

UK Courts and the Reception of European Community Law

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Abstract

The paper examines the reception of European Community law by courts in the United Kingdom. It is concerned to gauge both the 'direct' and the 'indirect' impact of EC norms on the domestic system of public law. As regards direct impact, the paper surveys the adaptations which have been necessitated in order to ensure that the United Kingdom is able to discharge its obligations under the EC Treaties. With respect to indirect impact, the paper chronicles instances in which changes initially prompted by the accommodation of EC norms have subsequently 'spilled over' into purely domestic practice.

The first section of the paper deals with adaptations in the realm of constitutional law. Attention is focused on the gradual reformulation of the doctrine of 'parliamentary sovereignty' by UK courts, in a manner which has successfully accommodated the 'supremacy' of European Community law. There is further seen to be a considerable potential 'spill-over' in this area, insofar as the implementation of major proposed constitutional changes (such as the incorporation of the European Convention on Human Rights) may draw on the courts' experience in dealing with EC law.

The second section of the paper is concerned with administrative law issues. The discussion focuses on changes necessitated in the domestic regime of public law remedies, as well as the 'importation' of the doctrine of 'proportionality'. There is further a consideration of both actual and potential instances of 'spill-over'. It emerges that, to date, 'European' practices have tended to 'spill over' into the purely domestic realm where they can be seen to offer a higher standard of protection for individual rights.

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Introduction

The present paper examines the reception of European Community law by courts in the United Kingdom. It is primarily concerned with gauging the impact of EC norms on the domestic system of public law. Throughout the paper, that impact is understood as potentially being both 'direct' and 'indirect'. 'Direct impact' refers to those adaptations of domestic public law which have been directly necessitated by the obligations created under EC law. 'Indirect impact', by contrast, refers to instances where adjustments first made in response to EC obligations have then 'spilled over' into purely domestic law. Cumulatively, a survey of these 'direct' and 'indirect' adaptations should allow one to make an initial assessment of the extent to which participation in the integration project has contributed to a more general reshaping of UK public law.

The two main sections of this paper deal, successively, with constitutional and administrative law. The constitutional law section focuses on the doctrine of parliamentary sovereignty, looking at the manner in which UK courts have reformulated this fundamental premise of the domestic system so as to accommodate the equally central principle of the 'supremacy' of Community law. The potential thereby created for further 'spill-over' is also discussed. The administrative law section of the paper looks, in turn, at the issue of remedies and the 'importation' of the doctrine of 'proportionality'. Here, beyond an examination of the adjustments directly necessitated by Community law obligations, cases of both actual and potential 'spill-over' are highlighted. More general lessons from across the two areas of public law are then drawn together in the conclusion.

I. Constitutional Law

Introduction

The major constitutional issue posed for the United Kingdom by accession to the European Communities was that of the apparent irreconcilability of the traditional doctrine of parliamentary sovereignty with the supremacy of Community law. The traditional doctrine of parliamentary sovereignty, usually traced back to the writings of Blackstone and Dicey, essentially holds that

Parliament may, at any time, make or unmake any law whatsoever.¹ The only limitation placed on parliamentary power by this form of the doctrine is, perhaps somewhat paradoxically, that there may be no self-limitation. Stated more simply, no parliament may bind its successors. Flowing from this, there can logically be no law 'higher' than statute. Any act, duly passed by the legislature, must be accepted as the expression of the 'sovereign will'. In the event of a conflict between two acts of Parliament, the latter is simply given precedence, as the more recent expression of that will.

It is apparent, on the face of it, that this conception of parliamentary sovereignty is not- and could not be- adequate for dealing with the supremacy of Community law. The EC legal order demands, precisely, that a category of law 'above statute' be recognised and given precedence, irrespective of chronology. In consequence, the traditional understanding of parliamentary sovereignty did not seem altogether viable as the basic 'rule of recognition' in cases dealing with Community law.

The domestic instrument of accession, the European Communities Act of 1972, attempted to 'square the circle' described above. Most notably, its Section 2 (4) 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'.² Stated more clearly, the Act thus appeared to create an obligation to construe all legislation, irrespective of its date of passage, in a manner consistent with the directly effective provisions of European Community law. The logical difficulty, of course, remained that the European Communities Act was itself only an act of Parliament like any other. As such, following the traditional doctrine of parliamentary sovereignty, the provisions of the 1972 Act could theoretically be repealed- either explicitly or implicitly- by any subsequent act of Parliament.

The present section begins with an examination of the manner in which UK courts have dealt with this basic constitutional conundrum. Three lines of cases, representing different aspects of the relevant domestic jurisprudence, are analysed. This, in turn, serves as the basis for a discussion of the extent to which the incorporation of Community law has led to a broader redefinition of the concept of parliamentary sovereignty.

¹ H.W.R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Journal* (1955), pp. 172-197 provides a more recent restatement of the doctrine.

² My emphasis.

A. Jurisprudence

1. Domestic Legislation Implementing European Community Law

In a series of major decisions in the 1980s, the House of Lords gradually extended and modified traditional canons of statutory interpretation in such a way as to eliminate the possibility of conflict between domestic legislation and European norms, where the domestic legislation in question was intended to implement the UK's EC obligations. There gradually emerged in these cases a notion of 'purposive interpretation', whereby acts of parliament intended to implement EC norms are read in function of that intention. This technique of interpretation departs from that conventionally employed by British courts, according to which statutes are normally construed on the basis of a strict and literal reading of their terms.

The first major decision in this series was that handed down by the Law Lords in the 1982 case of *Garland vs. British Rail Engineering Ltd.*³ At this stage, the obligation to construe domestic norms so as to respect EC legislation was enunciated as a particularly strong form of a long-standing and more general interpretive practice.⁴ It had been the established practice of UK courts to interpret domestic statutes in a manner which would not violate the UK's international law obligations, where such an interpretation was reasonably possible.⁵ This general rule was taken to apply, with all the more force, in the case of obligations flowing from the Treaty of Rome. In the words of Lord Diplock,

[T]he words of [a] statute passed after [a] treaty has been signed and dealing with the subject matter of [an] international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not be inconsistent with it.⁶

No specific status was, however, accorded to Community law at this point. Indeed, Lord Diplock asked, but explicitly chose not to answer, the crucial question of whether anything short of an express parliamentary declaration of intent to the contrary would lead a British court to interpret domestic

³ [1982] 2 All ER 413.

⁴ The 'internationalist' reading of *Garland* is contested in O. Hood Phillips, 'A Garland for the Lords: Parliament and Community Law Again', *Law Quarterly Review* vol. 98 (1982), p. 526. Phillips emphasises the specificity of European Community norms, as deriving from Section 2 (4) of the European Communities Act.

⁵ See, for example, Michael Akehurst, *A Modern Introduction to International Law* (London: Allen and Unwin, 1984/Fifth Edition), pp. 43-48.

⁶ *Garland* at 415.

implementing legislation in a way which would place the UK in breach of EC law. As he cast the problem:

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 1 January 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 however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency.⁷

The answer was to come six years later in *Pickstone v. Freemans*.⁸ The case turned in part on the compatibility between the EC Council's Equal Treatment Directive and the 1970 Equal Pay Act, as amended in 1975 so as to give force to the Directive. Specifically, the case involved an equal pay claim made by five female warehouse operatives, asserting that their work was of 'equal value' to that of male warehouse checkers. It emerged that the 'equal value' claim made by the applicants was sustainable on the basis of the EC Directive, but not under the terms of the domestic implementing legislation as these would normally be read. On this basis, the Court of Appeal ruled that it could not interpret the domestic statute in a way which would carry out the UK's EC law obligations, though the Court was able to find for the applicants on other grounds. The House of Lords, however, took a very different line. Two of their Lordships did explicitly agree with the Court of Appeal that the 'plain and ordinary meaning' of the words contained in the UK statute would not bear an interpretation in conformity with the Directive. As Lord Oliver phrased it, 'In the instant case, the strict and literal construction of the section does indeed involve the conclusion that the regulations, although purporting to give full effect to the United Kingdom's obligations under Article 119, were in fact in breach of those obligations'.⁹ Nevertheless, the House was able to arrive at an interpretation which placed the UK statute in conformity with Community law. It was able to do so, in good part, by breaking with normal practice and looking 'behind the statute' to the parliamentary deliberations which preceded its adoption.¹⁰ These deliberations clearly indicated Parliament's intention to adopt legislation which fulfilled the UK's obligations under Community law. With reference to this clear parliamentary intent, the Law Lords then felt able to read the statute in a manner which permitted the

⁷ Ibid.

⁸ *Pickstone and others v. Freemans plc.* [1987] 3 All ER 757 CA and [1988] 2 All ER 803 HL.

⁹ *Pickstone* HL at 818. Jauncey LJ (at 819) shared Oliver's view.

¹⁰ See particularly the speech of Templeman LJ, *Ibid* at 807-815.

application of the 'equal value' test demanded by the applicants. As Lord Oliver described this novel line of reasoning,

I am satisfied that the words of [the Act], whilst on the face of them unequivocal, are reasonably capable of bearing a meaning which will not put the United Kingdom in breach of its Treaty obligations. This conclusion is justified, in my judgment, by the manifest purpose of the legislation, by its history, and by the compulsive provision of S 2 (4) of the 1972 Act.¹¹

Here, then, Community law no longer served as an 'aid to construction' for ambiguous provisions in domestic legislation. Rather, the domestic implementing legislation was 'interpreted' in a manner which effectively gave precedence to a conflicting European norm.

