**Martin Howe**

# Safeguarding Sovereignty

## A Bill for UK Constitutional Rights in the EU

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Martin Howe is a practising Queen's Counsel specialising in European law and intellectual property law. He conducts cases in the English courts, the European Court of Justice and other European tribunals. His previous publications include *Europe and the Constitution after Maastricht*, *From Maastricht to Amsterdam* and numerous articles on European legal and constitutional issues. For Politeia he has written *Tackling Terrorism: The European Human Rights Convention* and *The Enemy Within* (2001, 2003) and, with Oliver Letwin and John Marenbon, *Conservative Debates: Liberty under the Law* (2002).

## Foreword

Perhaps no unwritten doctrine is more fundamental to the British constitution than the supremacy of Parliament. It has been profoundly affected by the United Kingdom's membership of the European Union, yet hitherto British Governments have shied away from addressing the constitutional implications of that impact.

Britain's unwritten constitution has served this country rather better than many of the written constitutions some of our European partners have enjoyed over the years. Our constitutional tradition, however, leaves the relationship between the United Kingdom's sovereignty and the authority conferred upon the European Union in an exceptionally ambiguous position. We lack the legal clarity provided to other European partners by their constitutional courts.

The Lisbon Treaty has now endowed the EU with a new legal status, further expanded its competences and explicitly affirmed, albeit politically rather than legally, the European Court of Justice's doctrine of primacy of Union law. This development has made acute the need for constitutional clarity and certainty in the United Kingdom's application of that doctrine.

Martin Howe's discussion of the issue in this pamphlet is succinct and eloquent. It should be essential reading for any politician interested in the matter. His argument that the United Kingdom is constitutionally 'specially disadvantaged' demands serious consideration from policy-makers.

Martin Howe concludes that a Sovereignty Bill would 'put us on a par' with other EU Member States in guaranteeing our country's ultimate sovereignty in respect of the EU. The case for such a legal remedy is compelling. As this pamphlet explains, there is a long-term potential problem of a shift in where our courts deem ultimate authority to lie. The time to deal with that potential problem is now.

Both the Lisbon Treaty's contents and the manner of its ratification in the United Kingdom have weakened the EU's democratic legitimacy in this country. I hope that after the next general election a Conservative Government will be in a position to sort out the particular but characteristic mess the current Labour Government have made in this area. A Sovereignty Bill, of the kind Martin Howe outlines, will be an important part of that and I am grateful to him for his considered and considerable contribution to the debate on this important question.

**William Hague MP**
**Shadow Foreign Secretary**

# I
# The Problem: The EU and the British Constitution

## The special vulnerability of the UK's constitution

The United Kingdom is almost unique among the world's states in lacking a formal written constitution. Instead, the UK has a fundamental constitutional rule: the supremacy (or sovereignty) of Parliament. According to this rule, Parliament can do anything: except that it cannot prevent a future Parliament from amending or repealing anything which it has passed.

But where does this constitutional rule come from? The answer is that it derives from centuries of constitutional practice, and is reflected in authoritative constitutional writings and in the decisions and reasoning of judges.

But membership of the EU (originally the EEC) raises another fundamental question about who rules the UK: in what circumstances can the UK's fundamental constitutional rule of the sovereignty of Parliament be modified or even ended? A formal written constitution would normally specify with precision the circumstances in which, and the procedure by which, it can be amended: but the rule of the supremacy of Parliament is not written down in a formal constitutional text.

According to the case law of the European Court of Justice (ECJ), the Treaty of Rome created a 'new legal order' - a system of law[1] - which has primacy over the laws of the Member States, both externally and within domestic courts of law. The UK's membership of the EU has required the traditionally understood rule of supremacy of Parliament at least to be modified, in order to accommodate a situation in which an EU law conflicts with a later Act of Parliament.

But some have argued that the consequence of the UK's membership is even greater. By passing the European Communities Act 1972, which gave internal effect in UK law to the Treaty of Rome and the later European Treaties, has Parliament incorporated into our law the ECJ's rule of primacy and thereby repealed the sovereignty of Parliament itself?

This study considers that question. It suggests that if our courts were confronted with this question directly today, they would answer it: 'No, Parliament retains the ultimate

[1] This system of law was correctly known as 'Community law' but, with the coming into force of the Lisbon Treaty on 1st December 2009, formally became 'Union law'.

power to unmake any law, including the 1972 Act and any EU law which has force in the UK under the 1972 Act'. However, no one can be confident about what might happen in future circumstances. The rule of the supremacy of Parliament rests, in the end, on the opinions of judges. Such opinions are capable of changing according to the climate of the times as judicial attitudes and loyalties change.

