of Rome was signed, and 1961, when the United Kingdom applied to join the Common Market, the Conservative government with Labour support tried to establish alternatives to the new European economic alliance. Since the EEC now existed, all prophecies to the contrary notwithstanding, Britain had to take some view of it. Thus, much diplomatic effort was now expended in trying to form a customs union which would link the Six of the EEC with perhaps six other nations, Norway, Sweden, Denmark, Portugal, Austria and Switzerland, in a European trading bloc. This, however, came to little, with the British insisting on the need for special protection for British agricultural produce as well as for Commonwealth foodstuffs.\(^8^3\)

Britain now fell back on her second idea of a European Free Trade Association (EFTA, or the ‘Outer Seven’ as it became known), consisting of Britain, Norway, Sweden, Denmark, Austria, Switzerland and Portugal. This was designed to counterbalance the Six, but the United Kingdom was its only industrial-economic power, so it stood little chance of becoming an effective rival to the Six. In a sense, it was too obvious a device to undermine the cohesiveness of the Common Market. By 1960, its failure compared with the growing success of the European Economic Community made plain that Britain would have to think again. Through a process of indifference, opposition and floating alternatives, Britain came to accept that a European force had been born from which she had excluded herself when she might have been

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The British political orientation took a European turn in 1961, when the government applied for membership in the common market; but from a position of weakness rather than strength. The United Kingdom appeared to be approaching Europe not from conviction but because everything else had failed. In August 1961, Macmillan announced that Britain had decided to apply for membership of the Six. There were some protests in Tory ranks, mainly from pro-Commonwealth MPs, but a majority of Conservatives were in favour.\textsuperscript{84} The Labour opposition went through some disarray in 1962, but finally decided emphatically against Britain's joining the Common Market. Public opinion in general took much the same line. It remained insular and unconvinced of the virtues of getting closer to European foreigners, but for Macmillan and his colleagues, membership of the Common Market would fill a huge vacuum in British foreign policy by providing Britain with a different kind of regional association, one highly acceptable to the Americans. It would also give the country a guaranteed and growing market on the continent as well.\textsuperscript{85}

After almost two years of negotiations, when the British Government was ready to sign, the application was in effect vetoed at a press conference on 14 January, 1963, by the President of France, General de Gaulle. In his opinion, the British were not sufficiently European and neither their transatlantic connections nor their commerce or industry would fit into the European Common Market. Moreover, the British entry would change the nature of the Community and open up many problems, including that of an American intrusion.\textsuperscript{86}

\textsuperscript{84} D. Childs, \textit{loc.cit.} at 133-135.

\textsuperscript{85} \textit{Ibid.}, c. 6; and J. Frankel, \textit{loc.cit.}, c. 10.

A majority of the Labour Party were pleased that Britain had failed to gain entry into the Community -- not just for party political reasons, but from ideological opposition to what they believed the Common Market to represent -- an elite capitalist club.\textsuperscript{87} Renewed rhetoric was expended upon the Commonwealth. Then, in 1964, Labour came to power under Harold Wilson\textsuperscript{88}. From his accession until his defeat in 1970, Wilson was faced constantly with the problems in Rhodesia which plunged the Commonwealth into crisis. The tensions it produced at the 1966 Commonwealth Conference soured Wilson's faith in it and in the autumn he announced that the Labour Party was to approach the EEC.

In January 1967, Wilson and his Foreign Secretary, George Brown, toured the capitals of the Six exploring the chances of entry. In May Britain applied to join and in November, predictably, de Gaulle again vetoed the application. Nothing had changed since Macmillan's attempt; de Gaulle's suspicions were the same as ever, and the British were divided on the issue, two-thirds of the Labour Party being anti- rather than pro-Community.\textsuperscript{89} Above all, it still appeared that entry was seen in London more as a solution to current problems than as a statement of faith in the European idea.

The third British attempt led by Conservative leader Edward Heath\textsuperscript{90} was successful. In France, de Gaulle had been replaced as President by Georges Pompidou, who was far more amenable to an expanded Community. Though protracted, negotiations were completed and the

\textsuperscript{87} G. Arnold, \textit{loc.cit.} at 60.

\textsuperscript{88} Labour Prime Minister of Great Britain, 1964-70; and 1974-76.

\textsuperscript{89} \textit{The Times}, 29 Nov. 1967.

\textsuperscript{90} Conservative Prime Minister of Great Britain, 1970-74.
United Kingdom joined the Community in January 1973.\textsuperscript{91} Yet it was not a popular decision. A vociferous Tory minority, led by Enoch Powell, was against entry as was the majority of the Labour Party.\textsuperscript{92} Despite the government’s enthusiasm, the opinion polls revealed a considerable opposition in the country and opponents contended that there was no material advantage in membership, while the surrender of sovereignty was an irreparable blunder. Thus, as Kenneth Morgan asserts, the prevailing mood of the British nation at accession was

\begin{quote}
... one of waning acceptance, since no obvious alternative could be found. It even appeared a kind of surrender, a recognition that the loss of Empire and the breakdown of an equal partnership with the Americas had left Britain as an enfeebled and divided offshore island with nowhere else to turn. It was not an invigorating mood in which to celebrate the ending of ‘a thousand years of history’.
\end{quote}

Consequently, 1 January, 1973, came and went with little sense of historical change at all.

The Institutions of the European Community

The uniqueness of the European Community stems from the deep involvement of its institutions in matters traditionally within the exclusive control of each individual state and its capacity to make rules directly and automatically binding not only on the member states themselves but also on individuals and corporate bodies within those states.\textsuperscript{94} Thus the unique character of the EC lies in the degree of its penetration into the internal legal relations of the

\begin{footnotes}
\item[91] On January 20, 1972, the last attempt to prevent the signing of the EEC Treaty was foiled by a majority of twenty-one for the government. See, (1972) 829 House of Commons Official Report (5th series) col. 800.
\item[93] K. Morgan, \textit{loc.cit.} at 342.
\item[94] See, \textit{infra}, chapter 3.
\end{footnotes}

In the first place, there are institutions vested with a variety of political, legislative, executive and administrative functions and powers. These are the Commission, the Council and the European Parliament. In the second place, there is the Court of Justice of the European Communities (Court of Justice or ECJ), the judicial organ of the European Community.

The \textit{Commission} is the executive authority of the EC and represents the interests of the Community. Its three primary functions are: to propose Community legislation, to ensure that the provisions of the EEC Treaty are enforced,\footnote{Should a member state be in breach of a Community obligation then it is the responsibility of the Commission to challenge the legality of such a breach (if it so chooses) and to pursue the matter before the Court of Justice.} and to implement Community policies. The Commission is composed of nationals of the individual member states who exercise their duties in complete independence: "they shall neither seek nor take instructions from any Government or from any other body".\footnote{EEC Treaty, art. 157 (amended by Merger Treaty, art. 10(2)). The Commission currently is comprised of 17 members, with at least one representative from each member state. No member state may have more than two of its nationals or the Commission at any time.} Although its seventeen members are named by unanimous consent of the member states' governments for a renewable term of four years, the Commission is not politically responsible to the Council. Rather, the Commission is politically responsible to the European Parliament (Parliament) which has the power to remove it by adopting a motion of
censure pursuant to article 144 of the EEC Treaty.\textsuperscript{98}

The *Council* is the EEC’s true legislative organ\textsuperscript{99} as the Treaty ascribes to it the power to make decisions.\textsuperscript{100} Composed of one representative from each member state,\textsuperscript{101} the Council begins the legislative process with a qualitatively different point of view than does the Commission. The difference is that the individual member states start the process with an understandably national, rather than a European focus on policy objectives.\textsuperscript{102}

The Council of Ministers can be confused with the *European Council*. The latter, created by the Heads of State and Government at the 1974 Paris Summit, is the result of a decision by the leaders of the EEC countries to institutionalize and to regularize their summit meetings. The European Council, which meets at least two times each year, was intended to provide a high level political impetus to European integration.\textsuperscript{103} Since the passing of the *Single European Act* (SEA 1986, art.2) the European Council has become *de jure* the supreme organ of the Communities representing both the sovereignty of the member states and the corporate person

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\textsuperscript{98} Under article 144 of the EEC Treaty, the European Parliament may remove the entire Commission from office if a motion of censure is carried by a two-thirds majority of the votes cast representing a majority of the Members of Parliament. This has never occurred.

\textsuperscript{99} In the domain of the Community budget and in the area of accession and association agreements, Parliament enjoys real decision making power and may properly be considered part of the Community’s legislative body. T.C. Hartley, *loc.cit.* at 41-45.

\textsuperscript{100} EEC Treaty, art. 145. In certain circumstances, the EEC Treaty centres normative power directly on the Commission. See for example, arts 10(2), 13(2), 33(7), 90(3) and 91(2).

\textsuperscript{101} EEC Treaty, art. 146.


\textsuperscript{103} Wallace, *loc.cit.* at 69.
of each Community. It consists of the Heads of State or of Government of the member states and the President of the Commission. However, it is concerned only with matters of principle and general direction of the Communities, while the Council of Ministers retains its position as the supreme working organ.

The European Parliament represents the European people in the Community.\textsuperscript{104} There are 518 Members of the European Parliament (MEPs) who, although directly elected by the citizens of their respective member states since 1979,\textsuperscript{105} align themselves in Parliament according to party affiliation and not on the basis of nationality. Except in the domain of the Community budget, Parliament has traditionally exercised only advisory and consultative powers in the decision making process.\textsuperscript{106} The most serious defect in the constitution of the

\textsuperscript{104} EEC Treaty, art. 137.

\textsuperscript{105} Universal suffrage endows the Parliament with a direct mandate from the European population and fortifies its claim for a greater role in the EEC legislative process. See, V. Bogdanor and G. Woodcock, 'The European Community and Sovereignty', Parliamentary Affairs, 44(4), 1991, at 481. Direct elections to Parliament are held every five years. The most recent elections were held in June 1989 and followed direct elections in 1979 and 1984. The number of MEP's elected in each member state is as follows: Germany, France, Italy and the U.K. (81); Spain (60); Netherlands (25); Belgium, Portugal and Greece (24), Denmark (16); Ireland (15); and Luxembourg (6). Within the United Kingdom, the 81 seats are distributed as follows: England (66); Scotland (8); Wales (4); Northern Ireland (3). While MEP's may be members of their own national Parliaments their office is incompatibile with membership of a national Government. The EEC Treaty (Article 138) and the EC Council 'Act of 1976' (Article 7(1)) envisaged that direct elections would take place in accordance with a uniform electoral procedure in all the member states. The 1976 Act also provided that pending the entry into force of such a procedure, the electoral procedure should be governed in each member state by its own national provisions (Article 7(2)). Since the member states were unable to agree on a uniform procedure, all three direct elections were held in accordance with the various voting systems in force in the member states. In the United Kingdom the simple majority ('first past-the-post') system was used in England, Scotland and Wales, and the single transferable vote system in Northern Ireland. See, A.G. Toth, loc.cit. at 225.

\textsuperscript{106} EEC Treaty, art. 137.
Community, from a democratic point of view, is that the Parliament has very few real powers.  Although the European Parliament as now composed has not greatly increased its powers, it has without a doubt increased its influence, particularly in the decision making process. Its debates provide a focus for Community affairs, and members, whether inside or outside Parliament, can bring valuable publicity to bear on key issues.

The legislative process is best understood as an ongoing dialogue between the Council and the Commission grounded in the three elements: (1) the Commission's right to propose legislation (right of initiative), (2) the Council's right to modify the Commission's proposal, and (3) the Commission's power to execute (implement) legislation adopted by the Council. The Commission's right to initiative is central to the legislative process, as the Council can only exercise its power to adopt regulations, directives, or decisions by acting on a Commission proposal. Thus, originally, the Commission was conceived of as "the chief policy formulating body, leaving the Council of Ministers as legislator, to accept or reject the proposals of the Commission." Clearly, the Commission's right of initiative is balanced by the Council's right of amendment. In the end, however, the Council's power to amend the Commission proposals and its general power of decision endow the council with the final word in the legislative process.


108 Article 149 of the EEC Treaty provides the central mechanism for Commission-Council collaboration in the legislative process.

109 The Council can, however, act on its own initiative in a limited number of cases. See, for example, EEC Treaty, arts. 84(2), 126 and 127. Regulations, directives and decisions are the three categories of binding legislative acts emitted by the Council. They are defined in Article 189 of the EEC Treaty. Much more will be said about these legislative forms, see infra, chapter 3.

110 Wallace, loc. cit. at 57.
The judicial power of the Community is in the hands of the Court of Justice,\textsuperscript{111} whose main function is to ensure that in the interpretation and application of the EEC Treaty the law is observed.\textsuperscript{112} The Court has jurisdiction to decide disputes between member states concerning the application of the terms of the Treaties or relating to the general object or purpose of the Communities, and to hear proceedings brought by Community institutions against member states, including power to determine the validity of acts of the Council and Commission. In addition to its contentious jurisdiction, the Court is empowered by Article 177 of the EEC Treaty to give preliminary rulings, in particular cases arising in the courts of the member states, on the interpretation of the Treaty and of acts and statutes of Community organs. This advisory jurisdiction is discussed below. Composed of thirteen Judges and assisted by six Advocates-General\textsuperscript{113} chosen from persons of proven independence and qualified to hold the highest judicial offices in their countries, the Court is really not an international court. It is in fact an internal court of the Community. Its jurisdiction, as defined by the EEC Treaty is not a substitute for the jurisdictions of the national courts of the Member States since it is confined

\textsuperscript{111} The Court of Justice is no longer the sole judicial body of the EC. The Single European Act laid down the legal foundations for the establishment of a ‘Court of First Instance’ (SEA, art.11) The new court has been operational since early 1989. The Court has twelve members and sits primarily in chambers of three or five judges. The Court deals primarily with technical matters relating to the ECSC Treaty and actions in respect to certain competition provisions of the EEC Treaty. The activities of this new Court are of no significance to the issues explored in this thesis. See, T. Millett, The Court of First Instance of the European Communities, (London: Butterworths, 1990).

\textsuperscript{112} EEC Treaty, art. 164.