The broad rule of 'purposive construction' employed in *Pickstone* was confirmed the following year in *Litster v. Forth Dry Dock*.¹² Again, the opinion of Lord Oliver merits citation:

The approach to the construction of primary and subordinate legislation enacted to give effect to the United Kingdom's obligations under the EEC Treaty have been the subject matter of recent authority in this House and is not in doubt. If the legislation can reasonably be construed so as to conform with those obligations, ... such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.¹³

As made clear in this opinion, legislation adopted to implement the UK's EC obligations thus forms a distinctive category as far as the courts are concerned. Unlike ordinary legislation, where the courts will normally look only to the wording of the act, legislation implementing EC obligations will be interpreted 'purposively' so as to ensure that the UK is not in breach of those obligations.¹⁴ Although the jurisprudential developments discussed above strictly concern only questions of statutory construction or interpretive technique, they nonetheless point to a more fundamental shift in the practice of UK courts. The logic underlying the differential treatment of EC-related legislation pointed clearly to the recognition of Community law as constituting, in some sense, a 'higher norm'.

¹¹ *Ibid* at 818-819.

¹² *Litster and others v. Forth Dry Dock and Engineering Co. Ltd. and another* [1989] 1 All ER 1134.

¹³ *Ibid* at 1140.

¹⁴ *Pickstone* has since partially 'spilled over' into purely domestic contexts. In *Pepper (Inspector of Taxes) v. Hart and related appeals* [1993] 1 ALL ER 42, the House of Lords held that reference might be made to *Hansard* as an aid to the construction of domestic legislation, where 'the legislation was ambiguous or obscure or the literal meaning led to an absurdity'. Note, however, that European legislation still forms a distinct category, insofar as it may be construed with reference to parliamentary intent even where no such ambiguity exists. See further the discussion in Jonathan Levitsky, 'The Europeanization of the British Legal Style', *American Journal of Comparative Law* vol. 42 no. 2 (1994), pp. 370-374.

2. 'Ordinary' Domestic Legislation and Non-Directly Effective European Community Law

In contrast to the broad interpretive constructs which UK courts have been willing to adopt in the case of legislation explicitly intended to implement European norms, there has been a marked reticence to depart from more traditional canons of interpretation in instances where a conflict has arisen between European norms which do not have direct effect and domestic legislation not directly connected to the process of implementation. In these cases, UK courts have not been willing to distort the ordinary meaning of domestic statutes so as to ensure conformity with the relevant European legislation. Under substantial pressure from the Court of Justice, however, there has been a recent, if still somewhat indeterminate softening of this line of resistance.

The seminal statement of this line of jurisprudence came in the 1988 case of *Duke v. GEC Reliance Ltd.*¹⁵ *Duke* concerned an action brought by a female employee forced to retire at the age of 60, claiming unlawful discrimination on the grounds that her male counterparts could continue working until the age of 65. The employer's practice of applying discriminatory retirement ages was in conformity with the relevant domestic legislation, the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975. The Court of Justice had, however, ruled two years earlier, in *Marshall v. Southampton and South West Hampshire Health Authority (Teaching)*, that the UK legislation was inconsistent with the 1976 Equal Treatment Directive.¹⁶ Moreover, citing the direct 'vertical' applicability of directives (as between the state and a private party), the Court further held that the employer, a public sector body, was liable for damages. In the present case, however, Mrs. Duke could not rely on the provisions of Community law alone, as the directive did not have direct 'horizontal' effect (as between private parties). Thus, for her claim to stand, the domestic courts would have to place an interpretation on the domestic legislation which ran contrary to its plain and ordinary meaning. The House of Lords refused to do so. The House stressed that the legislation concerned had not been passed with a view to implementing the UK's obligations under Community law, noting particularly that the domestic statute actually predated the Council Directive. In this situation, the Law Lords held that they could not distort the meaning of the British statute in order to remove such inconsistencies as might exist with European legislation. Simply stated, where domestic

¹⁵ [1988] 1 All ER 626.

¹⁶ Case 152/84 [1986] ECR 723, [1986] 1 CMLR 688.

legislation was not explicitly passed in order to meet the UK's European obligations, the courts would not depart from the normal rules of statutory construction. Furthermore, the House also signalled that it would not hold a private party liable for a violation of a non-directly effective Community norm where the individual(s) had acted in accordance with valid national law.

The House of Lords reaffirmed this position two years later in *Finnegan v. Clowney Youth Training Ltd.*¹⁷ *Finnegan* raised essentially the same issues as *Duke*. The plaintiff brought an action against a private employer, again seeking redress for the application of differential retirement ages to men and women. In this later case, however, the relevant implementing legislation was the Sex Discrimination Order (Northern Ireland) of 1976. Unlike *Duke*, therefore, the domestic legislation in question post-dated the Directive. On this basis, it was argued that, contrary to *Duke*, the domestic legislation could and should be given an interpretation consistent with the Community norm. The Law Lords, nonetheless, again rejected the claim. The Court noted that the Order had been intended solely to extend the application of the 1975 Sex Discrimination Act to Northern Ireland. Consequently, it could not reasonably be argued that Parliament had, through the adoption of the Order, sought to implement the Community Directive. The Order had thus to be given the same construction as that which had been applied to the earlier act. *Duke* was directly reaffirmed, the court again proving unwilling to depart from the ordinary meaning of the statute.

Yet, within the same year, the *Duke/Finnegan* line of jurisprudence appeared to be called into question by the *Marleasing* decision of the Court of Justice.¹⁸ In *Marleasing*, the European Court appeared to place a general duty on national courts to interpret all domestic legislation in a manner which, insofar as possible, would ensure the effective application of all EC norms, even where those norms did not have direct effect. Most particularly, the Luxembourg court made clear that national law should be interpreted in conformity with directives 'whether the provisions were adopted before or after the directive'.¹⁹ Although *Marleasing* itself actually dealt with a reference from a Spanish court,

¹⁷ [1990] 2 AC 407.

¹⁸ Case 106/89 *Marleasing SA v. La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, [1992] 1 CMLR 305. The present case further strengthened the general injunction for 'faithful interpretation' first issued by the Court of Justice in *Von Colson and Kamann v. Nord-Rhein Westfalen*, Case 14/83 [1984] ECR 1891, [1986] 2 CMLR 430.

¹⁹ *Marleasing* at ECR I-4159.

the decision nonetheless represented something of a direct rebuke for the approach to the construal of domestic legislation adopted by the Lords in *Duke and Finnegan*.²⁰

At first, UK courts did not appear to change tack in function of *Marleasing*. The Court of Appeal, in the 1991 case of *Webb v. EMO Air Cargo (UK) Ltd.*,²¹ made clear that it still held to the principle of interpretation enunciated in *Duke*. *Webb* again centred on a possible inconsistency between the 1975 Sex Discrimination Act and the 1976 Equal Treatment Directive. The plaintiff had been engaged in order, initially, to replace an employee due to take maternity leave. Shortly after being hired, she found herself also to be pregnant and, when she informed her employer of this, was dismissed. The Court of Appeal found that the plaintiff's claim of unlawful discrimination could not be clearly established under European law. This, however, was held to have no bearing on the outcome of the present case. As the European norm concerned was not directly effective, and the claim could not be sustained on the basis of the domestic legislation without distorting the meaning of the statute, the Court ruled against the plaintiff.

On appeal, the House Of Lords somewhat modified the position which it had taken in *Duke*.²² The House continued to hold that the meaning of a domestic statute could not be distorted so as to conform to non-directly effective Community law. Nevertheless, reflecting *Marleasing*, the Lords did accept that legislation should be construed in conformity with Community norms where possible, irrespective of its date of passage. Thus, the simple fact that domestic legislation predated a Community norm could no longer, in itself, absolve UK courts from attempting to construe domestic legislation consistently with European norms. The Lords also made an Article 177 reference to the Court of Justice to determine if the plaintiff's rights had been violated under Community law. The Luxembourg court's decision, finding the claim of unlawful discrimination to be justified, was then duly applied.²³ Although in doing so the House carefully avoided any statement of general principle it is apparent from the result that the rigid rules of construction applied in *Duke* have effectively been modified.

²⁰ See particularly Philip Mead, 'The Obligation to Apply European Law: Is Duke Dead?', *European Law Review* vol. 16 (1991), pp. 490-501.

²¹ [1992] 2 All ER 43 CA.

²² *Webb v. EMO Air Cargo (UK) Ltd.* [1992] 4 All ER 929 HL.

²³ The decision of the Court of Justice is reported as Case 32-93, *Webb v. EMO Air Cargo (UK) Ltd.*, [1994] ECR I-3567. The ensuing decision of the House of Lords is reported as *Webb v. EMO Air Cargo (UK) Ltd. (no. 2)* [1995] 4 All ER 577.