By contrast, most if not all other Member States have written constitutions which are the ultimate source of legal authority within the state. While those constitutions normally give a special status to EU laws in contrast to ordinary domestic laws, it is usually clear that EU laws can only have force within the limits of the constitution: the EU Treaties and EU laws, however extensively they might be interpreted in the future by the ECJ, cannot override the fundamental rules of the constitution itself.

This pamphlet considers the present constitutional arrangements in individual countries and their relationship with Community law, international treaties and the ECJ. It examines the sovereignty of Parliament under the British constitution, the status of international treaties and the rulings of the ECJ. It compares the ways in which such international treaties and ECJ rulings affect or are applied in other nation states, along with the mechanism for resolving a conflict between Community law and national law. It suggests that the UK lacks the safeguards of some of the other major powers and considers how this problem might be addressed.

The pamphlet concludes by proposing a Sovereignty Bill to put the UK's constitution on the same footing as the constitutions of other Member States. Such a Bill would make it clear beyond doubt that nothing in a European treaty, and nothing which the ECJ might do or say, now or in the future, is capable of ending Parliament's ultimate sovereignty over the laws which apply within the United Kingdom. This Bill, though a radical step in terms of the UK political debate, would in practice mean that, for the first time since 1972, Parliament's sovereign power would be explicitly safeguarded against the risk of being undermined or eroded.

# II
# Parliamentary Sovereignty, the Status of International Treaties and the European Court of Justice

Given that the UK Parliament is supreme, can its powers be limited? Can international treaties or the EU and its European Court of Justice limit those powers?

**The sovereignty of Parliament under the British constitution**

In most states, the constitution is the supreme source of legal authority within the state; it is 'the fountain head from which other laws flow and whence they derive their validity'[2]. The United Kingdom is unusual in not having a specific basic document called 'the constitution': but it does have a fundamental constitutional rule, namely the 'supremacy of Parliament'. Parliament is supreme, and can make or unmake any law.

This rule is not the product of any specific constitutional act, nor is it laid down in any specific document. It is the product of established usage over the centuries, and it reflects the relationship between the courts and Parliament: the courts will give priority to an Act of Parliament over any other source of law, and will apply the most recent Act if it conflicts with an earlier Act.[3]

What limits are there to Parliament's sovereignty? The doctrine of supremacy of Parliament was expounded in its purest form in the 19th century writings of the constitutional lawyer A.V. Dicey and is associated with his name. However, even expressed in its purest form the doctrine is subject to limitations.

First, it is clear that Parliament may limit its sovereignty *by territory*, relinquishing its supremacy in a geographical area where it previously exercised it. Numerous Acts of Parliament have granted independence to dominions, colonies and other dependent territories of the United Kingdom. These have had the effect of ending Parliament's right to legislate in those territories. The independence of 26 counties of Ireland had the effect of ending Parliament's supremacy over part of the territory of the United Kingdom itself.

Secondly, it cannot be denied that Parliament possesses the legal power to transfer its own sovereignty to another body or bodies. The Parliament of the United Kingdom is itself the product the Act of Union with Scotland of 1707 and of the later Act of Union with Ireland. The 1707 Act meant that two previously sovereign and independent

[2] Pollard & Hughes, *Constitutional and Administrative Law* [1990 ed.] p.1.
[3] Subject to a qualification dealt with below, when an Act of Parliament is in conflict with a rule of Community law.

Parliaments, the Parliament of England and the Parliament of Scotland, ceased to exist and transferred their sovereignty to a new Parliament of the United Kingdom. It follows that the Parliament of the United Kingdom must likewise possess the legal power to transfer its sovereignty to the legislature or constitutional organs of a greater entity, if it were to choose to do so.

**The status of treaties under the British constitution**

Given the constitutional role of Parliament as the supreme law-making body, how are international treaties accommodated under British law? The United Kingdom is (in the standard terminology of public international law) not a 'monist' but a 'dualist' country. This means that our courts treat international law, except for very limited purposes, as a separate system of law. It is quite separate from the domestic laws which have effect in the courts. International treaties do not (except in special cases) give rise to legal rights or obligations which can be recognised or enforced in domestic courts of law. In this regard the constitution of the United Kingdom differs from that of many other countries[4].