\textsuperscript{113} The office of advocate-general has no equivalent in English Law, but it is similar to the Commissaire du Gouvernement at the French Conseil d'Etat. An advocate-general is required to consider the issues in a case impartially and individually and to reach his own personal conclusion as to what in law should be done. His/her "opinion" is then submitted to the Court prior to judgment.
to the administration of Community law. It is, however, a fully-fledged judicial body with the powers of arbitration, adjudication, control and advice. The power of interpretation of the Treaty and of the acts of the Community institutions enables the Court to exercise a quasi-legislative function and thus build up a body of case law which, like the French Conseil d’Etat, for example, contribute to the development of the law.

In brief, there are three main kinds of actions (proceedings) that may be brought in the Court of Justice. In an infringement action\[^{114}\], legal proceedings may be brought against a member state which fails to fulfil an obligation under the EEC Treaty or the law derived from it. The initiative may be taken either by the Commission under Article 169 or by another member state under Article 170. It is important to note that individuals or firms whose interests have been harmed by a member state’s failure to fulfil Community obligations are given no direct remedy in the Court of Justice. The granting of remedies was intentionally left in the domain of national courts of member states. In an action for annulment\[^{115}\] the Court of Justice has jurisdiction to review the legality of acts of the Community institutions on the grounds set out in Article 173 and if the act is found wonting, to declare it void under Article 174.

Finally, a reference for a preliminary ruling\[^{116}\] may be brought in the Court of Justice. The preliminary procedure, as will be seen, has been fundamentally instrumental in facilitating the integration of Community law into the national legal system of the United Kingdom as well as into the legal systems of the other member states. The reference procedure was designed to meet the danger that divergent lines of authority on points of Community law would develop in

\[^{114}\] EEC Treaty, arts. 167-171.


\[^{116}\] EEC Treaty, art. 177.
the various member states, reflecting disparities in their legal traditions and their economic and social circumstances. The procedure enables a national court, faced with the necessity of deciding a question of the interpretation or validity of a Community provision, to obtain authoritative guidance from the Court of Justice. The national proceedings are suspended and the Community point is encapsulated in one or more questions on which the ECJ is invited to rule. After the Court has done so, it will be for the national court to apply the ruling in the concrete circumstances of the case before it. The ruling is 'preliminary' in the sense that it does not form part of the decision that disposes of the case, however, a ruling by the European Court under Article 177 is binding on the national court deciding the case to which it relates.

Thus, the proceedings in the Court of Justice represent a stage in proceedings which begin and end in another court. The Court is uniquely positioned to strengthen the bonds of the emerging Community order. It is the watchdog of legality within the Community. Armed with the power of interpretation, the Court is the custodian of the EC Treaties and of all the laws emanating therefrom.

The powers of the Community organs which I have outlined above, would be quite meaningless if it were not for the corresponding surrender of sovereignty by the member states. The surrender of sovereignty is only partial and is defined by the Treaty obligations, but it is sufficient to create a distinctive bond between the member states and the Community.

It is clear that the EEC is not a state\footnote{While in international law the EC has been endowed with the status and attributes of a "corporate capacity" and "legal person", according to art. 1 of the Montevideo Convention of 1933 on the Rights and Duties of States, "the state as an entity of international law should possess the following qualifications: (a) a permanent population, (b) a defined territory, (c) a government and (d) a capacity to enter into relations with other states". [I. Brownlie, \textit{Principles of Public International Law}, 4th ed., (Oxford: Clarendon Press, 1990) at 72-79.] The European Community fails the test on all of the above points except (d).} for it has no territory of its own, no population
which is not a citizenry of the member states, while its 'government' has no powers except those defined by Treaty. However, it would be quite inadequate to define the EEC as the association of states which subscribe to the Treaty of Rome, since the Treaty lays down a foundation for something more than a loose partnership of states involved in a joint economic enterprise. As Lord Cockfield suggests, "the Treaty is not a mere contractual compact, it is an institutional stage of European unity". The relationship between the member states and the Community seems to resemble a federation and the EEC Treaty is the Constitution, as it were, of the Community. The acceptance of the Treaty, the law enacted by the Community organs, and the obligation to enact municipal legislation in accordance with the Treaty and the directives of the Community organs, emphasize the federal concept of the Community.

In the terms of the EEC Treaty the member states seek to build Community institutions and to create a body of law to regulate the economic activities of the members. Although surrender of a certain portion of sovereignty is necessary in order to achieve these objectives, the pooling of sovereignty is not explicit enough to create a federal state or a federal government of the Community. Therefore, at this stage of its development, it can be argued that the Community is an association of sovereign states which displays the characteristics of an embryonic federation.


Chapter 3: The Community Legal Order

In Chapter Two we saw that the unique supranational institutions of the EC bring the Community (which is, in the terms of the United Nations Charter, merely a regional organization) within the ambit of a federal concept. Moreover, it was shown that the founding treaties themselves are not merely treaty-contracts but essentially treaty-laws providing a 'constitution' of sorts for the European Community. In this chapter, an overview of the new Community legal order that has emerged as result of the treaties is provided. Specifically, the sources of Community law and the twin pillars of the Community legal order -- the doctrine of 'primacy' and the twin doctrines of 'direct applicability' and 'direct effect' -- will be examined. By 1973, the idea of primacy and the other cornerstone of Community law -- direct applicability/direct effect -- were clearly established so that the United Kingdom generally understood the constitutional implications arising from the doctrines and had the opportunity from the beginning of accommodating them. Although it is unique in form, the debt owed by the Community legal system to public international law is considerable and usually understated.\(^\text{120}\)

Sources of Community Law

The fundamental source of Community law, the source to which it owes its very existence, is of course the Treaties, of which the four main ones are:

The Treaty of Paris of April 18, 1951, establishing the European Coal and Steel

\(^{120}\) See, D. Wyatt, 'New Legal Order or Old?', (1982) 7 E.L. Rev. 147.
These treaties are the source of the constitutional law of the Communities. They set out the objectives and purposes of the Communities, define the powers of the institutions and regulate their relations with the member states. For the sake of simplicity when speaking of the Treaties, I will refer only to the European Economic Community. In practice the vast majority of cases in which Community law is relevant are concerned with that rather than with the law relating to the other two Communities.

The second major source of Community law is what is compendiously called ‘Community secondary legislation’ that is Regulations, Directives and Decisions made by the Council of Ministers and by the EC Commission. This source of Community law will be discussed later in the chapter. Member states are bound in international law to carry out the obligations imposed by the Treaty and secondary legislation. Breach of these obligations may give rise to an action before the Court of Justice at the suit of either the Commission or another Member State.

121 There are two more sources of Community law. One of these sources consists of the so-called ‘general principles of Community law’ - the ‘common law’ of the Community - which have been adopted by the European Court. They are an important source of Community law and will in all probability play an increasing role as the Community develops. International agreements with non-member states constitute the other source of Community law. They may be concluded either by the member states or by the Community.

122 Arts. 169, 170, supra, ‘infringement action’, p. 42.
There are three main characteristics of Community law that one must bear in mind:

(1) that it is an independent legal order that is common to all member states;

(2) that, if only for that reason, it must prevail over any national law that is incompatible with it; and

(3) that it can and often does confer rights and impose obligations directly on individuals (citizens) in the member states.

I will deal with these three characteristics seriatim.

**Community Law as an Independent Legal Order**

It is generally recognized that Community law is a separate legal system, distinct from, though closely linked to, both international law and the legal systems of the Member states. This was affirmed by the European Court in the well known *Van Gend en Loos* case, in which it was emphasized that the Community Treaties are more than mere international agreements. There it was stated:

...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.

The phrase "a new legal order" conveys, in a striking way, the concept that the Community and its Institutions are the creatures of, and governed by, this new body of law, and that their relations with the member states and with the citizens of those states are ordered by it too, as are the relations between the member states and their citizens in those fields where Community law is relevant.

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Though engendered by international law, Community law does not share all its characteristics; and the techniques and doctrines of Community law have more in common with branches of national law, such as constitutional and administrative law, than with those of international law. The relationship between Community law and national law clearly lends itself to comparison with the relationship between state and federal law in a federal system. Community law is, however, separate from national law, even though it is applied by national courts. Thus, national legislatures have no power to amend or repeal it; in the event of conflict, it will override national law, and its interpretation comes, in the last resort, within the exclusive jurisdiction of the European Court.

To say that Community law is common to all member-states is no doubt to state a fact that is obvious. But it is a fact that has important practical consequences because it means that Community law must be interpreted and applied in the same way throughout the Community. It is for this reason that Article 177 of the EEC Treaty exists (the preliminary reference): it enables the last word on any question of Community law to rest with the European Court.

The Primacy of Community Law

Community law introduces a new element into the context of the two classic theories of the relationship of national and international law. According to ‘monism’, both types of law belong in the same hierarchy of legal norms and international law is the higher, whereas ‘dualism’ considers the two systems to operate in separate spheres, with each state’s own national law superior inside that state. The approach of the Court of Justice has been monist,
while in Britain constitutional law is still unhesitatingly dualist.124

International law by its nature binds the State in its executive, legislative and judicial activities, and no international tribunal would permit a respondent State to plead provisions of its own law or constitution as a defence to an alleged infringement of an international obligation.125 The same is true of European Community law, "over which no appeal to provisions of internal law of any kind whatever can prevail".126 The fundamental principle of Community law with regard to the relationship between itself and the national laws of the member states is refreshingly simple. It is that in the event of a conflict between a rule of national law and a rule of Community law, the latter must prevail. The application of the principle of primacy may give rise to complexities in some situations, but while some national courts have hedged it around with limitations and qualifications and constitutional lawyers in the member states have struggled to reconcile it with their own constitutional provisions, the Court of Justice has never wavered from upholding it without reservation. This practice was born of the necessity to uphold the unity and uniformity of Community law throughout the Community, and without it the pursuit of the aims and objects of the Treaty would be jeopardized.

The principle of primacy was first laid down by the Court of Justice in the celebrated

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124 By virtue of the royal prerogative in foreign affairs, the Crown has the power to enter into treaties which bind the United Kingdom in international law. But this prerogative power does not include power to alter the rights of individuals within the United Kingdom. If such an alteration is required by a treaty, that can be done only by an Act of Parliament. See, infra, chapter 4, note 144.


case Costa v. ENEL.  The Court stated:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member-states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Then, after examining the provisions of the Treaty in some detail, the Court concluded:

It follows from all these observations that the law stemming from the Treaty, and 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.

The Court held in Internationale Handelsgesellschaft that Community law prevails whatever the conflicting national law, even where the latter is a basic constitutional provision guaranteeing fundamental human rights, and in Amministrazione delle Finanze v. Simmenthal, that it prevails whatever the national procedural difficulties. In Simmenthal the conflict had arisen in a lower court unable, according to Italian law, to do anything but apply national law; only the constitutional court could set aside national law in favour of the Community provision. The Court of Justice held that the primacy entailed Community law being applied in any court in which a conflict arose. There should be no question of waiting for the matter to reach a

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128 Ibid. at 593.

129 Ibid. at 594.


superior court.

In Van Gend en Loos and in Costa, the Court spoke of member states having "limited their sovereign rights" and having transferred powers to the Community. This could give member states a basis on which to begin to recognize the theory of primacy. The difficulty comes when the member state’s constitutional law cannot recognize irreversible limitations of sovereignty, as with the U.K.’s doctrine of parliamentary supremacy, or when the constitution does not allow transfers of sovereign rights which would touch upon certain basic entrenched provisions as was argued in Internationale Handelsgesellschaft. The principles of Costa and Internationale Handelsgesellschaft were repeated yet more forcefully in Simmenthal:

...any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.\[132\]

Thus, the transfer of power, the limitation of sovereignty and the principle of primacy stem from the signing of the Treaty by the member states. National constitutional adjustments are irrelevant, and, for the purposes of Community law, enactments such as the U.K.’s European Communities Act 1972 are cosmetic only. Until Simmenthal the Court of Justice had not spelled out the effect of primacy upon conflicting national law, but there it said that the entry into force of Community provisions rendered conflicting provisions of current national law "automatically inapplicable" and precluded "the adoption of new incompatible national measures" thus avoiding the description of the offending national law as 'void'.\[133\]


\[133\] See, infra, chapter 4 at 73.
Direct Applicability and Direct Effect

The doctrine of primacy is inseparable from the other twin cornerstone of the Community legal order, the doctrines of direct applicability and direct effect; for it is when the Community law can be pleaded in a national court that the potential conflict with national law is greatest. The legal impact of Community law in the member states springs from its capacity, even its tendency to give rise to rights in individuals which national courts are bound to safeguard. The position is complicated by the rather confusing terminology, which describes provisions of Community law as being either "directly applicable", or "directly effective". The generally accepted view is that 'directly applicable' means that the provision is automatically part of the national legal system as soon as it is promulgated by the Community authorities: no national measures of incorporation are necessary; while if a legal provision is said to be 'directly effective', it is meant that it grants individuals rights which must be upheld by the national courts. Establishing direct effect is a matter of interpretation, and it is clear that specific provisions of the Treaty, as well as specific provisions of regulations, directives or decisions, may be endowed with this quality.134 On the other hand, article 189 of the EEC Treaty

134 D. Wyatt and A. Dashwood, The Substantive Law of the EEC, 2nd ed., (London, Sweet and Maxwell, 1987) at 26. The issue of direct effect was raised for the first time in the Van Gend en Loos case, where a private firm sought to invoke Community law against the Dutch customs authorities in proceedings in a Dutch tribunal. The tribunal made a reference to the European Court for a ruling on the question whether the provision at issue was directly effective. The European Court decided that the provision in question was directly effective, and this was accepted by the Dutch Court. The ECJ's ruling affirmed the existence of the doctrine and ensured its survival as a principle of Community law. In its judgment the Court concluded that:

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. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon the institutions of the Community. [1963] E.C.R. at 12.
explicitly states that a regulation is "directly applicable in all member states”.