In sum, there has been a definite evolution of the position of UK courts in this area. While initially hesitant to break with traditional interpretive canons as regards domestic legislation with no direct connection to the implementation of European norms, the House of Lords has nonetheless shown itself willing to follow the lead given by the Court of Justice in *Marleasing*. The connection between 'parliamentary intent' and the interpretation of legislation looks to be correspondingly attenuated, if not entirely broken. Yet, it is as well to note that the maintenance of parliamentary sovereignty has likely not been the underlying concern of UK courts in the present line of cases. Rather, it is issues of liability and damages which have principally preoccupied the courts. The domestic courts were, understandably, unwilling to hold private parties liable for, essentially, complying with domestic law. The recent development by the Court of Justice of broader notions of state liability has, however, substantially changed the equation. Given that the absence of private liability may now lead to a direct action against the state, UK courts- as other national courts- are being forced to reconsider the extent of their interpretive obligations with respect to the application of Community law.²⁴

3. The 'Disapplication' of Statutes

Two recent cases have seen a more pronounced move by the House of Lords towards the explicit recognition of the supremacy of European law, with a corresponding erosion of the traditional conception of the sovereignty of Parliament. In both the long-running *Factortame* series of cases and in the 1994 *EOC* case, the House abandoned the artifice of ever-more creative techniques of statutory interpretation. Rather, national law has simply and directly been 'disapplied' insofar as it conflicted with Community law. EC norms have thus been recognised as constituting a 'higher law', taking precedence over domestic legislative acts.

The much publicised *Factortame* case centred on a 1988 revision of the Merchant Shipping Act. The revised Act tightened up the rules for the registration of vessels in the United Kingdom, creating new nationality and residence requirements. The imposition of these new requirements was intended to stop the practice of 'quota hopping', whereby nationals of other member states were able

²⁴ The relationship between the broadening of interpretive constructs and the increased scope of state liability is interestingly developed by Christine Boch in her commentary on *Webb* in the *Common Market Law Review* vol. 33 (1996), especially pp. 564-566.

to fish against the quotas allocated to the UK under their Common Fisheries Policy. A number of Spanish-owned companies affected by the legislation brought an action against the government, alleging that the revised act violated their rights under Community law. They further sought a temporary suspension of the Act, pending the final outcome of the case. It was this application for interim relief which was to produce a decision of major domestic constitutional significance.

After conflicting rulings by the Divisional Court and the Court of Appeal during the first two stages of the proceedings, the applicants' request for interim relief reached the House of Lords. The Lords ruled that no remedy was immediately available to the applicants under English law, as interim relief could not be granted against the Crown.²⁵ The House, however, further made an Article 177 reference to the Court of Justice, asking whether the availability of such a remedy was required under Community law. The Luxembourg court ruled in the affirmative.²⁶ The House of Lords then applied the European Court's decision.²⁷ Using a 'balance of convenience' test, the House found for the applicants and, in consequence, temporarily suspended the operation of the relevant provisions of the Merchant Shipping Act. An act of parliament was thus 'set aside' on the basis of a conflict with European Community law.

The significance of *Factortame* must be carefully assessed. On the one hand, the 'leap' from earlier cases such as *Pickstone* was not, substantively, a great one. Already prior to *Factortame*, UK courts had accorded a de facto precedence to Community law in instances of conflict with domestic legislation. Nevertheless, the explicitness with which the supremacy of Community law was acknowledged in the present case is, in itself, of substantial constitutional and political significance. In *Factortame*, a UK court, for the first time, appeared unambiguously to recognise that Community law constitutes a judicially enforceable 'higher norm' relative to domestic legislation. With a clarity that provoked reverberations well beyond the community of legal specialists,²⁸ the implications of EC

²⁵ *Factortame Ltd. and others v. Secretary of State for Transport* [1989] 2 All ER 692 HL. In the aftermath of *Factortame*, the House of Lords has come to accept the availability of injunctive relief against the Crown in purely domestic cases. See the discussion of *M. v. Home Office* [1993] 3 All ER 537 in Section II below.

²⁶ Case 213/89 *R. v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, [1990] 3 CMLR 1

²⁷ *Factortame Ltd. and others v. Secretary of State for Transport (no. 2)* [1991] 1 All ER 70.

²⁸ For example, in a memorable front page headline, *The Independent* (20 June 1990) proclaimed 'EC Rewrites British Constitution'.

membership for the traditional understanding of parliamentary sovereignty were unmistakably highlighted.

The precedent established in *Factortame* was confirmed by the House of Lords in its decision in the 1994 *Equal Opportunities Commission* case.²⁹ The Equal Opportunities Commission had brought an action seeking a declaration that the so-called 'threshold provisions' of the 1978 Employment Protection (Consolidation) Act violated Community law. The relevant provisions of the Act limited the rights of part-time employees as regards both redundancy pay and compensation for unfair dismissal. It was contended by the EOC that, as women are much more likely than men to be employed on a part-time basis, the Act contravened the prohibition on sex discrimination contained in Article 119 of the EC Treaty. The House of Lords granted the declaratory orders requested by the EOC, effectively holding the domestic statute to be in breach of Community law.

The *EOC* case is noteworthy on two grounds.³⁰ First, had the Lords so wished, the conflict between domestic and Community law could easily have been sidestepped. It was only by applying a relatively liberal definition of standing, as well as consulting a range of social science evidence well beyond that conventionally considered by a UK court, that the finding against the government was possible. Second, it is also worth underlining that no attempt was made to deflect potential political criticism by way of an Article 177 reference to the Court of Justice. Unlike *Factortame*, the declaration of the direct incompatibility of a domestic statute with Community law in the present case was made entirely under the authority of the House of Lords itself. The *EOC* judgment may thus rightly be seen as 'a landmark decision and turning point in the public law arena',³¹ having perhaps 'given Britain its first taste of a constitutional court'.³² More directly, it represents the high watermark to date of the challenge posed by the 'incoming tide' of European law to the traditional doctrine of parliamentary sovereignty. The *EOC* case, together with *Factortame*, would appear to

²⁹ *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission and another* [1994] 1 All ER 910.

³⁰ The present analysis draws on that of Immelda Maher, 'The Higher English Courts and the Implementation of EC law' in Terenth Daintith (ed.), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (London: John Wiley, 1995), pp. 321-322.

³¹ Case note by Carol Harlow and Erika Szyzszak in the *Common Market Law Review* vol. 32 (1995), p. 680.

³² Editorial in *The Times*, 5 March 1994, as cited in *ibid*, p. 652.

have definitively undermined the constitutional fiction that European norms do not constitute a body of 'higher law' relative to domestic legislation.

B. The Redefinition of Parliamentary Sovereignty

1. Parliamentary Sovereignty and European Community Law

The preceding discussion of jurisprudence has shown UK courts to have been 'good Community citizens'. Frequently overcoming substantial structural obstacles, they have generally- if not invariably- sought to ensure the proper application of Community norms within the domestic legal order. In this regard, emphasis must be placed on the continuity which exists between the *Garland/Pickstone* line of cases and the more recent *Factortame* and *EOC* decisions of the House of Lords. The gradual broadening of the techniques of statutory interpretation seen in the first series of cases led, almost by something of a 'natural progression', to the later, more explicit acceptance of the supremacy of European Community law. The *Duke/Finnegan* line of cases do run partially contrary to this general pattern of faithful, and even creative, compliance by UK courts with the demands of the EC legal order. Nevertheless, the importance of this more resistant line of jurisprudence must be qualified. The underlying rationale of these decisions appears to deal with questions of public vs. private liability for breach of Community law, rather than with the constitutional issue of parliamentary sovereignty. Moreover, whatever the significance of *Duke* and *Finnegan*, the recent *Webb* case marks a major move by the House of Lords towards the acceptance of the more general obligation, reaffirmed by the Court of Justice in *Marleasing*, to interpret all domestic legislation consistently with Community norms.

The cost of this compliance has, however, clearly been a move away from the traditional conception of parliamentary sovereignty at the core of the domestic constitutional order. In political and journalistic commentaries, there has been a strong tendency to view these developments in rather 'absolutist' terms. 'Europe' is cast as the villain of the piece, undermining a 'millenary tradition' of the sovereignty of parliament. Yet, the adaptations effected by the judiciary in order to deal with EC norms may be cast in rather different terms, drawn entirely from indigenous constitutional models. In effect, the manner in which British courts have dealt with European law represents not the 'abandonment' of parliamentary sovereignty, but rather its redefinition. Accession to the European

Communities necessitated a shift between two long-standing, competing models of the sovereignty of Parliament.³³ To use the conventional terminology, usually associated with the legal philosopher H.L.A. Hart, parliamentary sovereignty may be conceived in either 'continuing' or 'self-embracing' terms.³⁴ Taking this as a starting point, while the 'continuing' or traditional conception of the doctrine may have proven inadequate to deal with the demands of Community law, the alternative 'self-embracing' conception offers a way out of the constitutional conundrum created by EC membership.