Treaties *as such* do not have the force of law in the domestic courts of the United Kingdom. The Crown can sign and ratify a treaty as an executive act. The treaty is then binding on the United Kingdom under international law. However, the domestic courts of the United Kingdom will not enforce it, without further action.[5] Compliance or non-compliance with treaties is a matter for the Crown in the exercise of its prerogative powers to regulate the external relations of the United Kingdom. In *R v. Foreign Secretary ex parte Rees-Mogg*[6] (the Maastricht Treaty case) the Divisional Court pointed out that as a matter of British law, the Government could in the last resort denounce the Treaty on European Union or at least fail to comply with its international obligations under Title V (the foreign affairs section) of that Treaty, regardless of whether that would amount to a breach of international law.

It can obviously be a serious matter to breach a treaty, and doing so can have serious repercussions at the international level. But it is not correct to say that treaties take precedence or have primacy over domestic law. The two systems of law are separate and operate on different planes. International law is applied in international courts and tribunals. National law is applied in our own national courts. One system does not have primacy or take precedence over the other, although there may be instances where the two systems come into conflict.

[4] E.g. the United States, where treaties upon ratification by a two-thirds majority of the Senate become part of the 'supreme law of the land': US Constitution, Article VI, second clause; also Germany, Articles 25 and 59 of the Basic Law.

[5] *The Parlement Belge* [1880] 5 PD 197; *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

[6] [1994] QB 552 at 570.

Because of this separation between international law and British internal law, the government can sign and ratify as many treaties as it likes but by themselves they will have no effect in our internal law: even if they purport to impose an obligation to alter an internal law, or even if they contain an obligation that they must be given direct effect internally. In order for treaties to have effect as part of the internal law of the United Kingdom, there must be an Act of Parliament which gives them the force of law; in effect, an instruction given by Parliament to the courts telling the courts to give legal effect to the treaty.

In the case of the Treaty of Rome, this was done through the European Communities Act 1972. The Treaty of Rome has been progressively amended by a series of European Treaties, and now under the Lisbon Treaty is effectively superseded by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Despite the successive amendments made to the European Treaties, the basic provisions of the 1972 Act remain essentially unchanged. That Act provides the gateway through which EC or EU law is given effect within the United Kingdom.

The key part of the Act is the instruction by Parliament to UK domestic courts to give automatic effect to Community law without the matter being subject to further Parliamentary approval. The courts should, it says, give effect to the 'directly effective' parts of the Community Treaties[7] and to subordinate legislative instruments made under them (such as EU Regulations and in some circumstances Directives), without the need for further action by Parliament. That instruction is set out in subsection 2(1):

> '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.'

Subsection 2(1) is reinforced by subsection 3(1) which instructs our courts to interpret EC Treaties and subordinate instruments in conformity with rulings by the European Court of Justice (ECJ).

[7] The 'Community Treaties' are defined in Section 1 of the 1972 Act and now include all parts of the Treaties as amended by Lisbon, with the exception of provisions relating to the Common Foreign and Security Policy. The CFSP provisions, as regards the United Kingdom, are legally effective only on the international plane.

A further key provision of the 1972 Act deals with the relationship between EC law and Acts of Parliament. Rather curiously as a matter of drafting, this key provision is buried as a phrase within subsection 2(4):

> '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;'

This provision deals not only with past but with future Acts of Parliament; it deals not only with the *construction* or *interpretation* of Acts of Parliament but also purports to limit their *effect*. It therefore sits uneasily with the traditional doctrine of Parliamentary supremacy, under which Parliament has no power to limit the powers which may be exercised by a future Parliament. I will return to this point after dealing with the doctrine of primacy (or supremacy) of Community law as developed by the ECJ.

**The ECJ's doctrine of primacy of EC law**

Apart from the treaties themselves, there is an added complication in how international tribunals expect them to be applied. There is a longstanding principle of public international law, that a court or tribunal applying international law will not accept a state's internal law or a constitutional rule of a state as an excuse on the international plane for non-compliance with a treaty or other rule of international law. As a tribunal operating on the international plane, it is inevitable that the ECJ should adopt this approach and say that the internal constitutional and legal rules of a Member State cannot excuse the state from non-compliance with a treaty obligation.

However, the ECJ has gone further in a number of its utterances. As long ago as 1963, the ECJ asserted that the EEC[8] constituted a 'new legal order'. By this it meant that the Treaty of Rome was not just a normal treaty which created rights and obligations between the Member States who signed it, but that it also applied directly to citizens within the Member States conferring rights and imposing obligations on them. As it said in the case of *Van Gend en Loos*:[9]

> '[The Rome] Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to

[8] The European Economic Community or EEC, established by the Treaty of Rome, had its name formally changed to the European Community or EC by the Maastricht Treaty, and has now under the Lisbon Treaty become a new legal entity called the 'European Union'. This is not to be confused with the 'European Union' which existed under the previous Treaties, which was an umbrella body without international legal personality.