The exact meaning and use of these terms, however, is not yet free from doubt; in particular there is controversy about whether all Regulations are directly effective without being directly applicable, and whether Directives can be directly effective without being directly applicable.135

Community Secondary Legislation

The chapter began with a brief overview of the primary and secondary sources of Community law. We return now to a more complete discussion of Community secondary legislation. The secondary sources of Community law result in a body of law generated by the Community itself in its quasi-autonomous capacity. These sources are considered ‘secondary’ because their authority is derived from the provisions of the founding Treaties. Moreover in the hierarchy of legal norms they rank second to Treaty provisions. To all intents and purposes they resemble delegated legislation. The importance of the law-making power of the Community cannot be over-emphasized because, as stated by the distinguished jurist, A.J. Mackenzie Stuart, "the first and most essential means by which a supranational organization endeavours to carry out its objectives...resides in the law making power".136

One of the most striking characteristics of the legal order established by the Treaty is the competence vested in the Council, and to a lesser extent in the Commission, to enact legislation


for the purpose of attaining the objectives of the Treaty. Thus, Article 189 provides that: "In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations, or deliver opinions." Since "recommendations and opinions have no binding force," emphasis will be placed on regulations, directives and decisions.

Article 189 of the EEC Treaty provides that: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." Regulations therefore must be applied by the national courts without the intervention of any domestic implementing legislation. They can and do create individual rights which the national courts must protect. They take effect on the day specified, or in the absence of such date on the twentieth day following their publication in the Official Journal of the EC.

Article 189 says of directives and decisions:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed."

Whereas a directive may be addressed only to a state, a decision may also be addressed to a legal person. An example of an individual decision would be a Commission ruling that a firm had acted in breach of Articles 85 and 86 of the Treaty. Such a decision might be accompanied by the imposition of a fine. An example of a decision addressed to a member state, by contrast, would be an act of the Commission requiring a member state to abolish or amend measures of aid to national undertakings.137

Directives are the usual channels by which the Community introduces its measures into national law. Unlike a Regulation, the law of the member state is not altered by a Directive until steps are taken whereby the member state incorporates its provision into its domestic law. A directive will invariably state by what date this must be done. A directive is thus an instruction to the member state to amend its laws to achieve a particular result within a particular time. It is left to the member state itself to decide how this is to be done.

It is clearly essential, if Community law is to be uniformly applied, that member states should implement Directives correctly, that is to say in such a manner as will achieve their intended result. In addition, where a Directive is designed to harmonize the laws of member states as regards the relationship between individuals, it is not open to a member state to grant more extensive rights or impose stricter obligations on the individuals concerned unless the Directive gives a discretion to do so.138

Prima facie therefore, a Directive has no effect in domestic law until it has been implemented by the member state concerned. In other words, until that moment an individual must look to his/her domestic law to ascertain one’s rights. However, the Court of Justice has decided that in certain exceptional circumstances a Directive, or at least certain of its provisions,

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138 Once the national legislation has been enacted to implement a Directive, then the national courts are under a duty to interpret the legislation to achieve the result required by the Directive. This follows from the obligation of the member states under art. 189(3) to achieve that result and from their duty under art. 5 of the EEC Treaty to take all appropriate measures whether general or particular, to ensure the fulfilment of that obligation. The duties are binding on all the authorities of the member states, including their courts, and it follows that "national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in art. 189(3)". Von Colson v. Land Nordrhein Westfalen, Case 14/83 [1984] E.C.R. 1891 at 1909, [1986] 2 C.M.L.R. 430 at 453. See also Johnston v. Chief Constable of Royal Ulster Constabulary, Case 222/84, [1987] Q.B. 129 at 153, [1986] 3 C.M.L.R. 240 at 269.
may be directly effective in national law before it has been implemented.\textsuperscript{139}

To conclude this chapter, then, the underlying philosophy of the Community and, indeed, the practical assurance of the Community development in accordance with the Treaty and the Community legislation is the doctrine of the supremacy of Community law. It is still a theory because in spite of the constitutional adjustments of the member states there is, generally, a certain amount of hesitation, if not reluctance, to accept the monist doctrine and by-pass national legislatures. At the root of this is an instinctive aversion to external laws and authorities invading, as it were, the sacred preserve of sovereign states. These states have a long and proud history and a strong sense of national identity coupled with an individualistic notion of national interest. Therefore, psychological barriers\textsuperscript{140} have to be removed in order to make the legal obligations enshrined in Treaties and subordinate legislation meaningful and acceptable. In the circumstance, it is not surprising that the lead in the process of the enforcement of Community law has had to come from the Community Court.

The main difficulty is that, apart from Article 189, the EEC Treaty contains no formal


and unequivocal assertion of the supremacy of Community law.\textsuperscript{141} Thus, it is the Community Court in a number of judicial cases, that has formulated the principle of supremacy. The Court, as the guardian of legality within the Community has, from the start, been in a strong position to define the status of the Community law and to give it precedence when in conflict with the municipal law of the member states. While the Court of Justice in its judicial capacity has no rival system of law to administer, and is only remotely concerned with the political consequences of its decisions, the municipal courts have to face the practical problems arising from the conflict between domestic law and Community law forming part of their national system. The theory that Community law is part of national law does not solve these problems.

\textsuperscript{141} Though the EEC Treaty contains no formal provisions that assert the supremacy of Community law, Article 5 of the Treaty implicitly compels member states to adhere to the legislative initiatives emanating from the Community organs. Article 5 states:

\textit{Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.}
When Denmark, the Republic of Ireland, and the United Kingdom signed the Treaty of Accession in 1972, they were required to take appropriate steps to accommodate Community law within their legal systems. For Denmark and Ireland, formal constitutional amendments were necessary. This course of action was not open to the United Kingdom, but it was essential that Parliament should authorize the reception of Community law and should empower British courts to administer Community law. The force of law within the United Kingdom had to be given not only to existing but also to future rules of Community law.

Given these objectives, the sovereignty of the British Parliament was both an advantage and a source of difficulty. The advantage was that no formal constitutional amendment was necessary. It took only a few lines in an Act of Parliament to receive within the United Kingdom a massive body of Community law. The difficulty came in so far as the future was concerned: could any constitutional guarantee be given or an undertaking entrenched that Parliament would not at some future date either legislate to leave the Community or (whether inadvertently or intentionally) legislate in a manner which conflicted with Community law?

The view taken by the government in 1972 was that no absolute legislative undertaking by Parliament should be given, since a future Parliament could disregard such an undertaking. Instead, the accession legislation went as far as was thought possible in instructing British courts how to apply Community law in the future.

The introduction of Community law into the national legal system of the United Kingdom was achieved by the enactment of the European Communities Act 1972. Nowhere in the 1972
Act is it explicitly stated that Community law is supreme, but neither is there a provision affirming the sovereignty of Parliament. Consequently, the issue of supremacy remains unresolved. It is here that English constitutional law and Community theory seem absolutely irreconcilable. In this chapter, the European Communities Act is examined and the issue of supremacy arising from the 1972 Act is discussed. The issue of supremacy has received substantial attention from the judiciary, but the case law speaks with an uncertain voice. However, it will be shown that the British courts have shown a considerable degree of willingness to move away from the traditional idea of parliamentary sovereignty.

**Incorporation of Community Law into the United Kingdom Legal System: The European Communities Act 1972**

The long-established rule\(^{142}\) that "we take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us"\(^{143}\) has been applied by British courts to the treaties establishing the European Communities as to other treaties. Although, at least since the early eighteenth century, the customary rules of international law have been regarded as part and parcel of the common law and directly enforceable by British judges, the United Kingdom adopts a distinctly dualist approach to treaties.\(^{144}\) A treaty to which the United Kingdom is a party is, as we have seen, the result


of an exercise of the prerogative, and as such is not self-embracing in the sense that the provisions of such a treaty do not automatically have the force of law in the United Kingdom. The intervention of Parliament is necessary in order to enable the provisions of such a treaty to be enforced in British courts. The classic statement of this doctrine is contained in an Opinion of the Judicial Committee of the Privy Council in 1937. Said Lord Atkin:

It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more Sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or the statutes.... Parliament, no doubt...has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.145

This doctrine applies equally to the Community Treaties, so that the mere accession of the United Kingdom to those Treaties did not give them the force of law within the United Kingdom. Legislation was necessary to achieve that result and in the absence of such legislation, as the Court of Appeal has pointed out, the Community Treaties would fall outside the cognizance of British Courts.146 The Treaties whereby the United Kingdom agreed to join


the European Community were executive acts, affecting the relations between the United Kingdom and the other member states. In order to provide for the consequent changes of law in the United Kingdom, an Act of Parliament was necessary.

The mechanism for the introduction of Community law into the legal system in the United Kingdom is contained in the European Communities Act 1972\textsuperscript{147}. In relation to questions of interpretation and application the following provisions are relevant. The key provision of the 1972 Act is section 2(1) which provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring one to which the subsection applies.

It is in this way that "a whole complex of rights and duties has been incorporated into the law of the United Kingdom".\textsuperscript{148} In sweeping language section 2(1) says that all Community rules which are by Community law directly applicable or effective are given legal effect in the United Kingdom without any further incorporation procedure. The subsection provides for the recognition and enforcement in the United Kingdom of directly effective or applicable Community rights and obligations enjoyed by or imposed on member states or private


\textsuperscript{148} Collins, \textit{loc. cit.} at 46.
individuals. It covers rights and obligations created by the Treaties themselves, by existing and future Community Regulations which take effect directly in the member states and by Directives to the extent that they are directly effective or applicable.\textsuperscript{149} It is a constitutional innovation to give effect to future Community legislation. In section 2(2)(a) power is granted to the executive to give effect by subordinate legislation to Community law which is \textit{not} directly applicable or effective and in section 2(2)(b) power is granted to the executive to make regulations to deal with matters arising out of or related to directly applicable Community law.\textsuperscript{150}

By section 2(4) it was provided that "any enactment passed or to be passed, other than one contained in this part of the Act, shall be construed and have effect subject to the foregoing provisions of this section." This means that, subject to clear provision to the contrary, subsequent enactments are to be read subject to the rule that directly applicable or effective Community law is to be given effect in the United Kingdom.

Section 3(1) provides:

For the purposes 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 treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto).

\textsuperscript{149} It should be noted here that s. 2(1) only applies to those provisions which are accorded direct effect or applicability. Neither s. 2(1) nor the section as a whole incorporates the EEC Treaty "lock stock and barrel" (\textit{Re. Westinghouse Uranium Contract}, [1978] A.C. 547 at 564. per Denning MR).

\textsuperscript{150} See Appendix A.
and by section 3(2) judicial notice is to be taken of the Treaties, the Official Journal of the Communities and any decision of, or expression or opinion by, the European Court. Section 3 makes explicit what as a result of section 2 must be implicit, namely that Community law is to be treated in the United Kingdom as part of national law.

The Supremacy Issue

It is generally accepted by the Community Court and by the original six member states that the Community Treaties have established a new and distinct system of law, the rules of which are legally superior to the rules of the municipal laws of the member states. Thus, for the duration of British membership, the municipal law of the United Kingdom must yield in cases of conflict to the superior Community law. To the generations of students schooled in the Diceyan orthodoxy such a prospect is no doubt unthinkable; but nevertheless it is one of the obligations of membership. The implications were clearly summarized in a 1967 White Paper:

The Community law having direct internal effect is designed to take precedence over the domestic law of the Member States. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it. This result need not be left to implication, and it would be open to Parliament to enact from time to time any necessary consequential amendments or repeals. It would also follow that within the fields occupied by the Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force. This would not however involve any constitutional innovation. Many of our treaty obligations already impose such restraints - for example, the Charter of the United Nations, the European Convention on Human Rights and GATT.151

The 1967 White Paper stated that Parliament will have to refrain from passing fresh legislation inconsistent with Community law and remarked this was by no means an innovation because of existing restraints under other treaties. But the critical question is whether the doctrine of Parliamentary sovereignty means that such restraints must always be voluntarily imposed by Parliament or whether they can be compulsorily guaranteed.

The application of the orthodox doctrine of the absolute sovereignty of Parliament to statutes implementing treaty provisions into United Kingdom law has meant that such statutes have been regarded as in no way different from ordinary statutes and may be either expressly or impliedly amended or repealed by subsequent inconsistent statutes.\(^{152}\) It is true that there is a legal presumption that Parliament does not intend to derogate from international law, but such a presumption cannot prevail in the face of an expressly inconsistent subsequent enactment.\(^{153}\) If this doctrine were to be applied to Community law it would hardly satisfy the Communities since there would be no legal guarantee of Parliament's good behaviour.

There have been a variety of possible solutions to this problem put forward. Some are suggested in the writings of those contemporary constitutional scholars who challenge the orthodoxy of Dicey and his followers. Professor Mitchell has argued that the Act of Union with Scotland 1707 is fundamental law which imposes legal restraints on the United Kingdom Parliament and just as a new legal order was established in 1707, so there is no reason why another new legal order in the context of the Communities should not be created in 1972.\(^{154}\)


\(^{154}\) See, Mitchell et al., loc.cit.
Professor Heuston, while not denying that Parliament is sovereign in terms of the area of her power, maintains that limitations may be imposed on the manner and form by which that power is exercised. Others have suggested that reliance should be placed on the gradual emergence of a constitutional convention by which it would be recognized that Parliament could not legislate contrary to Community law.

In dealing with the problem of the supremacy of Community law, the European Communities Act adopts a subtle approach which does not incorporate any of the fundamentalist solutions described above, nor is it content to rely on the uncertain emergence of conventional limitations. The act avoids any outright statement of the supremacy of Community law. Such a statement would have been contrary to the main stream of British constitutional practice and it would in any event have been politically dangerous to have adopted such an approach. The supremacy of Community law in the United Kingdom is effectively guaranteed by the combined operation of provisions of sections 2 and 3 of the Act. As we have seen section 2(1) gives present and future Community law legal force in the U.K.. Thus, since the doctrine of the primacy of Community law is part of that law, section 2(1) makes that doctrine part of the law of the United Kingdom. Moreover, the effectiveness of that doctrine is guaranteed by two further provisions - sections 2(4) and 3(1).

When these provisions were debated in Parliament, it was widely agreed that they did not exclude the possibility that the United Kingdom Parliament might one day wish to repeal the

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155 See, supra, chapter 1, and Heuston, loc.cit.