The 'self-embracing' variant of parliamentary sovereignty, long canvassed by constitutional theorists, argues for a different form of parliamentary 'omnipotence' than that found at the root of the traditional variant.³⁵ Advocates of such a view argue that parliament's sovereignty extends to the ability to adopt 'self-limiting' legislation. Parliament may thus bind itself and its successors by placing special amending provisions within statutes. There consequently may exist categories of 'special' or 'entrenched' legislation which stand outside and above normal statutes. The limitations which parliament may impose on itself are theoretically of two types. Most commonly, it is argued by proponents of this position that Parliament may place so-called 'manner and form' limitations in legislation. Such provisions would require that any subsequent amendment of the legislation concerned must be passed by a special procedure. For example, a qualified majority vote in the House or the holding of a referendum may be required. Alternatively, though this variant of the position has never been widely accepted, Parliament could conceivably place 'substantive' limitations on its

³³ The position adopted by H.W.R. Wade is particularly instructive in this regard. One of the foremost exponents of the 'Diceyan' view of parliamentary sovereignty in the post-war period (as at note 1 above), Wade has nonetheless accepted that a 'constitutional revolution' has occurred by which 'the Parliament of 1972 has evidently succeeded in binding its successors'. See H.W.R. Wade, 'What Has Happened to the Sovereignty of Parliament?', *Law Quarterly Review* vol. 107 (1991), pp. 1-4.

³⁴ The 'paradigmatic' statement of the two models of parliamentary sovereignty may be found in H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 145-148. G.A. Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined', *Law Quarterly Review* vol. 92 (1976), pp. 591-617, provides a wide-ranging discussion of its application to contemporary constitutional debates. The specific applicability of the two models to the treatment of EC norms within the domestic legal order is discussed in P.P. Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*', *Yearbook of European Law* vol. 11 (1991), pp. 221-255 and Levitsky, 'The Europeanization of the British Legal Style', *op. cit.*, pp. 352-355.

³⁵ 'Classic' statements of the 'self-embracing' view of parliamentary sovereignty include R.F.V. Heuston, *Essays in Constitutional Law* (London: Stevens and Sons, 1964) and Geoffrey Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971).

successors. In this instance, certain categories or areas of legislation would effectively be placed beyond the reach of subsequent parliaments.

The self-embracing view of parliamentary sovereignty, as is already apparent from the conventional formulation of the doctrine, is logically consistent with the actual handling of Community law. Within this model, it can be argued that the 1972 European Communities Act represented a voluntary choice by Parliament to exercise its sovereign power in such a way as to bind its successors. The 1972 Act thus itself stands outside and above ordinary statute law. It further creates a category of 'entrenched' legislation, EC norms, which also enjoy precedence over ordinary statute law. This understanding of the incorporation of Community law into the domestic order received perhaps its most important judicial formulation in Lord Bridge's speech at the time of the second *Factortame* decision of the House of Lords:

Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of 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. Under the terms of the 1972 Act, it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.³⁶

As is made clear in the foregoing, the supremacy of Community law may - and has been- reconciled with a conception of parliamentary sovereignty, albeit not the relatively narrow and brittle variant more commonly expounded.

If one accepts this 'new' understanding of parliamentary sovereignty, the only question remaining is that of the exact nature of the limits which Parliament placed on itself by the 1972 Act. Two possibilities, consistent with the two forms of 'self-limitation' discussed above, may be put forward.

On the one hand, it can be argued that the limitation placed by Parliament on its successors in 1972 is only a 'manner and form' limitation. In this case, Parliament retains the ability to derogate

³⁶ *Factortame No. 2* [1991] 1 All ER 107-108.

from Community law, as long as it does so explicitly. It suffices that a form of words be included in a legislative act which clearly indicates that it has been passed, 'notwithstanding the United Kingdom's obligations as contracted under the EC Treaties'. This interpretation of the limitation placed on Parliament was put forward by Lord Denning in the 1979 case of *McCarthy's Ltd. v. Smith*:

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 of acting inconsistently with it and says so in express terms then I should have thought it would be the duty of our courts to follow the statute of our Parliament.³⁷

The possibility for a 'selective exit' from Community obligations would, on this model, remain open at least as far domestic law was concerned.

On the other hand, it could also be argued that Parliament, in 1972, imposed a substantive limitation on its successors. On this understanding, it would be held that Parliament is bound to observe all of the United Kingdom's obligations under Community law, as long as the state remains a member of the European Union. While the possibility of withdrawing altogether from the Union remains open, that of 'selective exit' is taken to be foreclosed. The domestic courts thus emerge as the guardians of the integrity of Community law, preventing any attempt by the national legislature to 'pick and choose' from within the *acquis communautaire*. This position is implied in the opinion delivered by Justice Hoffmann in the 1992 case of *Stoke-on-Trent City Council v. B & Q plc.*:

The Treaty of Rome is the supreme law of this country, taking precedence over acts of Parliament. Our entry into the Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which it regulated.³⁸

As reflected in the conflicting judicial opinions cited above, the question as to what UK courts would do, if faced with a derogation by Parliament from a specific Community law obligation, remains, for the time being, irresolvable. Indeed, were such a highly charged political situation to arise, one suspects that the courts would, most probably, seek if at all possible to sidestep the controversy. Were they unable to avoid becoming embroiled in the issue, it is likely that domestic courts would continue to feel an obligation to give precedence to the domestic statute. Such an assumption cannot, however, 'automatically' be made. There has clearly been a divorce, over the past two decades, between the prevailing political and legal understandings of parliamentary sovereignty.

³⁷ [1979] 3 All ER 325 CA at 329.

³⁸ [1990] 3 CMLR. 31 at 34

The courts, having to deal with the practical demands of Community law, have moved towards a self-embracing conception of the sovereignty of parliament. The political class, by contrast, still appears largely wedded to the earlier, Diceyan variant of the doctrine. Although relatively improbable, it is certainly not inconceivable that this 'gap' in understanding between legislators and the judiciary may, at some point, produce practical consequences. If the judiciary were to find itself inextricably caught between Westminster and Luxembourg, it might well feel more comfortable siding with the latter.

2. Further Implications

The final question to be addressed in the present section is whether there has been a 'spill-over' from the incorporation of European Community law to other aspects of UK constitutional law. On a narrow construction of the question, the answer must be a simple 'no'. No other bodies of law have had attributed to them a 'supra-legislative' status comparable to that now effectively enjoyed by Community law. Nevertheless, the experience gained by UK courts in accommodating the 'supremacy' of Community law may serve as a useful precedent in a number of other areas. In this sense, the 'Europeanisation' of UK constitutional law may potentially facilitate, or even accelerate, other forms of constitutional change.

Most obviously, the treatment accorded to Community law may serve as a precedent for the adoption of a bill of rights. Such a bill, the subject of longstanding discussion, could take a number of forms.³⁹ The likelihood, however, is that any movement in this direction will at least initially take the form of an 'incorporation' of the European Convention on Human Rights into UK domestic law.⁴⁰ Yet, the legislative status of the incorporation instrument remains a subject of some doubt. A fairly wide range of possibilities have been canvassed, including the incorporation of the Convention as a purely 'interpretive' instrument. Nonetheless, it is certainly possible that the incorporation of the Convention could be modelled on that of Community law. That is to say, the act incorporating the Convention may specify, in terms analogous to those of Section 2 (4) of the European Communities

³⁹ Michael Zander, *A Bill of Rights?* (London: Sweet and Maxwell, 1997/Fourth Edition) provides a useful survey of the relevant debates.

⁴⁰ At present, though the United Kingdom is a signatory to the European Convention on Human Rights and has since 1966 accepted the individual right of petition to the Commission, the Convention does not form part of domestic law. As such, it may only serve as an aid to statutory construction before the domestic courts. Both the Labour Party and the Liberal Democrats have, however, included a promise of incorporation in their manifestos for the current election campaign.

Act, that all legislation- both predating and postdating the present act- is to be construed in conformity with its terms. It is probable, in this instance, that the courts would apply the same broad interpretive constructs and principles to the interpretation of the Convention as they have in cases dealing with Community law. Similarly, in the event of a direct conflict between the Convention and a domestic norm, the prior treatment of Community law provides precedents for the 'disapplication' of statutes. There is, in short, a possible- though not a necessary- 'parallelism' which may be established between the domestic treatment of the two major bodies of European law.

Devolution statutes, initially applying to Scotland and Wales, may also take the form of 'entrenched' legislation. Here, the terms of entrenchment might be such as to prevent an implied or unintentional infringement on the powers of the devolved assemblies by the Westminster parliament. Politically, entrenchment in this case is perhaps less likely than in the case of a bill of rights. Nevertheless, as regards the legal logic, it bears underlining that there is no inherent contradiction in establishing a 'subordinate legislature' by means of an 'entrenched statute' (at least as regards the imposition of 'manner and form' limitations). The entrenchment of the devolution acts could merely establish that the Westminster parliament would be able to override these acts only by means of a specified procedure. Again, there would appear to be an obvious symmetry with the treatment of Community law.

In both of these cases, it can be said that the incorporation of Community law has cleared out the 'legal underbrush' often seen as an obstruction to constitutional reform. It has long been argued that the adoption of a bill of rights or of certain forms of devolution in the United Kingdom could not be accommodated within the structures of the existing constitutional system. Yet, the treatment of Community norms as a *de facto* form of 'higher law' would appear to have put paid to such essentially 'technical' objections. There is no inherent reason why that which has been done in the case of Community law could not be done as regards either the incorporation of a bill of rights or the adoption of 'entrenched' devolution acts. As it can be argued that the prevailing legal understanding of parliamentary sovereignty has already evolved in a manner which could easily accommodate constitutional changes of the type presently under discussion, the question of whether to proceed with such changes becomes squarely one of political will.