[9] Case 26/62: *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 at 12.

> peoples. ... the Community constitutes a new legal order in international law for whose benefit the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.'

It is important to realise that this doctrine of the creation of a 'new legal order' is nowhere spelt out in the Treaty, but was formulated by the Court as a result of its interpretation of the Treaty's overall objects and purposes, including the vague reference in the preamble to 'the peoples of Europe'. Nor did the process stop there. By 1991, in a judgment given[10] after the Single European Act but before the Maastricht Treaty, the ECJ had advanced its doctrine on this subject somewhat further. Instead of giving up their sovereign rights in 'limited fields', the Member States had given them up in 'ever wider fields'; and an 'essential characteristic' of the Community legal order was its 'primacy over the law of the Member States':

> 'The Rome Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union. Article 1 of the Single European Act makes it clear that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity. It follows from the foregoing that the provisions of the Rome Treaty on free movement and competition, far from being an end in themselves, *are only means for attaining those objectives*. ... the Rome Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, *in ever wider fields*,[11] and the subjects of which comprise not only the member-States but also their nationals. The essential characteristics of the Community legal order which has been thus established are in particular its *primacy over the law of the member-States* and the *direct effect* of a whole series of provisions which are applicable to their nationals and to the member-States themselves' (emphasis added).

In this reference to primacy, the ECJ therefore reiterated the doctrine it had developed in a series of earlier cases. In the *Simmenthal* case the European Court said:[12]

> '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 provisions of national

[10] *Re Draft Treaty on a European Economic Area:* Opinion 1/91 [1992] 1 CMLR 245.
[11] It should be noted that this phrase represents a significant change from the words 'albeit within limited fields' which were used in *Van Gend,* to 'ever wider fields'.
[12] *Amministrazione delle Finanze v Simmenthal Spa* [1978] ECR 629 at 644.

> legislation, even if adopted subsequently, and it is not necessary for the court to request or await a prior setting aside of such provision by legislative or other constitutional means.'

The European Court also made clear its view that Community law should be supreme even over the constitutional laws of the Member States, including basic entrenched laws guaranteeing fundamental rights:[13]

> 'The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed ... Therefore the validity of a Community measure or its effect within a Member State remains unimpaired even if it is alleged that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure'.

The primacy of Community law goes hand in hand with the doctrine of the 'occupied field' developed by the European Court of Justice. This legal doctrine means that once a field of activity is occupied by Community laws, the powers of the Member States are excluded from that field of activity. As stated by the European Court:[14]

> 'The transfer by the States from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.'

It is important to appreciate that the ECJ's assertions about the primacy of EC law go, in a very important respect, beyond the rule of international law that a state cannot excuse itself from compliance with an international obligation by reason of an internal constitutional rule. The ECJ asserts not merely that a Member State cannot excuse itself from compliance with the Treaty, but that the courts of the Member States *must* give full effect to EC law regardless of 'either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure.' The ECJ is in effect urging the courts of the Member States to rebel against limitations on their own powers contained in their own national constitutional structures.

Article I-6 of the rejected 2004 Constitution Treaty would have cemented the doctrine of primacy into the actual text of that Treaty, by stating that 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.' In the Lisbon Treaty, the reference to primacy has been downgraded to a Declaration[15] which refers to the 'well settled case law of the Court of Justice'.

[13] *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide* [1970] ECR 1125 at 1134.
[14] *Costa v ENEL* [1964] ECR 585 at 594.
[15] Declaration 17.

# III
# Nation States and National Constitutions v the European Court of Justice

Given the potential for conflict in the UK about where sovereignty lies, what happens in other European countries?

In its decisions the ECJ seems to be asserting that EC law or EU law has a direct force in its own right within the courts of the Member States; i.e. it not only has *primacy in international law* but *internal primacy* as well. But the national courts which have considered this point have generally rejected such an assertion. They have decided that EC or EU law can only have internal force as a result of whatever mechanism of incorporation is adopted under the national constitution concerned. This means that major European states like Germany and France refuse to accept the primacy of EC law in the way claimed by the ECJ and maintain that such law can only have effect through, and subject to, their own constitutions.

The position of a national court, which is not itself part of the Community legal order, is quite different from that of a Community or international court or tribunal. A national court will only apply rules of Community or international law (including the rule of primacy itself) if, and to the extent that, the governing rules of the national legal order which define the jurisdiction of the court either require or permit it to do so.