Act and thus effectively prevent the continued operation of Community law within the United Kingdom. In this sense the ultimate sovereignty of Westminster was not affected, as ministers admitted, even though they refused to allow a statement to this effect to be included in the Act.157 But there was and continues to be uncertainty about a less extreme situation, when either deliberately or inadvertently an Act passed after 1972 contains a provision which is inconsistent with an established rule of Community law. In this situation, we have already seen that the European Court of Justice will insist that Community law must prevail. But should the British courts take up the same position (as section 3 of the 1972 Act would indicate is their duty), or does the later Act of Parliament override the 1972 Act, including sections 2 and 3, to the extent of requiring the conflict to be resolved from a British standpoint?

In Parliament in 1972, ministers emphasized that section 2(4) contained what was essentially a rule of construction, so that if an apparent conflict arose between a later Act and Community law, the British courts were if at all possible to construe the Act in such a way as to achieve consistency rather than conflict. Lord Colville said, "It is only if they cannot do so that the law of the English courts allows them to give precedence to the later English Act."158 Speaking in the same debate, the judge, Lord Diplock, said, "This clause is designed to ensure that the courts, when they are construing that subsequent Act of Parliament, will recognize that it was the intention of Parliament not to conflict with the Community law."159 But, said Lord Diplock, when a conflict could not be resolved by construction, the courts would be bound to


159 Ibid., col. 1029.
give effect to the subsequent Act of Parliament.

The question of supremacy has received substantial attention from the judiciary but the case-law under the European Communities Act does not speak with a certain voice. Prior to 1989, British courts never had to confront the question of a stark conflict between an Act of Parliament and Community law. True, implicit conflicts did arise, however, British judges were able to resolve them by skillful demonstrations of constructive interpretation. In 1989, two cases arose where a conflict between a United Kingdom statute (passed after the European Communities Act had come into force) and Community law could not be so easily resolved. Lord Diplock had suggested that in this event British courts would be bound to give effect to the subsequent Act of Parliament. Recent rulings by the European Court in Factortame Ltd. and others v. Secretary of State for Transport and Factortame (No. 2) allowing national courts to suspend, or to declare void, Acts of Parliament which conflict with Community law, suggests, however, that Lord Diplock’s assertion is erroneous. The rulings have brought with them some concern that the ultimate bastion of the British constitution, the supremacy of Parliament, could finally be breached. The Factortame judgments are particularly interesting for their implications concerning the obligations upon United Kingdom courts when faced with supremacy issues and it is to these which I now turn.

The Courts Respond: The Factortame Saga

The background to the complex litigation in Factortame is to be found in the EEC’s attempt to conserve fish stocks by means of a system of national quotas (EC Council Regulations 170/83 and 172/83). Spain, which had not been a member of the Community when the regulations were adopted, fared badly in the allocation of quotas. As a result, a number of Spanish fishing companies attempted to secure part of the British quota by buying up trawlers already registered as British or by re-registering their existing vessels under the British flag. This practice, known as ‘quota-hopping’, was comparatively easy, because the principal requirement for registration - that a British ship be British-owned - could be satisfied by establishing a subsidiary company in the United Kingdom.

The United Kingdom took a number of steps to prevent quota-hopping. It introduced requirements regarding the nationality and residence of crew members of British fishing vessels and requirements that they operate from United Kingdom ports. The government considered, however, that these conditions were proving too difficult to enforce. It therefore took steps to control the ownership of British fishing vessels. Part II of the Merchant Shipping Act 1988 provided that a fishing vessel would qualify for registration as a British ship only if it was owned by British citizens resident in the United Kingdom or by companies of whose shareholders and directors were British citizens resident in the United Kingdom. The Merchant Shipping Act gave rise to a set of proceedings.

Factortame v. Secretary of State for Transport, was an action for judicial review in the English courts. The applicants were a number of companies, all of which were substantially Spanish owned and which operated fishing vessels affected by the 1988 Act. They challenged all of the new ownership conditions on the ground that the new conditions violated their rights under Community law, in particular under Articles 52, 58, 221 and 7 of the EEC Treaty. All of these provisions have direct effect and therefore must be enforced by national courts. The United Kingdom countered that the provisions of the 1988 Act were not incompatible with the fundamental provisions of Community law but were intended only to ensure that fishing vessels flying the British flag had a genuine link with the United Kingdom. The government maintained that international law entitled each state to determine the conditions under which a ship might fly its flag and that Community law had not removed that right.

The judicial review proceedings clearly raised important questions of Community law and the Divisional Court\(^\text{162}\) requested a preliminary ruling from the Court of Justice under Article 177 of the EEC Treaty in respect of those questions. It was accepted by all parties that there would be a considerable delay before that ruling was given (the Court of Justice ruled on the substantive questions in July, 1991 - two years after the Divisional Court's request for a preliminary ruling). Meanwhile the applicants argued that if the 1988 Act were applied during that period, their businesses would suffer irreparable harm for which they would receive no compensation even if the Court of Justice subsequently ruled in their favour. The Secretary of State, on the other hand, contended that if the operation of the Act were suspended, the will of Parliament would have been thwarted and considerable damage done to the United Kingdom.

fishing industry when it was by no means clear that the Court of Justice would reject the United Kingdom’s defence of the 1988 Act as compatible with Community law.

The Divisional Court sided with the applicants and therefore granted an interim injunction ‘disapplying’ the relevant provisions of the 1988 Act and restraining the Secretary of State from enforcing them in respect of the applicants until the Court of Justice had given its ruling on the questions referred. The Factortame case then went to the House of Lords on the question whether the English courts had jurisdiction to grant an interim relief of this kind.

The House of Lords accepted that if the Court of Justice were to rule in favour to the applicant companies on the substantive questions referred by the Divisional Court, the applicants’ directly effective Community law rights would prevail over the Merchant Shipping Act 1988. This is the most authoritative recognition by an British court to date of the principle of the supremacy of directly effective Community law. The House of Lords held, however, that the courts had no jurisdiction under traditional English law to grant an interim injunction ‘disapplying’ an Act of Parliament. Nevertheless, the House made a second reference to the Court of Justice requesting a ruling on whether Community law required or empowered national courts to grant interim relief in a case of this kind even though the national court had no such power under national law.

In view of the urgency of the issues raised by the House of Lords, the Court of Justice gave its ruling on these questions before it considered the substantive questions referred by the Divisional Court. In a brief judgment, Factortame (No. 2)\textsuperscript{164}, the Court of Justice reaffirmed

\begin{footnotes}
\item[163] [1989] 2 All E.R. 692.
\item[164] Loc. cit., note 160, ante.
\end{footnotes}
the principle - by now well established in its case law - that a national court must set aside a rule of national law which prevented directly effective Community law from having full force and effect. The court then held that where a litigant was seeking to assert rights which he/she claimed to possess under directly effective Community law and the existence of those rights was the subject of a reference to the Court of Justice:

...the full effectiveness of Community law would be...impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.165

In short, Community law required the British courts to set aside the rule that there was no jurisdiction to grant interim relief suspending the operation of an Act of Parliament and that the courts could not grant interim injunctions against the Crown.

The case then went back to the House of Lords166 for the House to determine whether it was appropriate to grant interim relief until such time as the Court of Justice should give a ruling on the substantive questions referred by the Divisional Court. The difficulty was that there were no criteria in English law for the grant of an interim injunction against the Crown to suspend the operation of an Act of Parliament, because prior to the decision of the Court of Justice, the British courts had no jurisdiction to grant such an injunction.

The House of Lords was unanimous, however, that the applicants had shown a strong prima facie case that the 1988 Act would be held to be contrary to directly effective rules of

165 Ibid. at 105.

166 [1991] 1 All E.R. 70 at 106.
Community law. The House therefore granted an interim injunction restraining the Secretary of State from withholding or withdrawing registration from the applicants' vessels on the grounds introduced by the 1988 Act.

One year later, in July 1991, the long awaited answers to the substantive questions raised in Factortame were delivered by the Court of Justice. The Court held that although it was for member states of the EEC to determine, in accordance with the general rules of international law, the conditions which had to be fulfilled in order for fishing vessels to be registered in their registers and granted the right to fly their flag, in exercising that power a member state had to comply with the rules of Community law. Accordingly, the Court declared that the statutory system governing the registration of British fishing vessels set out in Part II of the Merchant Shipping Act 1988 was contrary to Community law, in particular article 52 of the EEC Treaty, because the nationality, residence and domicile requirements contained in the legislation were contrary to the principles of freedom of establishment and non-discrimination of nationals of other member states on grounds of nationality. Consequently, the Court ruled that the registration system in the 1988 Act was ineffective in relation to nationals of other member states. As has already been pointed out, the House of Lords has stated, without reservation, that it will be bound to follow the ruling of the ECJ on the substantive questions posed in Factortame. Consequently, the House of Lords is, at present, poised to declare invalid that portion of the Merchant Shipping Act found to be in contradiction to the United Kingdom’s European obligations.

As a matter of United Kingdom constitutional law, the Factortame cases are of immense

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significance. The principle that Acts of Parliament are now subordinate to directly effective rules of Community law must now be regarded as clearly established. Not only has the House of Lords accepted that such Community rules must prevail even over subsequent legislation once a conflict between the two has been clearly established, it has accepted that the British courts have a duty to give effective interim protection to Community law rights by preventing the application of statutory provisions when there are strong grounds for suspecting that the application of those provisions will be found to be contrary to Community law. As Sir William Wade has put it, "Acts of Parliament are now subject to a higher law, and to that extent they now rank as second-tier legislation."  

This aspect of the case has, not surprisingly, been received with consternation by those who believed that the Westminster Parliament enjoyed unfettered sovereignty. Yet, as Lord Bridge pointed out in Factortame (No. 2):

> If the supremacy within the European Community of Community law over the national law of the member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.  

Such an approach is fully in accordance with the principle laid down by the Court of Justice in the Simmenthal case that "a national court which is called upon to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted...

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subsequently.\footnote{[1978] E.C.R. 629 at 645.}

Notwithstanding the Factortame saga, the British courts have shown a considerable degree of willingness to move away from traditional ideas of parliamentary sovereignty. In Macarthy\textit{ Ltd. v. Smith}, Lord Denning said:

The provisions of Article 119 of the EEC Treaty take priority over anything in our English statute on equal pay which is inconsistent with Article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.\footnote{[1981] Q.B. 180 at 200.}

In \textit{Aero Zipp Fasteners v. YKK Fasteners (U.K.) Ltd.}\footnote{[1973] C.M.L.R. 819 at 820.}, Lord Justice Graham said\textit{ obiter} that the European Communities Act had "enacted that relevant Common Market law...should, where there is a conflict, override English law" In \textit{Marshall v. Southampton and South West Hants. Health Authority}, an industrial tribunal found that there was a conflict between Community law, which entitled the plaintiff to adequate compensation, and the \textit{Sex Discrimination Act 1975}, which placed such a low limit on compensation as to make it inadequate; the tribunal, invoking the principle of supremacy of Community law, decided to ‘ignore the limit’ contained in the 1975 Act and to award the plaintiff the compensation to which she was entitled under Community law.\footnote{[1988] 1 C.M.L.R. 5 at 9-10.} Moreover, Mr. Justice Hoffman in \textit{Stoke on Trent...
City Council v. B & O plc,\textsuperscript{174} stated that the EEC Treaty is the supreme law of the United Kingdom and that Parliament had surrendered its sovereignty on matters of social and economic policy regulated by the Treaty.

Professor Hood Phillips\textsuperscript{175} has argued that such cases are concerned only with interpreting English statutes to make them conform with Community law. But it is respectfully submitted that this explanation is unconvincing. Judges are trained to use words carefully; and, when judges use words like ‘priority’, ‘override’, ‘supremacy’ and ‘ignore’, they are not the sorts of words which judges use when they are doing nothing more than interpreting Acts of Parliament.

However, there are limits to the willingness of British courts to accept the supremacy of Community law. In Garland v. British Rail Engineering Ltd., the House of Lords said:

The instant appeal does not present an appropriate occasion to consider whether...anything short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty, would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom...\textsuperscript{176}

This statement clearly implies that English courts will apply an Act of Parliament which contains an express positive statement that it is intended to violate Community law.\textsuperscript{177}

\textsuperscript{174} [1990] 3 C.M.L.R. 31.


\textsuperscript{176} [1983] 2 A.C. 751 at 771, (italics added).

\textsuperscript{177} But the Factortame litigation answers the question which the House of Lords left open in Garland, and makes clear that nothing short of such an express positive statement will justify an English court in construing an English statute in a manner inconsistent with the U.K.’s obligations under Community law.
Similarly, in *Macarthys Ltd. v. Smith*, Lord Denning said: "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the [EEC] Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms I should have thought that it would be the duty of our courts to follow the statute of our Parliament"\(^\text{178}\).

Thus, the position appears to be that British courts will apply an Act of Parliament which expressly states that it is intended to violate or repudiate a rule of Community law, or to repeal, amend or limit the application of the *European Communities Act*; but in all other cases they will recognize the supremacy of Community law over the sovereignty of the British Parliament. In one sense then, parliamentary sovereignty remains in being and could be exercised should a future government wish the United Kingdom to leave the European Community. But, until that time arrives, British membership in the Community necessarily entails considerable restrictions on the scope for national decision making and hence for national legislation. British constitutional doctrine, thus, remains in an uneasy theoretical conflict with basic principles of Community law.

\(^{178}\) [1979] 3 All ER 325 at 329, (italics added). But he added: "Unless there is an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty."
Chapter 5: The Politics of Sovereignty in the United Kingdom Today

Up to this point I have sought primarily to examine the impact that Britain’s obligation to European Community law has had on the fundamental constitutional principle of parliamentary sovereignty. To facilitate this, my discussion has been confined to the sovereignty of the British Parliament in a ‘legislative’ sense, as a doctrine of constitutional law. From this legalistic perspective, strictly speaking, parliamentary sovereignty means that there are no legal limits to the legislative authority of Parliament. Consequently, the legislation of Parliament cannot be overridden except by the express wish of Parliament itself. In the absence of constraints, Parliament possesses the freedom to enact what it sees fit, subject only to the will of the general population or future parliaments. Chapter 4 revealed that Britain’s obligation to adhere to Community law has now begun to impose some considerable restrictions on the legislative authority of Westminster.