II. Administrative Law

Introduction

In the introduction to the preceding section of this paper it was noted that the constitutional issue facing the UK on accession to the (then) EEC was singular, namely the apparent irreconcilability of the traditional doctrine of parliamentary sovereignty with the supremacy of Community law. In terms of administrative law, however, the UK courts have been faced with a plurality of questions concerning the 'day-to-day' relationship between EC law and the domestic body of administrative law. Firstly, there has been the question of how far EC law has been able to fit within existing patterns of administrative law and how far the domestic system has had to adjust itself. Secondly, there has been the issue of how far any adjustments made to the domestic body of law to facilitate EC law have 'spilled over' into the purely domestic sphere. And, following on from this issue, there has been the concern of how far spillover should be allowed to occur before it is seen to encroach upon the conceptual underpinnings of domestic administrative law. In the following pages, these matters will be considered by reference to two areas of law, namely remedies and the doctrine of proportionality as a ground for seeking a review of an administrative decision.

A. Remedies

*1. Remedies in EC Law*⁴¹

At the outset of any consideration of remedies in EC law, it is important to be aware that the jurisprudence of the ECJ has evolved from being essentially 'non-interventionist' to the stage whereby the Court has required the creation of new remedies for the purpose of protecting rights under EC law if such remedies are deemed necessary.⁴² Indeed, in the context of this paper, this observation is of particular importance as it has been the development of the ECJ's jurisprudence in this regard which prompted the constitutional high point of *Factortame* discussed above.

⁴¹ The case law on remedies laid out in this paper can be read in more depth in P.P. Craig and G. de Burca, *EC Law: Text, Cases and Materials* (Oxford: Clarendon Press, 1995), chpt. 5.

⁴² The Treaty basis for the development of the ECJ's jurisprudence has been Article 5 EEC. '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 Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty'.

The initial approach of the ECJ to the question of remedies for breach of an EC norm can be seen in the following dicta.

[I]t is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature...

In the absence of such measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.⁴³

It is clear from the above that the ECJ was, in the first instance, content to leave the protection of Community rights to the competent national authorities subject only to two 'Community' conditions: parity of protection for rights claimed under national and EC law, and the application of national rules which would not render the actual protection of rights impossible. The ECJ did not, at this stage, require that new remedies be created, a point which was more fully developed in subsequent case law.⁴⁴

It quickly became apparent, however, that differences in the legal traditions of the Member States could not guarantee a uniform standard of protection for EC rights. Accordingly, there began an incremental process which saw the ECJ develop the law in such a way as to require that, when a national remedy was sought for a breach of EC law, attention must be paid to the principles of proportionality, adequacy and effectiveness.⁴⁵ It was this latter principle, that of effectiveness, which sat at the centre of the *Factortame* litigation.

The facts of the *Factortame* case have already been outlined above. As noted, the House of Lords, having been asked to grant an interim injunction against the operation of the Merchant Shipping Act 1988, referred to the ECJ the question of

⁴³ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, 1997.

⁴⁴ See, for example, Case 158/80, *Rewe Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805.

⁴⁵ See, for example, Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.

[W]hether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.⁴⁶

After reiterating the point that national procedures must ensure the effectiveness of EC law the ECJ further stated that

It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised 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 the rights claimed under Community law. It follows that if 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.⁴⁷

Craig and de Burca have neatly summarised the tension arising in the ECJ's jurisprudence post-*Factortame*.

Factortame...seems to fit less well with the Court's other statement that, in the absence of harmonisation, national courts are not obliged, by virtue of Community law, to create new remedies...[A]ccording to the House of Lords, the remedy of interim relief against the Crown was not available under national law, yet the effect of setting aside the 'rule of national law' which prohibited the grant of relief would be to provide for this very remedy to ensure the effectiveness of Community law.⁴⁸

In the years immediately succeeding *Factortame*, the ECJ proceeded to elucidate further which requirements Community law placed on domestic procedures in terms of adequacy and effectiveness while simultaneously holding that national courts were not under any obligation to create new remedies.⁴⁹ Then, in the case of *Francovich*⁵⁰, the ECJ finally broke with its previous jurisprudence and ruled that when the remedy sought before a national court concerned damages for a breach of Community law, that matter should be governed by a uniform Community norm.⁵¹

The *Francovich* ruling arose out of a failure by the Italian government to implement Directive 80/987 (concerning employee rights in the event of employer insolvency). The facts of the

⁴⁶ Per the ECJ. See Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433 at para.17.

⁴⁷ *Ibid* para. 21.

⁴⁸ Craig and de Burca, *op. cit.*, at p. 211

⁴⁹ These cases include two references from Irish Courts, namely Case C-377/89, *Cotter and McDermott v. Minister for Social Welfare and Attorney General* [1991] ECR I-1155 and Case C-208/90, *Emmott v. Minister for Social Welfare* [1991] ECR I-4269.

⁵⁰ Cases C-6/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

⁵¹ The *Francovich* ruling excited much debate about its implications for the 'constitution' of the EC. See, for example, G. Bebr, 'Francovich v Italy, Bonifaci v Italy', *Common Market Law Review* vol. 29 (1992), pp. 557-584 and J. Steiner, 'From Direct Effects to *Francovich*', *European Law Review* vol. 18 (1993), pp. 3-22.

case involved a claim by Francovich and Bonifaci against the Italian state for wages they had been denied subsequent upon the non-implementation of the said Directive, a claim which was upheld. "(F)oundation for the obligation on the part of Member States to pay compensation for such harm is to be found in Article 5 EEC...It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible".⁵²

The most notable shortcoming of the ruling in *Francovich* was the uncertainty it created in terms of the scope of state liability. The recent judgments of the ECJ in the cases of *Brasserie du Pêcheur* and *Factortame* (no. 3) have, however, gone some way to clarifying the issue.⁵³ Whereas *Francovich* concerned only the question of state liability vis-à-vis the non-implementation of directives (i.e. the EC norm in question was not directly effective) the *Brasserie du Pêcheur* and *Factortame* cases have established that state liability exists as a general rule (i.e. irrespective of whether a right claimed under EC law is directly effective and irrespective of its legislative form). Crucially, however, the *Brasserie du Pêcheur* and *Factortame* cases also established the conditions which must exist before Member State liability can exist. In essence, the ECJ laid down a three-stage test closely linked to the exercise, and extent, of discretion.⁵⁴ Firstly, the EC norm which has allegedly been breached must have been one designed to confer rights on an individual. Secondly, the breach of the EC norm must have been sufficiently serious. In this context the extent to which a national legislature enjoys discretion vis-à-vis the implementation of an EC norm is important: if the national legislature enjoys a wide discretion, for example, liability will rest only if that legislature

⁵² Per the ECJ, [1991] ECR I-5357 at paras. 36-37.

⁵³ Cases C-46 & 48/93, *Brasserie du Pêcheur S.A. v. Germany, R. v. Secretary of State for Transport, ex p. Factortame Ltd* [1996] 1 ECR 1029. For a discussion of these cases see P.P. Craig, 'Once More unto the Breach: The Community, the State and Damages Liability', *Law Quarterly Review* vol. 113 (1997), pp. 67-94. For an argument that the model of state liability introduced by the ECJ potentially is one which will be problematic at the national level, see, D. Chalmers, 'Judicial Preferences and the Community Legal Order', *Modern Law Review* vol. 60 (1997), at pp. 191-199.

⁵⁴ The model which the ECJ applied to State liability was that already developed by the ECJ vis-à-vis the non-contractual liability of the Community under Article 215(2) EEC. See [1996] 1 ECR 1029 at para. 42-45.

manifestly and gravely disregards the limits of its discretion.⁵⁵ Thirdly, there must be a direct causal link between breach and damage: whether there is such a link is a question for the national court.⁵⁶

2. Remedies in EC Law and Administrative Law in the United Kingdom

From the foregoing, it is immediately apparent that the development of the ECJ's jurisprudence on the question of remedies has raised two issues for the UK courts and the domestic body of administrative law. Firstly, there has been the anomaly which *Factortame* created in terms of the availability of injunctive relief against the Crown. Secondly, there exists the question of how EC standards for state liability can be married to domestic provisions.

With regard to injunctive relief, the above discussion touched on Craig and de Burca's contention that the ECJ had effectively obliged the UK courts to create a new remedy in a manner which was inconsistent with its preceding rulings. In domestic administrative law, the implications of *Factortame* were similarly problematic. As already implied, the ruling in *Factortame* 'turned on its head' the ECJ's previous arguments about the need to ensure parity of protection for EC and national rights by effectively granting to individuals superior protection when their claim was based in EC law (i.e. only in those circumstances could individuals obtain injunctive relief against the Crown in Parliament). The point is well made by Dawn Oliver.