The most emphatic rejection of the ECJ's doctrine of primacy has come from the Federal German Constitutional Court in the Manfred Brunner case which challenged the constitutionality of German ratification of the Maastricht Treaty. The Court rejected Brunner's challenge, essentially on the grounds that the German constitution had been specifically amended to permit the proposed transfer of powers to the European Union and that the transfer did not infringe any of the basic provisions of the constitution.[16]

However, in doing so, the Court in effect totally repudiated the ECJ's assertion in the *Internationale Handelsgesellschaft* case that EC law has primacy over the constitutions of the Member States. The German Court stated that if international conventions or treaties, or common actions and measures under Titles V or VI of the Treaty, impose obligations binding in international law on Germany which require internal implementation in a way which would infringe guaranteed constitutional rights, then the measures providing for internal implementation are:

[16] *Brunner v The European Union Treaty*, reported in English translation at [1994] 1 CMLR 57.

> 'subject to review in full by the German courts. In this respect the protection of basic rights provided by the Constitution is not displaced by supra-national law that could claim precedence. An international law obligation on the Federal Republic of Germany cannot in any event diminish the existing protection of basic rights available as against German state powers ... in so far as its internal implementation would infringe constitutional rights it is prohibited by constitutional law.'[17]

The German Court was also emphatic that it, and not the ECJ or other European institutions, had the ultimate say over the scope of the powers conferred on the EU under the Treaties. If the European institutions over interpret the extent of the powers conferred on them by the Maastricht Treaty, the German Court said:

> '[49] ... What is decisive is that Germany's membership [of the Union] and the rights and duties that follow therefrom (and especially the immediately binding legal effect within the national sphere of the Community's actions) have been defined in the Treaty so as to be predictable for the [German] legislature and are enacted by it in the Act of Accession with sufficient certainty. That also means that subsequent important alterations to the integration programme set up by the Union Treaty and to the Union's powers of action are no longer covered by the Act of Accession to the present Treaty. Thus, if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that was the basis for the Act of Accession, *the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. The Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them*'[18] (emphasis added).

The Court added that if powers conferred by the Treaty are interpreted 'to have effects which are equivalent to an extension of the Treaty, such an interpretation of enabling rules would not produce any binding effects for Germany.'[19]

[17] Para [22] of judgment [1994] 1 CMLR 57 at 81.
[18] Para [49] [1994] 1 CMLR 57 at 89.
[19] Para [99] [1991] 1 CMLR 57 at 105.

Ten years later the position was essentially unchanged according to evidence given to the House of Lords European Union Committee[20] in 2004 by Professor Hans-Jürgen Papier, President of the Federal German Constitutional Court. He said that he did not believe that the doctrine of primacy[21] could override 'the inviolable basic structure' of the German Constitution.

In its June 2009 ruling on the compatibility of the Lisbon Treaty with the German constitution, the Court[22] adhered to the same basic position as it had expounded in the Brunner case, by reasserting its own ultimate power over the legal validity of EU measures within Germany.

It also made it clear in the judgement[23] that any transfer of ultimate sovereignty from the Federal Republic of Germany to the EU would require the explicit consent of the German people to abrogate the Basic Law.

So it is clear that within Germany the powers of the ECJ and of the other European institutions are clearly circumscribed by the German constitution, and further that this fundamental limitation on the scope of EU powers within Germany cannot be changed except by an explicit alteration to the Basic Law sanctioned by the directly declared

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[20] House of Lords EU Committee, 6th Report of Session 2003-04, HL Paper 47, *The Future Role of the European Court of Justice*; Prof. Papier's evidence is quoted at para. 43.

[21] As embodied in Article I-10(1) of the draft European Constitution. Dr Papier said:
'In Germany the transfer of sovereign rights to international institutions, and also the European Union, is restricted by a guarantee of identity (Article 23.1 sentence 3 and Article 79.3 of the Basic Law (Grundgesetz)). A violation of this core of constitutional provisions, which also include, for instance, democracy and respect for human dignity, could therefore be identified by the Federal Constitutional Court as an exercise of supranational sovereign power that is not covered by the Community Treaties and be declared inapplicable in Germany.'

[22] Judgment of 30 June 2009. The quotation below is from the Court's own English summary of its decision at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html The full judgment is available in English at:
http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html 'The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, i.e. of the constitutional identity (Article 23.1 sentence 3, Article 79.3 GG). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to watch, within the boundaries of its competences, over the Community or Union authority not violating the constitutional identity by its acts and not evidently transgressing the competences conferred on it. The transfer of competences, which has been increased once again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.'

[23] Para 228. '228. …The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone.'

will of the German people. In France a similar principle, that the French constitution ultimately limits the scope of EU law, has been established.