Apart from the narrow legislative interpretation of the doctrine, parliamentary sovereignty has always been linked in Britain to perceptions of national sovereignty. This is understandable, for once a nation loses control over the laws it will pass to govern and regulate itself, it follows that national sovereignty -- or the capability of a nation to act in its own self-interest -- is lost. Since the United Kingdom’s accession to the European Community, the perceived threat to British sovereignty has been the primary reason that a clear and united national vision of the role that the U.K. ought to play in European integration has, to date, remained so elusive.

As this paper has endeavoured to convey, membership in the EC has required that member states surrender some domestic control over certain classes of subjects, as circumscribed by the Treaty of Rome, to the Community’s central institutions. The Court of Justice, we have
seen, continues to remind member states of this new political reality. Hence in Britain today, political discussion of membership in the EC, while invariably linked to parliamentary sovereignty in the legalistic sense, is predominately focused upon perceived threats to national sovereignty. This helps to explain the rift that has opened up in Prime Minister John Major’s Conservative caucus, where there exists a strong element on the right-wing of the party that speaks vociferously against a strengthened European union. MPs in the bloc fear that as European union increases, what will follow is the progressive derogation of the right of self-government, to the stage at which it might be neither theoretically nor practically within the power of Parliament to reverse the process of change from independent self-governing nation to a form of EC province.

In part one of this chapter, recent political developments in the United Kingdom regarding the European Community are assessed, with particular reference to the historical agreements on increased political and monetary union reached by all 12 EC member states at Maastricht, The Netherlands, December 9-11, 1991, and to the divisions present in the Conservative party over the direction that Britain should move regarding closer European union. This will set the stage for part two of the chapter, where, in light of the EC, the dimensions of parliamentary sovereignty as an issue in British politics today are explored.

The EC in British Politics Today

The United Kingdom has proved a difficult and somewhat cool partner in the European compact. Both major political parties are much to blame, primarily for the lack of national policy for Europe and the lack of a clear vision of the Community as well as the role the British
ought to play in the European integration. Under the new Conservative leadership of Prime Minister John Major, however, such an indecisive approach to the EC may well be a thing of the past. It seems possible that Britain may finally possess a leader firmly committed to a British future in the EC. As Major himself has stressed, "for many of my generation, Europe is a cause of political inspiration". But, if the EC-related strife within his own Conservative party is any indication, a clear and united national vision of the role the British ought to play in European union has yet to be formulated.

Leading his first party conference in October 1991, in Blackpool, England, the Prime Minister delivered an important speech that indicated a more positive approach to the European Community than that pursued by his predecessor Margaret Thatcher. In his speech Major said, "My aims for Britain in the Community can be simply stated. I want us to be where we belong, at the very heart of Europe, working with our partners in building the future." Major stressed his desire for Britain’s greater participation in Europe by saying it was important to work "together as friends and fellow builders of a more united Europe", however, he also


181 Conservative Prime Minister of Great Britain, 1979-90. During her term as Prime Minister, Thatcher was a virulent opponent of British integration into Europe. She believed that the EC should be an elaborate free trade zone and nothing more. Her staunch opposition to greater European union was most clearly defined in her now famous anti-Europe speech of September 1988, see infra, note 212. Thatcher’s inflexibility on the European issue is now considered one of the primary reasons for her sudden downfall in 1990, see, P. Riddell, The Thatcher Era, (Oxford: Blackwell, 1991).


183 Ibid. 11 October, 1991.
made clear that the United Kingdom favoured cautious progress toward closer integration. The European Commission President, Jacques Delors, a leading advocate of swift moves toward further EC integration, responded to Major's address suggesting that the Prime Minister's position "shows that the British attitude has certainly changed, not only in style but in substance, too"\textsuperscript{184}.

Prime Minister Major cautiously demonstrated his commitment toward closer European integration at the EC summit meeting held at Maastricht, The Netherlands, from December 9-11, 1991. The meeting concluded the year-long parallel intergovernmental conference on European political union (EPU) and economic and monetary union (EMU), which had opened in Rome in December, 1990. The Maastricht summit ended with agreement on a treaty framework for European union incorporating the EPU and EMU agreements and setting a timetable for their implementation, and providing for a new security/defence dimension to European cooperation.\textsuperscript{185}

The treaties would expand the EC's powers over matters that were previously the jurisdiction of national governments and would set the introduction of a single currency for the European Community by 1999. At the heart of the leader's efforts was a change from the EC's traditional role of fostering free and open trade among its members to a community whose goal was making pan-European policies on social, economic, foreign and security affairs.

At the summit, the United Kingdom continued to hold the most cautious position on greater integration, but, as The Times reported, Prime Minister Major was "at the centre of the negotiations, and was widely seen as playing a more constructive role in the process than his

\textsuperscript{184} The Sunday Times, 13 October, 1991.

\textsuperscript{185} The Times, 12 December, 1991.
predecessor, Margaret Thatcher. Britain chose not to join a plan by the 11 other nations to expand EC powers over social issues. Britain also won an agreement that would allow the British Parliament to choose at a later date whether to join the single European currency.

In summary, the key provisions of the Maastricht treaties and the accompanying protocols agreed on by the leaders:

- Committed the EC to launching a common currency for at least some nations by 1999. Britain and Denmark were allowed to ‘opt out’ of joining.

- Sought to establish common foreign policies for the 12 members.

- Laid the groundwork for a common defense policy under the Western European Union (WEU) while preserving the primacy of NATO.

- Expanded the policy issues in which the EC would have a voice.

- Pledged increased aid for the Community’s four poorest nations: Ireland, Greece, Portugal and Spain.

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187 See, infra, note 190.

188 See, infra, note 189.

189 The new treaty on economic and monetary union built on previous agreements that had established three stages in the process toward the creation of a single European currency. The Maastricht pact set a definite mechanism for implementing the third stage -- including the creation of the currency -- by January 1, 1999. The EC was currently in stage one of the monetary process, in which member nations had to abolish restrictions on capital movements and adopt economic plans that would help lead to a ‘convergence’ in economic performance among the 12. The new treaty fixed January 1, 1994 as the beginning of stage two. A European Monetary Institute would be created to strengthen cooperation of the member nations’ central banks and to prepare for the creation of the European Central Bank, which would come into effect in stage three of the process. During stage two, states would seek to meet conditions for convergence of their economies. By the end of 1996, the EC heads of government would meet to see whether a majority of states had met the criteria and whether they wanted to go ahead with stage three which would establish a single currency for the qualified nations and the European Central Bank. A separate protocol gave the U.K. Parliament the opportunity to ‘opt out’ of joining the third stage, though the economic consequences of doing so were expected to be adverse.
- Slightly increased the powers of the 518-member European Parliament.
- Gave the EC a leading role in social policy. Britain was not included in this plan.\textsuperscript{190}

The Maastricht treaties would amend and add to the 1957 Treaty of Rome and the 1987 Single European Act. The treaties cannot go into effect until ratification by all 12 member states. In Britain, after ratification, the Maastricht agreements would be implemented by amendment to the \textit{European Communities Act}.

In a national referendum in Denmark, June 2, 1992, the Danish population narrowly rejected the treaty on European Union agreed at Maastricht.\textsuperscript{191} The result of the referendum was a serious blow to the Maastricht Pact. Accordingly, on June 4, 1992 EC Foreign Ministers held an emergency meeting on the Danish vote. The ministers agreed that the other 11 nations would press ahead with their national ratification processes while deciding what to do about Denmark's rejection. The process toward closer unity was rekindled, however, when Irish voters in the Republic of Ireland on June 18, 1992 voted to approve the Maastricht settlement by a margin of more than two-to-one.\textsuperscript{192}

Prime Minister Major's mix of enthusiasm and caution in crafting Britain's position at

\textsuperscript{190} A protocol on social policy was adopted by the 11 nations. In the protocol, the 11 agreed to use EC institutions to 'support and complement' member governments in the areas of workers' health and safety, sexual equality in the work place, and providing information and consultation for workers. Decisions taken by the 11 would not apply to Britain. John Major had argued that such powers could reimpose labour regulations that Britain had removed under Margaret Thatcher. The protocol would allow majority voting among the 11 to decide most issues. Major initiatives, such as those regarding social security would require unanimous approval. Actions taken by the 11 would not be EC law, but would nonetheless become law in the 11 nations.

\textsuperscript{191} \textit{The Times}, 03 June, 1992.

\textsuperscript{192} \textit{The Guardian}, 21 June, 1992.
Maastricht satisfied many of the pro-European and anti-European MPs at Westminster who continue to disagree on the direction the United Kingdom ought to take regarding European union. On December 19, 1991, at the conclusion of a two day debate about the outcome at Maastricht, the House of Commons voted 339-to-253 in favour of a motion supporting Major's negotiations at the summit.193

During the debate, however, both the opposition Labour and Liberal Democratic parties accused the government of not going far enough in its commitment to European union. Outgoing opposition Labour Party leader Neil Kinnock criticized the Prime Minister's performance at Maastricht primarily because of Britain's failure to join the emerging European social charter.194 Moreover, argued Kinnock:

... the government, whose duty was to resist development of a two-speed Community, had contrived to get one, with Britain in the slow lane. Mr. Major spent his whole time at Maastricht getting two escape clauses. That is not the action of a Prime Minister who wanted to be at the 'heart of Europe', but of a Prime Minister who wanted Britain at the tail of Europe.195

Liberal Democratic leader Paddy Ashdown, while supporting the general developments at Maastricht, condemned the British government for "squandering yet another European opportunity for Britain".196 Ashdown reflected the feelings of those in Parliament who believe that Britain is not moving decisively enough toward a commitment to European integration,


194 The Parliamentarian 73, no. 2 (April, 1992) at 129.

195 H.C. Deb., vol. 201, 18 December, 1992 at 286-287. Prominent Conservative, Sir Norman Fowler defended Major’s actions, stating to the House of Commons that because of the Prime Minister's successful demands, Britain "was uniquely well placed to make a sensible judgement on an important matter at the right time in the future". Ibid. at 293.

when he said:

Maastricht marks a decisive and irreversible step towards integration and unity for Europe. It could have been a decisive moment for Britain, too, the moment when Britain decided to end 40 years of indecision and ambivalence. It could have been the moment when Britain declared without qualification once and for all that its future belongs to a United and dynamic Europe. It could have been a historic week for Britain as well as for Europe, but it was not. The Prime Minister declared...that Maastricht was a good deal. Maybe it was a good deal for the Conservative party but, it was a very bad deal for this country. Once again, we find ourselves in a vacuum of European uncertainty.197

Britain’s Labour party has become steadily more pro-Europe. It started after the 1983 election, which Labour lost heavily, partly because it campaigned for withdrawal from the European Community. The pro-EC move accelerated in 1988 when Jacques Delors launched the EC Social Charter which he vaunted at the British Trades Union Congress that year. It was triumphantly rewarded the following year when Labour replaced the Tories as the largest contingent from a single country in the European Parliament elections.198 The increasing enthusiasm of Britain’s broad left (including the Liberal Democratic Party which has always been pro-EC) for the environment, consumer protection and constitutional reform has, according to opinion surveys199, whetted its interest in the Community where these issues are seen to be dealt with better.

During the election campaign leading up to the British general election of April 9, 1992, there was little discussion of Britain’s future within the European Community and its implications for national sovereignty. In the run-up to the election, attention shifted almost

197 H.C. Deb. vol. 201, 18 December, 1992, cols. 300-301.


overnight from the EC to domestic concerns about the state of the British economy. To a large extent this can be attributed to a keen awareness which the three major political parties displayed of the vague and uncommitted attitude of the electorate at that time towards Britain’s position within the EC. On March 10, on the eve of the dissolution of Parliament marking the start of the election campaign, a national poll commissioned by the Telegraph revealed that only 39 percent of the general population had decided whether or not to support the agreements reached on political and economic union at Maastricht. Moreover, as the campaign progressed, other opinion polls consistently marked economic interests and domestic political issues, such as Scottish devolution and electoral reform, as the primary area of concern among British voters. As a result, both the Tories and the Labour Party responded predictably by ignoring the thorny issue of Britain’s future in the EC and the sovereignty question. Both major parties instead chose to emphasize domestic issues, specifically commitments to lower taxes, fighting economic recession and revamping the National Health Service. The Liberal Democrats meanwhile, vigorously championed the need for electoral reform.

The lack of discussion about Britain’s future in the EC was reflected in two of Britain’s leading newspapers. A survey by the author of the Times and the Telegraph between March 11 and April 9, 1992 revealed only five articles containing significant election discussion relating

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201 The Telegraph, 10 March, 1992.


204 Ibid., at 5.
to the EC, and virtually nothing relating to Britain’s concern for national sovereignty in a more unified Europe. All five reports deliberated upon technical economic merits of British involvement in the European exchange-rate mechanism (ERM).

It is striking that at a time of such historic advancement in the European Community, so little was said by any of the political parties during the election campaign about Britain’s future within the EC and the corresponding concern for national sovereignty. Why did this happen? As a matter of conjecture, there are two possible explanations.

First, throughout the campaign, polls consistently indicated a tight race, thus, it became very important that each political party highlight its distinctiveness in relation to the others so that the narrow margin of undecided voters could be attracted by clear alternatives. Since all three major political parties supported closer union of the European Community, each party sought to emphasize other issues in which there were clear policy differences. Hence, the Labour party emphasized more equitable taxation and constitutional reform, while the Conservatives portrayed Labour as the party of high taxation, and as a party less trustworthy to be in office at a time of economic recession. The Liberal Democrats made much of the fact that it was the only party to promise an increase in the standard rate of tax (by one penny) and this, to fund extra spending on education. Secondly, the Telegraph poll conducted on the eve of the election campaign, revealing that only 39 percent of the population had decided whether or not to support the Maastricht agreements, suggests that at the time, to have 205 The Telegraph, 12 March and 01 April, 1992; The Times, 16 March, 27 March and 07 April, 1992.


207 Ibid. at 5.
campaigned on the EC issue would have been unpredictable and, therefore, potentially politically dangerous.

Ironically, Prime Minister Major faces more trouble from his own party than from the opposition Labour and Liberal Democratic parties over negotiations on European political and monetary union. At present, a vigorous debate is being waged within the Conservative party over the direction the United Kingdom ought to take with respect to closer alignment with the EC. The Conservatives are clearly divided. A serious rift has formed between a majority of MPs who favour closer union within the European Community and a minority of MPs fervently opposed to such a political development, who believe, on the contrary, that the trend toward increased European union should be reversed. The cleavage represents the single greatest threat to the continuity of John Major’s government.