It is hard to see what justification there is for the common law rule in cases not raising issues about rights under Community law...(I)n non-Community law cases the absence of a power to grant either interim injunctions or interim declarations means that there is a real problem...(A)lthough the rule causes few problems in practice, it does cause some and it is anomalous, has been anomalous for many years, and is even more anomalous now that Community law requires it not to apply where Community rights are in issue. It is ripe for consideration by Parliament.⁵⁷

The spillover from *Factortame* arguably came in the 1993 case of *M. v Home Office*.⁵⁸ As Loveland has speculated, "One might wonder...if their Lordships innovative decision in *In re M* would have

⁵⁵ *ibid*, paras. 55-56. The ECJ further identified a series of grounds by which the gravity of any breach may be gauged. See para. 56.

⁵⁶ It should be noted that these standards apply also to administrative and executive actions provided the required level of discretion is present. See [1996] 1 ECR 1029 at paras. 42-44.

⁵⁷ D. Oliver, 'Fishing on the Incoming Tide', *Modern Law Review* vol. 54 (1991), at p. 448.

⁵⁸ [1993] WLR 433. The qualification 'arguably' cannot properly be omitted. As Koopmans has noted, "Although European influence on our different national legal systems cannot easily be weighed or measured, it is fairly obvious that it enters them through many different routes". See, 'European Public Law: Reality and Prospects', *Public Law* (1991), at p. 53.

appeared if not for the previous acceptance of similar principles in relation to EC matters in *Factortame (No.2)*.⁵⁹

M. v Home Office arose out a failure by the Home Office to fulfil an undertaking given to the court not to deport M (a citizen of Zaire claiming refugee status) pending the outcome of an application for judicial review of the Home Secretary's decision ordering the deportation of M. The legal reasoning in each of the courts hearing the case was complex, in part because the Court of Appeal considered the case to centre on the availability of contempt jurisdiction in proceedings against the Crown or its servants whereas the House of Lords felt that it was a case concerning the availability of injunctive relief against Crown servants.⁶⁰ However, of direct interest in this context is the final ruling of House of Lords that injunctive relief is available against Crown servants in 'domestic' cases.

[T]he argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the civil war.⁶¹

In strict legal terms, of course, there exist differences between *Factortame* and the decision in *M v Home Office*. On a narrow reading of the two cases, for example, *Factortame* effectively concerned the availability of injunctive relief against the Crown in Parliament whereas the decision in *M* extended only to servants of the Crown acting in their official capacity.⁶² However, this is not a legal technicality which should be overstated given that the Crown in Parliament ordinarily acts to confer duties on Ministers: "(T)here are likely to be few situations when there will be statutory duties that place a duty on the Crown in general instead of a named Minister".⁶³ Indeed, given the impact of *M. v Home Office* on domestic administrative law, particularly when seen in conjunction with the impact of

⁵⁹ See Ian Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995), Introduction at pp. 6-7.

⁶⁰ For an overview of the complexities arising from the rulings of the two courts noted, see, M. Gould, 'M. v. Home Office: Government and the judges', *Public Law* (1993), pp. 568-578.

⁶¹ Per Lord Templeman, [1993] 3 WLR at 437.

⁶² Injunctive relief is not available in 'domestic law' against a Minister of the Crown acting in their official capacity if the award of such relief would represent the indirect award of an injunction against the Crown.

⁶³ Per Lord Woolf, [1993] 3 WLR at 448. Gould has cautioned, however, that "[W]hilst it may be true now that statutes predominantly confer duties on ministers, there is nothing to prevent Parliament from adopting a form of words which confers duties on the Crown and using that formula more frequently than at present in order to avoid the very remedies made available in *M*". See, Gould, *op. cit.*, at p. 577.

Factortame, the lesson for this paper becomes quite apparent. *Factortame* necessitated adjustment in the domestic body of administrative law and simultaneously created an unacceptable shortfall in the availability of remedies in the domestic courts. *M v Home Office*, then, sought to fill the lacuna.

However, to the extent that *Factortame* and *M v Home Office* can be seen as administrative law cases with profound constitutional significance, an assessment of the ECJ's jurisprudence on state liability in damages is less easy to make. There are two reasons for this. Firstly, given how recent the ECJ's jurisprudence in this area has been, the matter of how the EC norm is to be applied in practice has not yet been 'tried-out' in full in domestic courts.⁶⁴ Secondly, to the extent that the issue of damages for breach of EC law has been addressed by the UK courts, the case law thus far has been mixed as regards the future direction of British law.

The first case in which the question of damages arising from a breach of EC law was considered was *Garden Cottage Foods Ltd. v. Milk Marketing Board*.⁶⁵ The case arose when the plaintiffs sought an injunction to restrain the defendants from breaking off business relations with them in a manner contrary to Article 86 EC.⁶⁶ At first instance, the application for injunctive relief was refused on the grounds that the plaintiffs would be adequately compensated in damages if their action was successful. At the Court of Appeal, however, doubt was expressed as to whether damages would be recoverable, and the original relief sought was granted. The House of Lords, then, overruled the Court of Appeal, finding instead that a breach of Article 86 EC would give rise in domestic law to a cause of action belonging to an individual who suffered financial loss as a consequence of such breach, and that such breach could be compensated by payment of damages. *Garden Cottage* is, therefore, often cited as a pre-existing authority that damages caused by a breach of the Treaty are recoverable through an action for breach of statutory duty.

The 'contrary' case to *Garden Cottage* is *Bourgoin S.A. and others v. Ministry of Agriculture, Fisheries and Food*.⁶⁷ It was a case brought by French turkey producers who sought damages for the period during which their licence to import into the UK was revoked by the UK

⁶⁴ For the argument that acceptance of the ECJ's jurisprudence at the national level may not be without difficulty, see Chalmers, *op. cit.*.

⁶⁵ [1984] AC 130.

⁶⁶ Articles 85 & 86 EC are concerned with competition policy. It should be noted that these articles are directly effective, both vertically and horizontally. See Case 127/73 *BRT V SABAM* [1974] ECR 51.

⁶⁷ [1986] 1 QB 716.

government (the ECJ determined that the removal of their licence by the UK government had been contrary to Article 30 EC). In its ruling, the House of Lords distinguished the present case from *Garden Cottage*, holding that when the defendant is a public body, the proper means of action is judicial review. Nevertheless, should an individual wish to make a claim for damages, they must base their claim on the tort of misfeasance in public office, an action which can be successful only if it is shown that the defendant acted maliciously, or in full knowledge that their actions were *ultra vires*. *Garden Cottage*, it was determined, applied only to private law actions involving a breach of the Treaty.

The logic underpinning the court ruling in *Bourgoin* is not difficult to discern; if a public body could be found liable in damages for any and every breach of a statutory duty, the process of government would become untenable (how EC law may be instructive on this issue is returned to below). Yet whatever the merit of the foregoing cases in terms of domestic law and administrative practice, there still remain the demands created by Community law. Member State governments can be liable in damages for non-compliance with Community law, and it is incumbent on domestic law and procedure to give effect to this obligation.⁶⁸

Craig has suggested that there are two ways in which the ECJ's jurisprudence from *Francovich* through to *Factortame (no. 3)* can be accommodated in the domestic system.⁶⁹ The first, and most obvious, option is to create a new tort under which the state would be liable in damages if the three conditions set out by the ECJ are met. Briefly stated again, those conditions are (1) the existence of an EC norm which is intended to confer rights on an individual; (2) a breach of that EC norm; and, (3) a causal link between the breach of that EC norm and harm befalling an individual.

The alternative option is to try and fit the EC norm within the domestic action for breach of statutory duty. The domestic standard has been stated most recently by the House of Lords in *X (Minors) v. Bedfordshire C.C.*⁷⁰

This category comprises those cases where the statement of a claim alleges simply (a) the statutory duty, (b) breach of that duty, causing (c) damage to the plaintiff...although the application of those principles in any particular case

⁶⁸ It is interesting to note that in *Kirklees Borough Council v. Wickes Building Supplies Ltd.* [1992] CMLR 765 at 785, Lord Goff accepted that, post-*Francovich*, the domestic court ruling in *Bourgoin* had probably been errant.

⁶⁹ See Craig, 'Once More Unto the Breach', at p. 88.

⁷⁰ [1995] 2 AC 633.

remains difficult. The basic proposition is that in the ordinary case a breach of a statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of that duty.⁷¹

It is apparent from this extract and the paragraph immediately preceding it that there exist clear parallels between the domestic and supranational norms. The domestic requirement that there exist a statutory duty, for example, is comparable to the supranational condition that there exist an EC norm which is intended to confer rights on an individual.⁷² Further, there exist similar requirements on the need for breach of a statutory duty/EC norm, as well as the need for any breach to cause loss to an individual seeking damages. On this analysis, therefore, it would seem that a fit between the domestic and supranational norms could be made, subject only to slight modification.

Assuming, however, that the supranational norm can be made to fit within the domestic standard, two further, interrelated, questions must be addressed. Firstly, there remains the underlying concern of the court in *Bourgoin* about the need to strike a balance between efficient administration and the protection of individual interests. Second, there remains the question of the extent to which the ECJ's jurisprudence on state liability may be able to spillover into domestic cases with no Community law component.