Community law has effect in France by virtue of Article 55 of the French constitution. This gives internal effect to treaties ratified by France, and explicitly provides that such treaties have an authority superior to that of ordinary statutes. In consequence, the Cour de Cassation has ruled that provisions of Community law take precedence over subsequent French statutes with which they conflict.[24] However, in doing so it rejected an argument that it should base its decision on the nature of the Community's legal order rather than on Article 55 of the constitution.[25] A Treaty which confers powers contravening other provisions of the French constitution cannot be validly ratified under Article 55, and a procedure is provided for the Constitutional Court to review the compatibility of treaties prior to ratification.[26]

Similarly in Italy the Constitutional Court ruled[27] that Community law has effect in accordance with, and subject to, the limitations contained in the Italian constitution, and that it would prevent the application within Italy of EU laws which were given an 'aberrant interpretation' which violated the fundamental principles of Italy's constitutional order or the inalienable rights of man.

As regards Denmark, Professor Rjalte Rasmussen of the University of Copenhagen gave evidence to the House of Lords European Union Committee[28] that Danish constitutional law took precedence over Union law:

[24] *Administration des Douanes v Soc. Cafés Jacques Vabre* [1975] 2 CMLR 336 at 369 para [5].

[25] Argument of the Procureur Général [1972] 2 CMLR at 363-4, who said that 'in so far as you restricted yourself to deriving from Article 55 of our constitution the primacy in the French internal system of Community law over national law ... such reasoning would let it be accepted that it is on our Constitution and on it alone that depends the ranking of Community law in our internal legal order.' The Court itself explicitly based its judgment on Article 55 of the Constitution alone.

[26] As it did with the Maastricht Treaty: [1993] 3 CMLR 345. The Court decided that a number of provisions of the Maastricht Treaty were inconsistent with other provisions of the French constitution; accordingly the constitution had to be amended before France could ratify Maastricht.

[27] *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372 at 389. '... It is hardly necessary to add that by Article 11 of the [Italian] Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein, and it should therefore be excluded that such limitations of sovereignty, concretely set out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberty of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man. And it is obvious that if ever Article 189 (now 249 of the Treaty of Rome, which confers the power on the Council of Ministers and the Commission to make Regulations, issue Directives and take decisions) had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that *this Court* would control the continuing compatibility of the Treaty with the above mentioned fundamental principles' (emphasis added).

[28] Ibid. at para 44.

> 'This has to be so since the Danish Constitution withholds from the Danish institutions any power to issue binding rules that, if in conflict with some constitutional provision, take precedence over the latter. Section 20 cannot authorize Union law to override Danish constitutional law.'

However, Belgium is unusual in accepting automatic primacy of Community law as a consequence of Belgium's membership. In *Orfinger v Belgium*[29] the Belgian Conseil d'Etat held that Community law prevailed over rules in the Belgian constitution, so long as Belgium remains a member. However, the Belgian court said that the application of Community law within Belgium could be set aside 'following an initiative by the Belgian authorities either to denounce their membership or renegotiate the conditions thereof'.[30] Thus, Belgium retains the power under its own constitutional order to renounce Community law *in toto* if it were to decide to take that step, although it seems that its courts will accept the doctrine of primacy of Community law so long as Belgium is a member.

[29] [2000] 1 CMLR 612.
[30] Para [9] of judgment.

# IV
# British Law v Community Law: Who Decides?

As can be seen from the foregoing survey of the position in some other Member States, the outcome of a conflict between EC law and a provision of the national constitution depends upon how the national constitution is interpreted and applied by the courts of that country. It can be seen that the existence of a written constitution acts as a rock upon which ultimate national sovereignty is founded.

In the United Kingdom, the position has to be decided by the courts taking into account on the one hand the doctrine of Parliamentary supremacy, and on the other hand the terms of subsections 2(1), 2(4) and 3(1) of the 1972 Act. But unlike the position where the effect of Community law is defined under and ultimately limited by the German, French or Italian constitutions, there is no comparable constitutional text in the United Kingdom.

What, therefore, happens if there is a conflict between a Community law and a domestic law, either an Act of Parliament or a subordinate instrument such as an Order in Council or ministerial regulation? One of the rules of Community law as interpreted by the ECJ is that Community law should prevail in the event of conflict with national law. Sections 2(1) and 3(1) of the 1972 Act oblige our courts to give effect to this rule (along with many other rules) of Community law. Where there is a conflict between Community law and an Act of Parliament predating the 1972 Act, there is no difficulty in squaring this position with the orthodox doctrine of the sovereignty of Parliament. One effect of the 1972 Act has been to repeal earlier Acts which are inconsistent with a directly effective rule of Community law.