On May 21, 1992, the House of Commons met to deliver a key vote on the Bill to ratify the Maastricht pact. The Maastricht legislation sailed through its second reading with a massive majority of 336-to-92 due to Labour’s decision to abstain.\textsuperscript{208} The vote revealed 22 stalwart anti-European Conservative MPs. Recent events seem to suggest that John Major is facing increasing opposition to the proposed treaty on closer economic and political union of the EC. By June 21, a further 70 MPs had signed a Commons motion asking the Government to make a fresh start and rethink its European position.\textsuperscript{209} One week later, 10 junior Ministers met in conclave to reinforce their opposition to anything except the minimum concessions toward

\textsuperscript{208} San Francisco Chronicle, 22 May, 1992. In response to the outcome of the Danish referendum, the British government on June 28, 1992 suspended parliamentary debate over Maastricht-related legislation, and has decided not to re-open debate on national ratification of the pact until at least the late autumn of 1992.

\textsuperscript{209} Christian Science Monitor, 01 July, 1992.
European union. Furthermore, in a nationally broadcast television interview on July 1, Margaret Thatcher egged on her allies in Parliament by suggesting that Maastricht was a "treaty that had gone too far". The former Prime Minister made it plain that she intended to oppose all efforts to have the treaty ratified by the British Parliament.

At present there are several identifiable groups among the 336 Tories at Westminster. The Bruges Group was formed after Thatcher's now famous anti-Community speech of September 1988, in the Belgian city of Bruges. It has more academics among its paid-up members than MPs, however, the group's sympathizers at Westminster, known as the 'Friends of Bruges', were recently able to enlist the backing of some two dozen Tory MPs for a resolution urging Prime Minister Major to keep Britain out of European economic and monetary union. At Parliament, the Tory rebels in the Commons are being encouraged by Margaret Thatcher and her former Cabinet colleagues, Nicolas Ridley and Norman Tebbitt, all newly arrived in the House of Lords. Although numerically they are small, this bloc of Tories poses

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210 Ibid.

211 The Times, 02 July, 1992.

212 In that speech, Thatcher reiterated her strong support for the economic liberalization planned by the EC for 1992, but at the same time stressed her opposition to centralization of European political and social decision-making. Thatcher warned against the creation of a European superstate and a central bank, as well as linking the British Pound to the European exchange rate mechanism (ERM). She argued that such events would be "catastrophic and horrific" for Britain because it would result in economic domination by Germany, the weakening of the sovereignty of the British Parliament and a loss of control over national economic destiny. See, (1988) 2497 Facts on File 709 at 719 and P. Riddell, loc.cit.. Thatcher continues to assail pending moves toward a more closely federated European Community along these lines, see for example, The Times, 15 May, 1992; 19 June, 1992; and the Christian Science Monitor, 01 July, 1992.


the strongest threat to the stability of the Conservative party. The group is well-organized, prominent and vociferous in its anti-European stance. A recently leaked draft of the bloc’s agenda shows many motions critical of the government’s policies on Europe.\textsuperscript{215} Moreover, in the draft it was stated that a significant number of Tories within the group intend to mount an offensive against John Major’s European initiative at the Conservative party’s upcoming conference in Brighton in October 1992, by calling for Britain to leave the ERM. They have also adopted a recalcitrant stance in support of Margaret Thatcher’s demands for a British national referendum on closer European union.

The European Reform Group is a collection of some 60 Conservative MPs, whose prime concern is to preserve the sovereignty of the Westminster Parliament against foreign encroachment.\textsuperscript{216} They are not as hostile to Brussels and all its works as is the Bruges Group. They would probably support a European monetary union treaty. Likewise, they might back a political union treaty, provided it did not give any significant new powers to the European Parliament and Commission. Pro-EC Conservatives are far less organized than either of the above groups. Perhaps, complacently, they feel that the tide of events in the Community continues to run in their favour.\textsuperscript{217} Larger than any of these groups are uncommitted Tory MPs, who want party unity above all. They are most likely to follow John Major’s lead -- if he gives a proper lead.

\textsuperscript{215} The Times, 17 August, 1992.

\textsuperscript{216} The Parliamentarian 73, no. 1 (January, 1992) at 127.

\textsuperscript{217} This may change suddenly depending upon the outcome of the upcoming national referendum in France (Sept. 20, 1992) on European union.
The Sovereignty Issue in British Politics Today

At present, the tide continues to run for the idea of European unification. This is probably the result of dramatic geopolitical and geocultural changes which remind us that the future of ‘Europe’, as indeed of every other nation-state today, will be largely determined by wider regional, or global currents and trends. But this same current may serve simultaneously as a model and a warning; what may flow so suddenly and vigorously in one direction may equally swiftly change course, and in so doing reverse the climate that seemed so conducive to the process of European unification. Hence the importance of basing any form of European union on firm and deep cultural and social foundations that are, to some extent, independent of economic and political fluctuations.

Thus, the issue of European integration is inextricably linked to its relationship with nations, national identity and national sovereignty. National identities are forged out of shared experiences, memories and myths, in relation to those of other collective identities. They are in fact often forged through opposition to the identities of others, as the history of paired conflict so often demonstrates. In this respect, national identifications possess distinct advantages over the idea of a unified European identity. They are accessible, well established, long popularized and still widely believed in. In each of these respects, a European super-state is deficient both in idea and form. Above all, it lacks a ‘pre-history’ which can provide it with emotional sustenance and historical depth. Consequently, rooted structures like the nation-state, and hallowed values like national sovereignty remain tenacious in their attachment to Western

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This is evident in the governing Conservative party of John Major, where the division over Europe is fuelled by competing visions of what Britain's likely future in a more closely unified Europe would be. The primary fear of anti-European Tories is that as European union increases, what is likely to follow is the progressive derogation of the right of self-government to the stage at which it may become neither theoretically nor practically within the power of Parliament to reverse the process of change. The roots of Britain's imperial legacy still run deep, and only serve to exacerbate the anxious concerns of those who would see closer European integration as a recipe for the devolution of power from Parliament to a centralized Eurobureaucracy in which Britain's national interest would no longer be paramount.

As we have seen, both the Labour and Liberal Democratic caucuses at Westminster have indicated their commitment toward furthering economic and political union in the Community. Despite the division over Europe in the Conservative party, a solid majority of Tory MPs remain supportive of closer European union as well. Pro-European politicians on both sides of the House of Commons argue that European monetary union is not a reckless scheme devised by Eurocrats in Brussels but, rather, a set of practical proposals with firm roots in the increasing trend toward integration of the European economies as a result of accelerating globalization. Proponents of EMU base such arguments on the acknowledged success of the ERM in providing exchange-rate stability and effective monetary co-ordination in the 1980s. Moreover, they point

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219 The Western model of the nation has tended to emphasize the centrality of a national territory or homeland, a common system of laws and institutions, the legal equality of citizens in a political community, and the importance of a mass, civic, culture binding the citizens together. See, L. Tivey, ed., The Nation-State, (Oxford: Martin Robertson, 1980); and C. Tilley, ed. The Formation of National States in Western Europe, (Princeton: Princeton University Press, 1975).
out that the advantages of a single currency for business are: that it would end transaction costs, eliminate exchange rate instability and provide a stable low-inflation environment for growth, as well as to enable the planning of trade and investment objectives without the worry of currency fluctuations.

Pro-EMU MPs maintain that Britain is already in a Deutschmark zone caused by the policies of the German Bundesbank\textsuperscript{220}, but without the institutions which would allow Britain to influence policy. A seat on the Eurofed as well as an element of accountability through an Economic and Finance Committee of the Council of Ministers, they argue, would give Britain an effective say.\textsuperscript{221} The choice, says Labour MP Giles Radice, "is between a single currency or a dominant currency".\textsuperscript{222} Furthermore, the pro-European politicians suggest that the only other option for Britain -- opting out -- would require considerably higher interest rates than the Euro-rate to keep the pound stable, to the detriment of British investment and growth.\textsuperscript{223} At the heart of the pro-EMU message at Westminster is a plea for rational interpretation of present economic trends. If Maastricht is ratified, exclaim the MPs, momentum for a single currency will gather speed and create an economic turning point out of which Britain cannot afford to be left.

Many of the pro-European supporters in Parliament, including such prominent Tories as Michael Heseltine and Sir Patrick Mayhew, simultaneously testify that if a united Europe is to...

\textsuperscript{220} See, \textit{infra}, at 96, and note 232.

\textsuperscript{221} \textit{The Observer}, 08 December, 1991.

\textsuperscript{222} \textit{Ibid}.

\textsuperscript{223} \textit{The Guardian}, 05 May, 1992.
flourish economically then it must also appear focused in its vision of foreign policy.\textsuperscript{224} They contend that this is to help reduce the likelihood of competing European and national identities coming into conflict, as was the case when EC member-states, responsive to national public opinion, were in disarray over foreign policy of the Gulf war and then over ethnic unrest in the former Yugoslav state. Thus, it is argued, maximum benefit of membership in the Community will only accrue to member states if there is a concerted European policy based on a single presumed European interest and self-image.

Why is it, then, that Tory Euro-sceptics in the Conservative caucus are filled with trepidation over greater monetary and political union between Britain and the European continent? The answer lies in the exigent cries of the Euro-sceptics themselves, which are largely fuelled by a perceived threat to the sovereignty, identity and democracy of the British nation, and ultimately, to the authority of the British Parliament to act in the greater interest of the British people. Professor Anthony Smith suggests that national identifications are "fundamentally multi-dimensional", and that though they are composed of analytically separable components - ethnic, legal, territorial, economic and political - "they are united by national ideology into a potent vision of human identity and community".\textsuperscript{225} The ideology of national sovereignty which emerged in Western Europe was premised on the belief of a world of exclusive nations, each possessing a uniquely developed identity. The basic goals of nationalists everywhere were identical: they sought to unify the nation, to endow it with a distinctive individuality and to make it free and autonomous. The nation-state, thus, became the supreme object of loyalty and the sole criterion of government. There was no legitimate exercise of


\textsuperscript{225} A.D. Smith, \textit{National Identities}, at 36-37.
political power which did not emanate expressly from the nation, for this was the only source of political power and individual freedom.

The concept of nation-state remains deeply rooted in the British national identity today and is reinforced by grand images of the ‘Island race’ -- ‘Little England’ -- that built an imperial dynasty and who twice stood alone in the defense of her freedom in two World Wars.226 Euro-sceptics in the Conservative Party have clearly embraced such a vision in the face of what they believe to be Maastricht’s blueprint for a European federation.227 Margaret Thatcher passionately reflected this prevailing attitude among dissident Tories when she said:

Deep down we are an island people, still, and I think we shall always be that. I do not wish to see Britain’s power taken away. Our Parliament is central to the life of our nation. It was the chimes of Big Ben that rang out across Europe during the [Second World] War. Nationhood remains the focus of loyalty and sovereignty in the modern world. Europe cannot be built by ignoring or suppressing this sense of nationhood by trying to turn us into regions rather than nations. The way forward lies in willing co-operation between independent sovereign states.228

Broadly speaking, anti-European Tories at Westminster have three misgivings toward the prospect of closer economic and political union with Europe. They believe that Maastricht will set off a supranational domino effect in which Britain ends up with little control over economic policy, social and foreign policy, and a parliament incapacitated by a centralized and undemocratic pan-European bureaucracy. I will deal with each of these seriatim.

Economic policy constitutes one of the most important actions of the modern state. In

226 See, for example, The Observer, 17 November and 24 November, 1991; San Francisco Chronicle, 18 December, 1991; Vancouver Sun, 22 August, 1991; and P. Riddell, loc.cit.

227 See, for instance, W. Cash, Against a Federal Europe, (London: Duckworth, 1992), a pamphlet summarizing the Bruges Group’s opposition to closer union of the EC.

228 The Observer, 29 November, 1991.
today's global markets it is more obvious than ever that a vibrant working economy is the engine which powers the survival of the nation-state. In the absence of a healthy economy, a nation's population falls prey to discomfort, then unrest, and finally, anarchy. As a nation's economy grows in size and success so also does its potential to exert influence on lesser economies peripheral to it. Hence, as history has shown repeatedly, national economies can become a medium through which a nation projects its values and identity to the world around it. It is not surprising, then, that for Britain, any prospect of losing control over vital instruments of national economic policy, such as a central bank, exchange rates and currency itself, stirs up a deep fear of losing a long-standing symbol of national autonomy -- the British pound. Here the experiences of early industrialization and empire can aid our analysis.

Britain was the world's first industrializer, and later, she became the manager of a vast overseas empire. Both experiences shaped the institutional setting of British markets, so fundamentally in some cases that their legacy has lasted right into the post-war period. One aspect of this legacy has been the persistent, and not always rational, defense of the pound by virtually every successive post-WWII government in Britain. As Peter Hall suggests in his seminal book, *Governing the Economy*:

... this approach to policy was rooted in the experience of empire. After WWII with Britain's financial legacy came a diplomatic one. Most of Britain's overseas balances were held in the official reserves of nations who once belonged to the old sterling area. Any fall in the British exchange-rate would reduce the value of the reserves and have serious diplomatic repercussions. As a result, British policy makers were inclined to see devaluation as form of default on Britain's international obligations. This legacy remains in Whitehall today.229

The British, suggests Hall, continue to cling to lofty perceptions of their currency. This

stands as a stark testament to the continued importance attached to national currency as a symbol of national sovereignty and the projection of influence.

Anti-European Tories fervently believe that a single European currency would result in a unequivocal transfer of control over economic policy from Parliament to a European central bank, and hence, Britain's loss of control over her own destiny. Their consistent scepticism about rushing into monetary union is based on an acute awareness that when countries agree to a common currency, they in effect surrender some of their most basic sovereign rights, pooling their sovereignty in monetary affairs. In justifying their fervour, the dissident MPs point to the stranglehold that the German Bundesbank now holds over Britain's economic fortunes. The economic crisis ensuing in Britain as a result of German economic policy is being trumpeted by anti-European forces at Westminster as a timely example of the disastrous consequences that would accompany British acceptance of a single European currency.

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230 See, W. Cash, loc.cit. at 12.