In considering these issues, Craig has suggested that the role which the ECJ's jurisprudence could play is essentially one of 'helping' the UK judiciary find the correct balance between the needs of efficient administration and the protection of individual interests. He refers, for example, to the concern of the ECJ with regard to Community liability under Article 215(2) EC that "the exercise of legislative functions must not be hindered by the possibility of actions for damages whenever the general interest of the Community requires legislative measures which may adversely affect individual

⁷¹ *Per* Lord Browne-Wilkinson at 731.

⁷² One problem in domestic law, however, relates to general statutory duties. In *X v Bedfordshire* Lord Browne-Wilkinson noted that an individual cannot argue breach of a general statutory duty, i.e. a duty to society as a whole. "Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general... The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific." [1995] 2 AC 731-732. Where an individual is seeking recompense for the breach of a right belonging to them under EC law, however, it is suggested that this domestic standard would not be problematic as whether such a right exists would be a matter for EC law alone.

interests".⁷³ In the domestic context the courts can be seen to have followed a similar logic by proceeding from the starting point that an *ultra vires* act *per se* will not occasion liability in damages. Rather, an individual wishing to claim damages against a public body for breach of a statutory duty must be able to place that claim within the framework of a recognised cause of action, such as negligence. Clearly, then, the ECJ's requirement that a 'breach be sufficiently serious' and the domestic demand that there must be 'something more than a breach' are drawn from the same school of thought.

However, there still remains the final question of whether the jurisprudence of the ECJ can spillover into domestic cases with no Community law component. In order to accept that spillover would be both possible and beneficial, it is necessary to concede that shortcomings exist in the domestic system, most notably with regard to fitting public authority actions within a negligence framework.⁷⁴ If this premise is accepted, it is at this stage that the parallels which may exist between the domestic and supranational norms can become instructive. As the following extract from Craig illustrates, it would seem that the benefit in allowing EC norms and practice to spillover would lie in the variety of comparable options that would be given to the courts.

The jurisprudence of the ECJ may be of assistance here, in that it increases the options at our disposal. It shows a way of adding to the existing heads of liability, without thereby imposing excessive burdens upon public authorities. The dichotomy drawn by the ECJ between those cases where the public body has some significant measure of discretion, and those where it does not, may be helpful. It would allow us to develop, in the former type of case, an action based upon the serious breach of a domestic norm. In the latter type of case breach of the norm in and of itself should suffice for liability. In both types of case the plaintiff would also have to prove that the rule infringed was intended to confer rights, and causation...[I]t might be objected that this recasting of domestic doctrine has failed to reconcile the fact that UK law requires proof of negligence in addition to the seriousness of the breach, whereas EC law imposes no such condition...[W]hat would be lost if we dropped this stipulation?...[T]he principal difference in this respect is that the ECJ's concept of serious breach is richer and better worked out than its national counterpart.⁷⁵

⁷³ Craig, 'Once More Unto the Breach', at p. 72.

⁷⁴ Craig has identified these shortcomings and suggested some possible reforms of the law. See, *Administrative Law* (London: Sweet and Maxwell, 1994/Third Edition), pp. 646-651.

⁷⁵ 'Once More Unto the Breach', at pp. 90-94. Craig has also noted how EC law has spilled over into other areas of domestic law. "This has already occurred in the *Woolwich* case, where one of the reasons given for extending restitutionary relief was that EC law demanded the presence of such relief in cases which did possess a Community element. It was clearly felt that the existence of differing rules to govern situations in which there was or was not a Community law issue would be unsatisfactory." See Craig, *Administrative Law* at p. 650. For the *Woolwich* case, see *Woolwich Equitable Building Society v. Inland Revenue Commissioners* (no. 2) [1992] 3 WLR 366.

B. The Doctrine of Proportionality and the Review of Administrative Decisions in the UK

Proportionality has been defined by the Council of Europe Committee of Ministers as requiring public bodies to "maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose it pursues".⁷⁶ Historically, the doctrine is taken to have its roots in German administrative law, and today it is an administrative standard that is common to most of the Member States of the EU.⁷⁷ In the Community legal order it sits as a general principle of law.⁷⁸ Accordingly, when an individual seeks to argue that a national standard is contrary to an EC norm, their argument can rely on proportionality.⁷⁹ In the United Kingdom, then, the doctrine has, for example, operated in cases concerned with 'Sunday Trading' and sexual discrimination.⁸⁰

Beyond Community law, however, proportionality is a vexed doctrine in the United Kingdom, most notably in the field of judicial review. The core of the problem is similar to that which existed in the UK immediately post-*Factortame*. If an application is made for judicial review of a decision with a Community component, an applicant can invoke the doctrine of proportionality. If no Community component is present, however, the application must proceed within 'domestic' parameters. Why, then, has proportionality not spilled over?

⁷⁶ R(80)2, II 4.

⁷⁷ On its applicability throughout the Member States, see generally J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 1992).

⁷⁸ On the role of proportionality in Community law, see G. de Burca, 'The Principle of Proportionality and its Application in EC Law', *Yearbook of European Law* (1993), p. 105.

⁷⁹ In Case C-237/82 *Jongeneel Kaas v. Netherlands* [1984] ECR 483, Advocate General Mancini stated that, "[T]he general principles elicited by the Court from the primary and secondary provisions of Community law, and in particular those fundamental values which are common to the legal systems of the Member States, form part of the Community legal order and may therefore be relied upon by individuals before the national court which, as is well known is also a Community court...[T]he general principles of law and, in particular, the principle of proportionality have direct effect. Accordingly they must be applied by national courts if the circumstances in relation to which they are relied upon display a connection with the Community system". See pp. 520-522.

⁸⁰ The 'Sunday Trading' cases concerned the question of whether the Shops Act 1950 contravened provisions of the Treaty (principally Article 30). See, for example, Case C-145/88, *Torfaen Borough Council v. B & Q plc*. [1989] ECR 3851, [1990] 1 All ER 129. Aidan O'Neill has, however, argued that proportionality has been interpreted by different courts in different ways in the Sunday Trading cases, leading to 'a lack of uniformity in the application of both the provisions of national law and the principles of Community law within one Member State'. See O'Neill, *The Government of Judges: The Impact of the European Court of Justice on the Constitutional Order of the United Kingdom*, EUI Working Paper Law No. 93/3 at pp. 121-149.

To understand why it is that proportionality has remained only within the Community sphere thus far, it is necessary to return to the broader public law role which the UK judiciary performs. As section one illustrated, constitutional theory in the UK has traditionally afforded absolute supremacy to Parliament with a corollary of this being a subordinate constitutional role for the courts. Given that '...administrative law must work within the framework of constitutional law, and can be said to be its most active manifestation',⁸¹ the grounds on which an individual can invoke the court's supervisory jurisdiction, then, are closely defined so as to ensure that the courts only 'review' administrative decisions rather than examining their merits (the function of an appeal jurisdiction).

Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality'...I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. By 'irrationality' I mean what can now be succinctly referred to as '*Wednesbury* unreasonableness'⁸²...I have described the third head as 'procedural impropriety' rather than a failure to obey the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such a failure does not involve any denial of natural justice.⁸³

Those who would argue in favour of the adoption of proportionality on top of these existing heads of review tend to do so on the basis of two arguments. The first argument aligns the doctrine to the concept of irrationality/*Wednesbury* unreasonableness. An irrational decision has been defined as one "which is so outrageous in its defiance of accepted moral standards that no sensible person who had applied his mind to it could have arrived at it".⁸⁴ On this understanding, then, proportionality is argued to represent nothing more than one particular form of the standards contained within the

⁸¹ See H. W. R. Wade, *Administrative Law* (Oxford: Clarendon Press, 1994/Seventh Edition) at p. v.

⁸² '*Wednesbury* unreasonableness' is Lord Greene's classic formulation taken from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223. *Wednesbury* unreasonableness is usually read as meaning that a decision can be reviewed if it is so unreasonable that no reasonable public body could have made it.

⁸³ Per Lord Diplock, *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All ER 935, 950-951. It is interesting to note that Lord Diplock proceeded to say in this judgment that he did not consider the grounds for review in domestic administrative law to be exhausted. "I have in mind the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community". See p. 950.

⁸⁴ *ibid.*

heading of irrationality.⁸⁵ Essentially, the belief is that the adoption of proportionality would represent only a 'variation on the same theme'.

The second argument is one that is less sympathetic to the notion of irrationality/unreasonableness. This argument suggests that unreasonableness is, in fact, a smoke screen which allows the judiciary effectively to review the merits of a decision. As Jowell and Lester have argued,

We suggest that it is unsatisfactory...First, it is inadequate. the incantation of the word 'unreasonable' simply does not provide sufficient justification for judicial intervention. Intellectual honesty requires a further and better explanation as to why the act is unreasonable...Secondly, the context of *Wednesbury* unreasonableness is unrealistic. Attempting as it does to avoid judicial intervention on the merits of decisions...it seeks to prevent review except where the official has behaved absurdly...In practice, however, the courts are willing to impugn decisions that are far from absurd.⁸⁶

Commentators who oppose the adoption of proportionality, by contrast, base their arguments on the converse of the foregoing. Fundamentally, they disagree with the premise that the courts already review the merits of decisions in practice. Thereafter they take exception with the notion that the adoption of proportionality would represent only a 'variation on the same theme' as irrationality, arguing instead that proportionality cannot fit within the function of the courts' supervisory jurisdiction. In essence, this argument is that, by requiring a decision to be 'irrational' in the manner defined above, the courts remain 'outside' the decision making process by supervising the exercise of government power rather than seeking to replace it.⁸⁷ The doctrine of proportionality would, it is argued, lower the threshold point at which the court's supervisory jurisdiction could be invoked. In other words, an 'extra-ordinarily unreasonable' decision would, subsequent upon the invocation of proportionality, only have to be flawed on the balance of probabilities.⁸⁸

⁸⁵ The most consistent advocates of the adoption of proportionality as a recognised principle in administrative law are J. Jowell and A. Lester. See, for example, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law', *Public Law* (1987), pp. 368-382. For a consideration of (some of) their arguments by reference to the operation of proportionality in French administrative law, see, S. Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?', *Oxford Journal of Legal Studies* vol. 12 (1992), pp. 237-264.