There is more difficulty in a case where an inconsistency arises between Community law and an Act of Parliament passed after the 1972 Act. Under the orthodox doctrine of Parliamentary sovereignty, more recent Acts always prevail over earlier Acts. Nor, according to the orthodox view, can Parliament impose any limitation on the manner in which a future Parliament may repeal or vary an earlier Act.[31] Therefore, it could be argued that the later Act must prevail, because Parliament by passing the later Act has impliedly repealed the 1972 Act to the extent that the 1972 Act gives effect to the conflicting rule of Community law.

[31] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, Court of Appeal, where Lord Justice Maugham said at 597: 'The Legislature cannot, according to our constitution, bind itself to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.'

However, section 2(4) of the 1972 Act has been interpreted by the courts as modifying the doctrine of the supremacy of Parliament. If a later Act is silent and says nothing expressly about conflicts with Community law, then it is to be interpreted as if a section had been written into it, saying that its provisions are to give way to any directly enforceable Community rights which have effect under Section 2(1) of the 1972 Act. This was the reasoning of the House of Lords as expressed by Lord Bridge in the *Factortame* case.[32] The approach is thus based on the presumption that Parliament intends that the later Act is to be subordinate to conflicting Community law, at least in a case where nothing explicit is said in the later Act.

This reasoning is based on the *presumed intention* of Parliament. However, if Parliament makes its intention clear that the later Act is to have effect despite the 1972 Act, then *presumed intention* is no longer a basis for limiting the effect of the later Act. In such a situation there are a number of judicial dicta, although no direct judicial decisions, that (at least in the present state of the law) the later Act of Parliament would prevail.

This view was expressed by Lord Denning MR in *Macarthys Ltd v Smith:*[33]

> 'If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of section 2(1) and 2(4) of the European Communities Act 1972. I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.'

The same view was more recently reiterated in the 'Metric Martyrs' case[34] by Lord Justice Laws who said:

> '59. ... Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. ... Thus there is nothing in the 1972 Act which allows the [European] Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy

[32] *R. v Secretary of State for Transport ex p. Factortame Ltd* [1990] 2 AC 85 at 140B-D.
[33] [1979] 3 All ER 325 at 329.
[34] *Thoburn v Sunderland City Council* [2003] QB 151.

> in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. *Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself.* This is, of course, the traditional doctrine of sovereignty. If is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands' (emphasis added).

These judicial dicta are supported by Ministerial statements made when the 1972 Act was going through Parliament. In the course of proposing the Bill in the Second Reading debate, Geoffrey Rippon assured the House of Commons that 'nothing in this Bill abridges the ultimate sovereignty of Parliament'.[35] This issue was addressed in more detail during the Bill's Committee stage by the Solicitor-General (Sir Geoffrey Howe), who had been responsible for the drafting of the Bill, in a speech advising the House on the purpose and effect of the different elements of clause 2(4) of the Bill.[36] He said: [37]

> 'Could Parliament in the future repeal this Bill? The answer is that if it came to that — nobody contemplates that it should — it could do so. ... We are giving effect to our treaty obligations. But at the end of the day if repeal, lock, stock and barrel, was proposed, the ultimate sovereignty of Parliament must remain intact.'

Short of a full repeal of the Act, Sir Geoffrey also expressed the view that a future Act which expressly stated that it was to apply notwithstanding the provisions of the 1972 Act would mean that the courts of this country would give effect to the later Act, so as if necessary to exclude or override Community obligations.[38] The Government resisted amending the Bill to state this explicitly, on the grounds that it would be undiplomatic to make explicit provision for the prospective breach of treaty obligations in a Bill giving effect to a treaty.[39]

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[35] HC, 15 Feb 1972; cols. 278-9; in giving this assurance, Mr Rippon quoted a statement to similar effect made by Lord Gardiner, Lord Chancellor in the previous Labour Government, to the House of Lords on 8 May 1967; vol. 282; col. 1202.
[36] HC, 13 June 1972; vol. 838; cols. 1311-22. The amendments under discussion are at cols. 1271-3.
[37] HC 13 June 1972; vol. 838; col. 1319; he made another statement to similar effect at vol. 840 col. 627.
[38] Vol. 838; col. 1320.
[39] ibid, cols. 1320-1.

These and other Ministerial statements to similar effect could be looked at by the courts in interpreting the effect of the 1972 Act, in accordance with the decision of the House of Lords in *Pepper v Hart* [40] that the courts are entitled to look at *Hansard* to resolve ambiguities.