231 The German Bundesbank is no ordinary central bank. It was established by law as an entirely independent branch of government, beyond the reach of grasping politicians with one sacred task - that of upholding the nation's currency. It has never betrayed its trust. The German people know this. Because it has the unflinching support of the German people, the Bundesbank does what it believes to be right, economically, with hardly a glance at Bonn, London, or Paris.

232 Today's Bundesbank crusade is against inflation, in defence of the German currency. The economic havoc created by unification is still reverberating through the nation. Bonn, as a result, has been printing money at more than double the target rate of the Bundesbank. In order to stamp this out, as the Bundesbank would see it, interest rates have been kept inordinately high. Germany's neighbours in the ERM are paying for it. Nowhere is this more apparent than in Britain where the economy is turning from recession into slump. Interest rates need to come down two or three points (from 10 to seven percent) to properly kickstart a totally dormant industrial sector. But the pound is consistently the weakest of all European currencies in the EMR; and until rates fall, along with the value of the mark, senior British officials can do nothing.

The threat to sterling has been debated in Britain for months and months. As we saw in Chapter 2, economic necessity gave birth to the European Economic Community in 1957. Even Britain, which at first was frozen out of the fledging Common Market by France and later became fastidious about whether the group was really good enough for it to join, has no serious questions any more about the economic benefits of membership.\textsuperscript{234} Prime Minister John Major does not really have any doubts about the benefits of a single currency\textsuperscript{235}, but to satisfy the doubters at home who have gathered under the banner of Margaret Thatcher, and in an effort to maintain party unity, he convinced his 11 EC partners to agree that Britain could remain outside the monetary union agreement, by an opt-out provision\textsuperscript{236}, until the British Parliament made the final decision whether to join.

The effect that closer European union would have on national social policy is another major issue of concern among British politicians today. The Conservative Bruges Group and a significant number of MPs in the Tory European Reform bloc remain firmly against attaching Britain to any type of European social charter. At the root of their opposition to such a development lies a deeply held belief that matters so directly related to the lives of British citizens must remain the sole responsibility of the British Parliament. Laws concerning social policy, argues Sir James Spicer, a leading MP in the European Reform Group, are "intimately connected to the fabric of our nation and our democratic tradition. Any act of submission to an enforced Europe-wide social policy would be tantamount to surrendering Parliament's


\textsuperscript{235} H.C. Deb., vol. 204, 11 February, 1992, col. 321.

\textsuperscript{236} Supra, note 189.
 responsibilities for the welfare of the British people".  

Euro-sceptics in the Conservative caucus vehemently opposed the protocol on social policy formulated at Maastricht. The protocol agrees to use EC institutions to 'support and complement' member governments in the areas of workers' health and safety, sexual equality in the workplace and providing information and consultation for workers. The protocol would allow majority voting among EC member states to decide most issues concerning social policy. Margaret Thatcher has stated unequivocally that "matters of such concern have no place but in the British Parliament". Furthermore, said Thatcher:

The Maastricht protocol on social policy proposes an enormous and unacceptable transfer of responsibility from Parliament, which is clearly accountable to the British people, to the European Community and its institutions which are not.

If John Major's successful demands at Maastricht for a British exclusion from the social protocol is any indication, it appears that pro- and anti-European forces in the Conservative caucus are united in their opposition to European encroachment on British policy. John Major and his pro-Europe supporters take a more economic-oriented stance against a European social charter, however, than do the MPs in the Bruges and European Reform Groups, who prefer to emphasize the threat that such a charter would pose to the sovereignty of the British Parliament.

The Prime Minister has argued that such powers as provided for in the Maastricht protocol on social policy could reimpose labour regulations that Britain had removed under former Prime

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237 Ironically a MORI opinion poll revealed that while only 17 percent of Britons favour the transfer of more power to the European Parliament in Strasbourg, France, there is a high degree of support -- 57 percent -- to give the EC Commission greater control over social and environmental policy. Robert Worcester, chairman of the MORI polling firm, suggests that the British public is saying "we don't necessarily trust Westminster to get it right on social and environmental issues". The Times, 27 February, 1992. The exact areas and extent of such a transfer remain, however, largely undetermined.

In its opposition to the protocol, the government of John Major seems to be taking a position that is exactly the reverse of that held by many Canadians about closer economic integration with the United States. They feared the loss of social benefits in a free market. The British government fears submission to social benefits standardized for all the members of the common market. Thus it opposes a maximum 48-hour work week and other elementary labour and health guarantees. This would appear to be the legacy of a decade of hard-nosed Thatcherism that spurned soft-hearted policies in a return to Victorian industrialism.

A concern for the future role of British foreign policy marks another reason that anti-European politicians in Britain have objected to European political union. This concern, however, appears to be less motivated with preserving the sovereignty of Parliament than it does with preserving the traditional position of Britain's relationship with the United States and within NATO. While the issue concerning British foreign policy is often over-shadowed by the debate over EMU and a single currency, the Bruges Group has continued to draw attention to its opposition to a supranational European foreign policy. Recently, long-standing anti-European MPs Sir Peter Emery and Sir Trevor Skeet sponsored a parliamentary petition supported by 52 fellow MPs calling for Prime Minister Major to "ensure that future European negotiations preserve the integrity of Britain's position as a partner in NATO and the country's unique relationship with the United States of America".240

Euro-sceptics in the Bruges Group believe that the United States has a special stake in the character of Europe. America's closest allies are members of the European Community. These special relationships will disappear, they warn, in a common European foreign policy and


in a defense policy based on the Western European Union. Had such common policies existed before the Persian Gulf crisis, the MPs are quick to point out, neither Britain nor France would have been in a position to offer prompt and substantial commitments of support to the United States.241

Although in many ways it is the least addressed of the issues surrounding European economic and political union, the prospect of being governed by European central institutions that remain largely unaccountable and whose policies reflect only bureaucrats, remains a central concern of anti-Europeans in the Conservative Party. Indeed, it is important to all those concerned about a future in the European Community. Britain possesses a democratic tradition genuinely hostile to bureaucratic centralism242, and because Britain has the mother of all parliaments, Tory Euro-sceptics argue that Britain potentially has the most to lose in European union.243 Anti-European MPs are bound to equate democracy with British parliamentary sovereignty, but a citizen may wonder whether democracy might also mean more accountable European institutions: above all, an elected Parliament with real power to control and review the decision of the Council and Commission. The so-called ‘democratic deficit’ within the Community structure, however, is very real. Consequently, Tory fears of ‘Europe’s’ inability to govern itself are not altogether unfounded.

Since 1986, the European Parliament has become a somewhat more influential actor in the EC policy process. In an attempt to redress the democratic deficit within the Community,

241 W. Cash, loc.cit. at 14.


243 W. Cash, loc.cit. at 20.
the Single European Act introduced a new ‘cooperation procedure’ which grants the European Parliament the right to a second reading of all Community legislation relating to the establishment and functioning of the internal market, social and economic cohesion and certain aspects of EC social and regional policies. This provides MEPs with a further opportunity to propose amendments to the ‘common position’ adopted by the Council of Ministers which can then be overridden by the Council of Ministers only by a unanimous vote.

The cooperation procedure has undoubtedly provided MEPs with additional leverage over the details of much Community legislation. Since the introduction of the Single European Act in 1989, the Commission has accepted 1,052 of the Parliament’s 1,724 amendments to single market laws, and of those the Council has agreed to 719.244 The Parliament has thus become a useful means of achieving amendments to EC legislation. Nevertheless, its legislative powers remain -- for the moment at least -- limited. It has no right to initiate legislation, no legislative powers with regard to policies outside the sectors listed above, and no powers to override decisions taken by the Council of Ministers.

Hence, the Conservative Euro-sceptics, wary of the absence of democratic controls in the EC’s central institutions, continue to uphold Margaret Thatcher’s vision of a "Europe of diverse, sovereign democratic states, prosperous because of the freedom of their societies and economies busily trading with one another, and looking outward".245 Like Thatcher, they reject a Europe in which each people has lost control of its affairs to the artificial bureaucracy in Brussels solely reflecting the vision of unrepresentative bureaucrats.

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244 The Observer, 26 April, 1992.

With respect to his policy toward Europe, there is little doubt that John Major has been forced to walk a political tightrope between those who see European union as the only way for the European Community to succeed, given the economic and political trends of the world today, and those that believe Britain must never forget the history from whence it has sprung. The division in the Conservative caucus has, if anything, provided a positive medium for debate and has enabled the British to carefully chart their course in a European future.

John Major has had to craft his vision of British participation in Europe with political astuteness. Not only has the Prime Minister been required to deal with a divisive caucus which has left his government atop a powder keg of conflicting dissatisfactions, but, he has also been forced to juggle the legacy of his predecessor, Margaret Thatcher. Major has carefully distinguished his positions from Thatcher on a variety of issues. Where she emphasized self-reliance, he has emphasized social solidarity. Where she emphasized differences among the nations of Europe, he has emphasized a "safe and prosperous" whole. Where she emphasized the preservation of national sovereignty and the role of Parliament in the life of the nation, he has emphasized building Europe.

The differences between Thatcher and Major may be less marked than they sound. They may also be more rhetorical than substantive, but, rhetoric is, after all, the medium by which political leaders communicate their purposes, and rhetoric was the medium that John Major chose to differentiate himself from his predecessor.

There are certainly clues to Major's similarity with Thatcher's European outlook. It was
Major who led the fight to have the principle of ‘subsidiarity’\textsuperscript{246} inserted into the Maastricht pact, and it is he who continues to lead the call for enlargement of the EC to include Eastern European states and parts of Northern Europe.\textsuperscript{247} One cannot help but suspect that his desire to push for the expansion of the EC is a way of rendering a supranational ‘federal’ Europe less likely.

Ironically, only a quarter of a century ago Britain was knocking at the door of the European Economic Community and it was France that was blocking British membership. Today, France, with Germany, are trying to convince Britain to sign up fully. For Britain there is a gamble either way. If it holds out by clutching as much sovereignty as possible, Britain can preserve its independence, its way of life, its position of Parliament and be as Thatcherist or socialist as it chooses. But that way could bring an eclipse of Britain as an economic and financial power, and political isolation.

If Britain whole heartedly joins the new union, it will lose a great deal of its sovereign discretion, but it stands a better chance of economic prosperity and can participate in the grand political alliance, ensuring the preservation of whatever national ‘quirks’ it can hang on to.

Slowing down the European express train just a little, however, as Britain has been trying

\textsuperscript{246} In the wake of Danish voters’ rejection of the Maastricht treaty, Prime Minister Major put forward the possibility of adding a special protocol to the treaty that would underline the need to avoid giving too much power to the European Commission in Brussels and devolve it instead to national parliaments. On July 1, 1992 EC members officially recognized the principle of ‘subsidiarity’ in the Maastricht agreements. The principle means that EC bureaucrats in Brussels should decide only those issues that they absolutely must. Everything else should be left for EC members to decide for themselves.

to do, may not be so harmful. It may force the other 11 to spend more time polishing the terms of political union which, in the long run, is going to have to take account of the aspirations of a great many other countries -- at least another dozen, including the Western associates of the free trade area, as well as Poland, Hungary and perhaps the Ukraine.
Conclusion

As readers may now be aware, discussion of legislative sovereignty is liable to become enmeshed in legal technicalities, and to give too little attention to the political significance of enabling the courts to review Acts of Parliament.\(^{248}\) A strong defence on political grounds can be made of the existing position in which legislation (non-EC related) by Parliament is immune from direct review or scrutiny by judges.\(^{249}\) The status quo is favoured by the two parties that have governed Britain in succession since 1945, since the ability to exercise legislative authority is one of the prized prerogatives of British government. Other parties and groups may be more attracted to the possibility of enabling the judiciary to apply limits to the legislature in the interests of individual and minority rights.

The present relationship between the courts and the legislature is founded upon the attitude which judges have taken to legislation over many years; it has also accorded with the wishes of successive majorities in the House of Commons. If studied closely, the exact


boundaries of legislative sovereignty are, however, difficult to determine. For example, so long as Parliament does not enact that all blue-eyed babies should be strangled at birth, we shall not know whether Parliament is restrained by purely political or moral reasons from doing so, or whether Parliament could be debarred from doing so by a gloss upon fundamental legal doctrine which the courts have never had occasion to develop. More relevantly, so long as Parliament does not seek intentionally to override a rule of Community law, we shall not know whether this is to be explained by the lack of political desire to legislate or by considerations of expediency, or whether Community law now imposes limits upon Parliament that are enforceable by British judges.

As regards Community law and the sovereignty of the British Parliament, essentially two main interlocking issues are involved: (1) the primacy of Community law over national law, including legislation, and, (2) the consequences of this on the doctrine of parliamentary supremacy, which, as commonly understood, is said to involve the unlimited and ultimately exclusive legislative capacity of Parliament, a capacity which is inalienable. Thus, it is said that Parliament can never by any Act bind its successors, and so, in particular, is not bound for the future by the European Communities Act, which does give effect to the primacy of Community law. In effect, it is argued on the traditionalist side that, because of the doctrine of the sovereignty of Parliament, United Kingdom legislation can always override Community legislation and that where there is a conflict between a Community Regulation and a later British Act of Parliament, British courts must always obey the latter. That this is no longer necessarily the case has been made abundantly clear in the results of the Factortame litigation.