⁸⁶ Jowell and Lester, *op. cit.*, at 371-2.

⁸⁷ For a conventional statement of this argument see Lord Irvine of Lairg, 'Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Unreasonableness', *Public Law* (1996), pp. 59-78.

⁸⁸ For an excellent overview of the debate on the adoption of proportionality see A. O'Neill, *op. cit.*, at pp. 189-195

The most recent high profile case wherein the judiciary was 'invited' to adopt proportionality as a ground for review was *R v Secretary for State for the Home Department, ex parte Brind and Others*.⁸⁹ The *Brind* case arose when several journalists wished to challenge the validity of the Home Secretary's decision to ban the BBC and IBA from broadcasting directly statements made by representatives of certain groups/political parties in Northern Ireland. The Home Secretary had made his decision pursuant to the discretion belonging to him under the Broadcasting Act 1981. The applicants challenged the decision on several grounds, included among which was that the directives issued were disproportionate to the end to be achieved. They further argued that the Home Secretary's decision was contrary to certain provisions of the European Convention on Human Rights (principally Articles 10 & 13).⁹⁰ However, as Sir Steven Sedley has observed (extra-judicially),

[I]t was not a popular case, and unpopular cases tend not to develop the law in a liberal direction. The House of Lords accordingly held the ban to be a permissible exercise of the Home Secretary's discretionary powers in the situation then confronting the United Kingdom. In doing so it did much to stifle the nascent doctrine of proportionality, which in consequence, and unhelpfully for the homogeneity of European Union law, is now likely to long delayed in its emergence in English law.⁹¹

As the foregoing quotation shows, the argument that the courts should use proportionality as a ground for review was rejected. As Lord Lowry noted, "(I)t...occurs to me that there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional review doctrine and the admittedly forbidden appellate approach".⁹² It is further amply clear that the facts of the *Brind* case were the wrong facts on which to argue proportionality. In many ways *Brind* encapsulated each of the problems associated with civil liberties in Northern Ireland, and it is apparent that the courts did not wish to usurp Parliament on this most sensitive matter. To that extent, therefore, perhaps *Brind* is a microcosm of all that would be problematic with the adoption of proportionality as a ground for review in the UK. Proportionality is

⁸⁹ [1991] 1 All ER 720.

⁹⁰ In essence, counsel for the applicants argued on this point that as the domestic courts seek to interpret national legislation in a manner which is not contrary to the Convention, then they should similarly seek to interpret the exercise of ministerial discretion under national legislation.

⁹¹ Sir S. Sedley, 'Freedom of Expression, the Media and the Courts', *Paper Presented to the European Group of Public Law Spetses Conference*, (1995) at p. 6.

⁹² [1991] 1 All ER 720 at 739. It is interesting to note that Lords Bridge and Roskill acknowledged Lord Diplock's belief that proportionality may eventually form an independent ground of review, although they too were concerned, in the instant case, not to cross the boundary between review and appeal.

supposed to operate as a principle of administrative law. In the UK, however, the fear among the judiciary seems to be that it could become a gateway to (overt) political decision-making.

C. General Comments

Returning to the questions posed in the introduction to this section, several (preliminary) concluding comments can be forwarded. Primarily, it is apparent that the fit between the rudiments of EC law considered in this paper and their domestic 'equivalents' has not been absolute. The area of injunctive relief, was, in the first instance, seen to be highly problematic, going as it did to 'core' constitutional practice. However, once the constitutional issue was resolved, a comparable form of injunctive relief quickly spilled over to domestic administrative law thus eradicating the anomaly created by *Factortame*. In the field of state liability, it has been posited that, potentially, the transition in this area could be easily achieved and that spillover should only be considered beneficial. Whether this proves so, remains to be seen. Proportionality, by contrast, remains as the only area where transition seems to be inherently problematic.

There are probably many reasons for this variation of receptiveness in different areas of domestic administrative law. However, a broad trend will be suggested. EC norms can, and will, spillover when they *have* to, not when opinion would desire that they do. Stated alternatively, spillover is a question of functional necessity. Taking injunctive relief as an example, the shortfall post-*Factortame* was unacceptable, creating as it did a 'dual' system of remedies between the Crown and its citizens. Accordingly *M v. Home Office* can be seen as seeking to ensure equal access to remedies as a matter of individual entitlement.

Proportionality, by contrast, is an issue more concerned with the relationship between the Crown and its courts. It is a doctrine that has fundamental implications for the conceptual underpinnings of the domestic body of administrative law, representing as it does a means of access to a remedy rather than a remedy in itself. As shown above, in political terms, the adoption of proportionality would lower the threshold point at which the courts supervisory jurisdiction could be invoked. Also, in practical terms, the adoption of a lower threshold point would likely further subject

the court system to pressures of overburdening.⁹³ Whether proportionality is functionally necessary, therefore, remains an open question.

Conclusion

In the realms of both constitutional and administrative law, UK courts have exhibited a marked 'culture of compliance' in their handling of EC norms. As detailed above, substantial adaptations have been effected, in both areas of public law, so as to discharge the UK's obligations under the EC Treaties. Constitutionally, the traditional notion of parliamentary sovereignty, the system *Grundnorm*, has itself been modified in cases dealing with the application of EC norms. Similarly, as regards administrative law, UK courts have broken with long-established practice. For example, responding to the demands of the EC legal order, UK courts accepted the creation of a remedy of injunctive relief against the Crown. Similarly, in Community law cases, they have accepted to 'import' the doctrine of proportionality, ascribing to the courts a much broader margin of discretion than that allowed for under English administrative law. Further developments, connected with the continuing development of a regime of state liability for non-compliance with Community law, also appear to be in the offing.

The question of 'spill-over' is, perhaps inevitably, a much more complex one. Here, dealing with the indirect effects of Community law, the pattern appears quite mixed. Constitutionally, it may reasonably be argued that the potential for 'spill-over' is structurally limited. While the broad interpretive constructs developed in the application of Community law have been limitatively applied in purely domestic cases, any further constitutional 'spill-over' from the incorporation of Community law must rely on a prior act of political will. The handling of Community law by the courts creates a precedent, essentially a technique, by which other constitutional changes- such as the incorporation of the European Convention on Human Rights- could be facilitated. An intervention of the 'constituent power' must, however, first take place.

Administrative law, by contrast, allows for something more of a piece-meal 'spill-over'. In this regard, UK courts have, on the whole, appeared quite willing to allow for a 'spill-over' of

⁹³ On the question of overburdening, see, for example, Sir H. Woolf, 'Judicial Review: A Possible Programme for Reform', *Public Law* (1992), pp. 221-237.

Community remedies into the domestic realm where the Community regime appeared more protective of individual rights than its domestic counterpart. In other words, where applicable, there has tended to be a 'levelling up' of the domestic regime to the supranational standard. The main area of resistance remains, nonetheless, that of proportionality. While UK courts have accepted the application of 'proportionality' in cases with a Community law content, they have thus far steadfastly refused to do so in strictly domestic cases. As suggested above, this would appear linked to the relatively broad political determinations which the doctrine of proportionality may require the courts to make. The transition here is one to a different conception of public law, rather than simply the extension of existing forms of remedy. While such a transition cannot be entirely excluded, it remains a 'leap' that the courts have thus far lacked the will- or the perhaps the apposite opportunity- to make.

Overall, it is fair to say that the reception of Community law in the UK has been marked by elements of both 'conservatism' and 'radicalism'. There has been a definite 'conservatism' of style, in keeping with both the courts' traditional constitutional position and the nature of common law jurisprudence more generally. The changes necessitated by EC law have been accommodated through an incremental pattern of adaptation, the rules and understandings of the domestic system being only quite gradually modified so as to deal with the demands of a very different legal order. At the same time, however, the cumulative impact of such gradual change has been quite 'radical'. In the realms of both constitutional and administrative law, substantial changes have already been necessitated- and more appear to be in prospect. Moreover, Community law unquestionably serves to reinforce indigenous reformist currents, acting as a major catalyst for the ongoing 'modernisation' of UK public law. Perhaps more than any other single factor, 'Europe' has undermined a long prevalent 'Diceyan orthodoxy' as regards the role and nature of public law within the United Kingdom. The exact shape and parameters of the paradigm which may replace that 'Diceyan orthodoxy' have not yet, however, been clearly defined.