In the light of this material, one can be reasonably confident that if *today* the courts were confronted directly with the issue, they would uphold Parliamentary sovereignty and would give precedence to a later Act which explicitly stated that it was to have effect despite the 1972 Act. However, it does not follow that this position is unassailable or that it would continue to be the case in the future as more powers are acquired or assumed by the EU.

[40] [1993] AC 593.

# V
# Parliamentary Sovereignty and EU Law: The Way Forward

**How secure is the doctrine of supremacy of Parliament?**

As has already been pointed out, the doctrine of supremacy of Parliament is a judge-made, or at least judge-acknowledged, doctrine. It is not embodied in a fundamental constitutional text. Its continuing force in our courts therefore depends upon the continued willingness of judges – ultimately the judges of the new Supreme Court – to continue to recognise and give effect to it.

Some academic writers[41] have argued that the effect of the 1972 Act has been to alter the fundamental constitutional rule of the United Kingdom and replace the doctrine of supremacy of Parliament with the primacy of the European Treaties as the 'Grundnorm' which should be applied by our courts.[42] The passage from the judgement of Lord Justice Laws quoted above dealt with an argument advanced by Eleanor Sharpston QC acting on behalf of a public authority that Section 2(1) of the 1972 Act had incorporated the rule of primacy of EC law into UK law and had thereby repealed or modified the rule of supremacy of Parliament. Eleanor Sharpston, a leading practitioner of EC law, is now an Advocate-General at the ECJ. She clearly considered the argument to be sufficiently serious and respectable to advance it, although it was not ultimately accepted by the court.

It is on fundamental questions like the sovereignty of Parliament that a drift of judicial opinion can occur over time. Judge-made doctrines accepted today may in the future reach the stage of no longer being accepted, not because they have been expressly altered or abrogated by a specific piece of legislation or a conscious change, but because of a general change in the judicial or political climate. The continued accretion of powers to EU institutions and the passage of time together may result in such a change of climate, coupled possibly with greater judicial assertiveness and reduced deference to Parliament, now that the highest judges have moved from the House of Lords to the Supreme Court. Could our judges one day decide that they owe their allegiance to some higher system of law deriving from the EU treaties, or from international treaties and principles, instead of to Parliament?

[41] For example, JDB Mitchell, (1980) 11 *Cambrian Law Review* 69.

[42] The 'Grundnorm' according to the jurisprudential writer Hans Kelsen is the fundamental rule applied by courts which tells them what rules of law to give effect to. In countries with a written constitution, the Grundnorm is 'give effect to the constitution and the laws which it authorises.'

In this respect, countries with written constitutions are better placed, and by contrast the United Kingdom is specially disadvantaged. In countries with written constitutions, whilst in almost all cases Community law is given a special status superior to that of ordinary laws, the enforceability of Community law derives from a provision of the constitution itself; thus, the *internal* validity of Community law (i.e. its enforceability through the courts and legal organs of the member state) is ultimately limited by the terms of the other provisions of the constitution in a way which is more resistant to changing judicial opinions or interpretations.

The trouble is that if such a change of judicial outlook were to take place in the United Kingdom, it might well happen at an extremely difficult time. It is not likely that Parliament would take the step of passing an Act which is to prevail in the face of the EU Treaties lightly or without good reason, or without considering the political ramifications of doing so on the UK's relations with the EU institutions or other Member States. It would be disastrous if Parliament's considered decision to pass such an Act were then to be undermined by a decision of our domestic courts that Parliament had no power to pass it. Even uncertainty as to whether Parliament has the power to pass such an Act might undermine the will of a future Government and Parliament to take a step necessary in the defence of national interests.

**What a Sovereignty Bill would achieve**

A Sovereignty Bill would assert Parliament's supremacy and amend the 1972 Act to make it explicit that the EU treaties or other measures to which that Act gives effect cannot interfere with Parliament's right, if it so chooses, to legislate inconsistently with EU laws or rulings by the ECJ. It would not alter the normal position that day-to-day Acts of Parliament are presumed to defer to inconsistent EU law.

Such a Bill would put us on a par with Germany, France and Italy amongst others in establishing the relationship between Community law and the national constitution, which in this country is Parliamentary sovereignty. The result would be to bring the UK into line with the position of most other Member States by providing an explicit constitutional guarantee that the ultimate power over the laws of the United Kingdom rests here in accordance with our constitution. It should be seen as a defensive constitutional measure, necessary for the reasons explained here: one which puts beyond any doubt or possibility of future erosion the position which now in principle exists, that in the UK, Parliament is sovereign.