Long before Factortame, at the passing of the European Communities Act in 1972,
successive Lord Chancellors denied either that Parliament would surrender its sovereignty or that the Act would be irreversible. Lord Gardiner pointed out that the United Kingdom had accepted restraints on its legislative power to take account of obligations arising out of such treaties as the United Nations Charter, the European Convention on Human Rights, NATO and GATT.\footnote{H.L. Deb., vol. 322, (1971) cols. 1202-1204.}

Lord Hailsham further pointed out that there were "stacks" of treaties designed to last for an indefinite period, some designed to last forever, and most peace treaties fall under one of these heads.\footnote{Ibid., at cols. 195-208.}

Lord Gardiner also said: "Under the British constitutional doctrine of parliamentary sovereignty no Parliament can preclude its successors from changing the law.... There is in theory no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law"; but he added that repeal of the 1972 Act would be a breach of international obligations, unless it was justified by exceptional circumstances and had the approval of the other member states.\footnote{Ibid., at cols. 1202-1204.}

Lord Justice Scarman (as he was then) has written: "The European Communities Act preserves the \textit{de jure} sovereignty of Parliament, Community law has the force of law because Parliament says so.... The European Communities Act cannot be read as limiting the sovereignty of Parliament. No British court could, I suggest go so far as to hold that Parliament today had limited the freedom of action of Parliament tomorrow."\footnote{Lord Scarman, ‘The Law of Establishment in the European Economic Community’, (1973) 24 N.I.L.Q. 61 at 70.}

Moreover, O. Hood Phillips has suggested that: "nothing in the 1972 Act even pretends to affect the fundamental principle of the supremacy of the United
Kingdom Parliament.... So far as United Kingdom courts are concerned, constitutional law -- notably the legislative supremacy of Parliament -- is supreme, and Community law can take effect in this country only by force of Act of Parliament. ²⁵⁴

That an Act of Parliament remains de jure, the ultimate constitutional authority in the United Kingdom today is not in doubt. What British membership of the European Community cannot ignore, however, is the growing de facto supremacy of Community law.²⁵⁵ The orthodox doctrine of the sovereign Parliament as it stands today is not an immutable part of the British constitution. It is important to remember that the law does not stand still. As Professor de Smith admits, in time the facts of life have their impact on legal theory.²⁵⁶

So, the ultimate question remains: whether express repeal by Parliament of a provision of EC law would be effective. If Parliament were to pass a Bill deemed vital to national interest, which clearly violated provisions of Community law, British judges would undoubtedly feel constrained to obey the Parliamentary mandate.²⁵⁷ In doing so, however, they would directly violate a basic tenant of Community law -- that Community law is supreme -- and thus provoke a European constitutional crisis. If the United Kingdom wished to remain a member of the Community, it would probably have to back down. The only alternative would be to leave the Community entirely. Therefore, in spite of the thrust of British constitutional theory,

²⁵⁴ O.H. Phillips, loc.cit. at 81.

²⁵⁵ By 1995, according to a research unit of the Economist 80 per cent of all new domestic legislation in the member states will have emanated from Brussels. Andrew Geddes, ‘The Incoming Tide: The Impact of EEC Law’, (1991) 141 N.L.J. 1330. at 1330.


²⁵⁷ See, Macarthy’s Ltd. v. Smith, loc.cit.
the practical possibility of express repeal by Parliament of a specific provision of Community law no longer exists, nor does the possibility of repealing a European Court of Justice interpretation of a Community law provision.

Parliament can still repeal the European Communities Act in its entirety and withdraw the United Kingdom from the European Community. It has been argued that even this option is not legal because no right of withdrawal is recognized by the EEC Treaty and a French proposal to include such a right was rejected. Moreover, article 240 of the Treaty states that the Treaty is "concluded for an unlimited time period". Thus, it could be argued under Costa v. ENEL that national legislation to withdraw would be overridden by Community law. This argument is ultimately unconvincing, however, because member states retain the unquestioned practical ability to withdraw. Consequently, there is nothing to prevent a future Parliament from repealing the European Communities Act in its entirety. Such an action by Parliament would indicate that the national political will to remain a member of the Community was lacking, and invariably, there is nothing which any mere rule of law can do in such a situation. Thus, the ultimate sanction remains an extra-legal one. It must be assumed that as long as the United Kingdom is a member of the Communities she will honour the legal and constitutional obligations of membership. It thus appears that the vigour of parliamentary sovereignty is becoming merely a synonym for national sovereignty.


259 Supra, at 50.

Some two centuries after becoming established as orthodoxy, the doctrine of parliamentary sovereignty is now facing its greatest crisis. Although its existence in its traditional formulation had been previously challenged, the current political and legal situation created by Britain’s membership in the European Community poses the greatest threat to the doctrine’s theoretical usefulness in explaining the British constitution, as it actually operates today.

The present doctrine of parliamentary sovereignty in light of the European Community means no more than that the United Kingdom retains a right of total withdrawal from the European Community and that this right is vested in the Queen-in-Parliament as a result of Britain’s constitutional history. The traditional notion of parliamentary sovereignty, which encompassed far more than a simple equivalence of parliamentary and national sovereignty, is being overtaken by new political and legal facts.261

261 The significance of this development was suggested by one English scholar’s observation that "when the facts cannot be made to fit the law, then the law must be made to fit the facts", K.W.B. Middleton, ‘New Thoughts on the Union Between England and Scotland’, (1954) 66 Jur. Rev. 37 at 53.
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European Communities Act 1972
(1972 c 68)

An Act to make provision in connection with the enlargement of the
European Communities to include the United Kingdom, together with
(for certain purposes) the Channel Islands, the Isle of Man and
Gibraltar [17 October 1972]

PART I
GENERAL PROVISIONS

1 Short title and interpretation
(1) This Act may be cited as the European Communities Act 1972.
(2) In this Act... —
'the Communities' means the European Economic Com-
munity, the European Coal and Steel Community and the
European Atomic Energy Community;
'the Treaties' or 'the Community Treaties' means, subject to
subsection (3) below, the pre-accession treaties, that is to say,
those described in Part I of Schedule 1 to this Act, taken
with—
(a) the treaty relating to the accession of the United
Kingdom to the European Economic Community and
to the European Atomic Energy Community, signed
at Brussels on the 22nd January 1972; and
(b) the decision, of the same date, of the Council of the
European Communities relating to the accession of the
United Kingdom to the European Coal and Steel
Community; and
(c) the treaty relating to the accession of the Hellenic
Republic to the European Economic Community and
to the European Atomic Energy Community, signed
at Athens on 28th May 1979; and
(d) the decision, of 24th May 1979, of the Council relating
to the accession of the Hellenic Republic to the
European Coal and Steel Community;
(e) the decisions, of 7th May 1985 and of 24th June 1988,
of the Council on the Communities' system of own
resources; and
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(f) the undertaking by the Representatives of the Governments of the member States, as confirmed at their meeting within the Council on 24th June 1988 in Luxembourg, to make payments to finance the Communities’ general budget for the financial year 1988; and

(g) the treaty relating to the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community, signed at Lisbon and Madrid on 12th June 1985; and

(h) the decision, of 11th June 1985, of the Council relating to the accession of the Kingdom of Spain and the Portuguese Republic to the European Coal and Steel Community; and

(j) the following provisions of the Single European Act signed at Luxembourg and The Hague on 17th and 28th February 1986, namely Title II (amendment of the treaties establishing the Communities) and, so far as they relate to any of the Communities or any Community institution, the preamble and Titles I (common provisions) and IV (general and final provisions);

and any other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom; and any expression defined in Schedule 1 to this Act has the meaning there given to it.

(3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.

(4) For purposes of subsections (2) and (3) above, ‘treaty’ includes any international agreement, and any protocol or annex to a treaty or international agreement.

NOTES
The words omitted from sub-s (2) were repealed by the Interpretation Act 1978, s 25(1), Sch 3, paras (c) and (d) were inserted by the European Communities (Greek
2 General implementation of Treaties

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.

In this subsection 'designated Minister or department' means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

(3) There shall be charged on and issued out of the Consolidated fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the
European Communities Act 1972

Bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment,—

(a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and

(b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (or any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

(5) . . . and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island of Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

NOTES
The words omitted from sub-s (5) were repealed by the Northern Ireland Constitution Act 1973, s 41(1), Sch 6, Pt 1.
3 Decisions on, and proof of, Treaties and Community instruments, etc

(1) For the purposes 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 treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court (or any court attached thereto)).

(2) Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court (or any court attached thereto) on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.

(3) Evidence of any instrument issued by a Community institution, including any judgment or order of the European Court (or any court attached thereto), or of any document in the custody of a Community institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution; and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.

(4) Evidence of any Community instrument may also be given in any legal proceedings—

(a) by production of a copy purporting to be printed by the Queen's Printer;
(b) where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised so to do;

and any document purporting to be such a copy as is mentioned in paragraph (b) above of an instrument in the custody of a department shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority so to do, or of the document being in the custody of the department.

(5) In any legal proceedings in Scotland evidence of any matter given in a manner authorised by this section shall be sufficient evidence of it.

NOTES

The words in square brackets in sub-ss (1)–(3) were substituted or inserted by the European Communities (Amendment) Act 1986, s 2.
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PART II

AMENDMENT OF LAW

11 Community offences

(1) A person who, in sworn evidence before the European Court [or any court attached thereto], makes any statement which he knows to be false or does not believe to be true shall, whether he is a British subject or not, be guilty of an offence and may be proceeded against and punished—

(a) in England and Wales as for an offence against section 1(1) of the Perjury Act 1911; or
(b) in Scotland as for an offence against section 1 of the False Oaths (Scotland) Act 1933; or
(c) in Northern Ireland as for an offence against Article 3(1) of the Perjury (Northern Ireland) Order 1979.

Where a report is made as to any such offence under the authority of the European Court [or any court attached thereto], then a bill of indictment for the offence may . . . in Northern Ireland, be preferred as in a case where a prosecution is ordered under . . . [Article 13 of the Perjury (Northern Ireland) Order 1979], but the report shall not be given in evidence on a person's trial for the offence.

(2) Where a person (whether a British subject or not) owing either—

(a) to his duties as a member of any Euratom institution or committee, or as an officer or servant of Euratom; or
(b) to his dealings in any capacity (official or unofficial) with any Euratom institution or installation or with any Euratom joint enterprise;

has occasion to acquire, or obtain cognisance of, any classified information, he shall be guilty of a misdemeanour if, knowing or having reason to believe that it is classified information, he communicates it to any unauthorised person or makes any public disclosure of it, whether in the United Kingdom or elsewhere and whether before or after the termination of those duties or dealings; and for this purpose 'classified information' means any facts, information, knowledge, documents or objects that are subject to the security rules of a member State or of any Euratom institution.

This subsection shall be construed, and the Official Secrets Acts 1911 to 1939 shall have effect, as if this subsection were contained in
the Official Secrets Act 1911, but so that in that Act sections 10 and 11, except section 10(4), shall not apply.

(3) This section shall not come into force until the entry date.

NOTES
The words in the first and third pairs of square brackets in sub-s (1) were inserted by the European Communities (Amendment) Act 1986, s 2(b), and the words in the second and fourth pairs of square brackets were substituted by the Perjury (Northern Ireland) Order 1979, SI 1979/1714, Art 19(1), Sch 1, para 24. The words omitted were repealed by the Prosecution of Offences Act 1985, s 31(6), Sch 2.

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SCHEDULE 2

Section 2

PROVISIONS AS TO SUBORDINATE LEGISLATION

1.—(1) The powers conferred by section 2(2) of this Act to make provision for the purposes mentioned in section 2(2)(a) and (b) shall not include power—

(a) to make any provision imposing or increasing taxation; or
(b) to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision; or
(c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or
(d) to create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than [level 5 on the standard scale] (if not calculated on a daily basis) or with a fine of more than [£100 a day].

(2) Sub-paragraph (1)(c) above shall not be taken to preclude the modification of a power to legislate conferred otherwise than under section 2(2), or the extension of any such power to purposes of the like nature as those for which it was conferred; and a power to give directions as to matters of administration is not to be regarded as a power to legislate within the meaning of sub-paragraph (1)(c).

2.—(1) Subject to paragraph 3 below, where a provision contained in any section of this Act confers power to make regulations (otherwise than by modification or extension of an existing power), the power shall be exercisable by statutory instrument.

(2) Any statutory instrument containing an Order in Council or regulations made in the exercise of a power so conferred, if made without a draft having been approved by resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House.

3. Nothing in paragraph 2 above shall apply to any Order in Council made by the Governor of Northern Ireland or to any regulations made by a Minister or department of the Government of Northern Ireland; but where a provision contained in any section of this Act confers power to make such an Order in Council or regulations, then any
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Order in Council or regulations made in the exercise of that power, if made without a draft having been approved by resolution of each House of the Parliament of Northern Ireland, shall be subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954 as if the Order or regulations were a statutory instrument within the meaning of that Act.

4.—(1) The power to make orders under section 5(1) or (2) of this Act shall be exercisable in accordance with the following provisions of this paragraph.

(2) The power to make such orders shall be exercisable by statutory instrument and includes power to amend or revoke any such order made in the exercise of that power.

(3) Any statutory instrument containing any such order shall be subject to annulment in pursuance of a resolution of the House of Commons except in a case falling within sub-paragraph (4) below.

(4) Subject to sub-paragraph (6) below, where an order imposes or increases any customs duty, or restricts any relief from customs duty under the said section 5, the statutory instrument containing the order shall be laid before the House of Commons after being made and, unless the order is approved by that House before the end of the period of 28 days beginning with the day on which it was made, it shall cease to have effect at the end of that period, but without prejudice to anything previously done under the order or to the making of a new order.

In reckoning the said period of 28 days no account shall be taken of any time during which Parliament is dissolved or prorogued or during which the House of Commons is adjourned for more than 4 days.

(5) Where an order has the effect of altering the rate of duty on any goods in such a way that the new rate is not directly comparable with the old, it shall not be treated for the purposes of sub-paragraph (4) above as increasing the duty on those goods if it declares the opinion of the Treasury to be that, in the circumstances existing at the date of the order, the alteration is not calculated to raise the general level of duty on the goods.

(6) Sub-paragraph (4) above does not apply in the case of an instrument containing an order which states that it does not impose or increase any customs duty or restrict any relief from customs duty otherwise than in pursuance of a Community obligation.

5. As soon as may be after the end of each financial year the Secretary of State shall lay before each House of Parliament a report on the exercise during that year of the powers conferred by section 5(1) and (2) of this Act with respect to the imposition of customs duties and the allowance of exemptions and reliefs from duties so imposed (including the power to amend or revoke orders imposing customs duties or providing for any exemption or relief from duties so imposed).

NOTES

The words in the first pair of square brackets in para 1(1)(d) are substituted by virtue of the Criminal Justice Act 1982, ss 40, 46. The words in the second pair of square brackets in that sub-paragraph were substituted by the Criminal Law Act 1977, ss 32(3), 65(10).

Paras 4, 5 were added by the Customs and Excise Duties (General Reliefs) Act 1979, s 19(1), Sch 2, para 5.