

## The ECJ, National Courts and the Supremacy of Community Law

By Paul Craig\*

A central issue in any future European constitution concerns the inter-relationship of national courts and the ECJ, in particular in relation to the claim to supremacy over national law contained in the ECJ's jurisprudence. The discussion begins with a brief account of the Community's supremacy doctrine. This will be followed by an analysis of the reaction of national courts to this claim. The focus will then shift from positive law to the normative evaluation of a number of issues that are central to this topic. The analysis concludes with some thoughts on the relevant provisions of the Preliminary Draft European Constitution that has emerged from the Laeken Convention.

### 1. Supremacy: The ECJ's Jurisprudence

It is readily apparent that there will be clashes between Community law and national law. These will often be inadvertent. More intentional recalcitrance on the part of the Member States will be less common, though it is not by any means unknown. In any event some rules must exist for such cases. Not surprisingly the ECJ has held that EC law must be supreme in the event of any such conflict. This principle was first enunciated in *Costa v. ENEL*<sup>1</sup> where the ECJ responded to an argument that its preliminary ruling would be of no relevance to the case at hand because the Italian courts would be bound to follow national law. It held,

By creating a Community of unlimited duration, having...powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and thus have created a body of law which binds both their nationals and themselves.

The Community's supremacy was given added force by the ECJ's ruling in the *Simmenthal* case,<sup>2</sup> where the Court made it clear that Community law would take precedence even over national legislation which was adopted after the passage of the relevant EC norms. The existence of Community rules rendered automatically inapplicable any contrary provision of national law, *and* precluded the valid adoption of any new national law which was in conflict with the Community provisions. It followed, said the ECJ, that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'.<sup>3</sup> The ECJ has, moreover, made it clear that not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of a directly applicable Community rule.<sup>4</sup> The reasoning of the ECJ concerning supremacy has been subjected to critical scrutiny, notably by de Witte (1984).

### 2. Supremacy: The Reaction of National Courts

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<sup>1</sup> Case 6/64, [1964] ECR 585, 593.

<sup>2</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

<sup>3</sup> *Ibid.* para. 21.

<sup>4</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125.

All legal systems in the Community have had to deal with the claim by the ECJ to supremacy over national law. In some systems this has been unproblematic. In others there has been greater controversy or difficulty. The very nature of these difficulties has differed as between the Member States that belong to the Community. These differences stem from different constitutional traditions. Space precludes extensive treatment of all the Member States of the Community. The analysis which follows will, however, seek to convey a spectrum of the more important views on this issue.

In reading the material which follows it should be recognised that there are four more particular issues which arise for resolution within national legal systems. First, how far have national courts accepted the supremacy of Community law, and have they placed any limits on this acceptance in relation to clashes between Community law and the national constitution? Secondly, what was the conceptual basis for the national judicial decisions? Did the national court base its acceptance of supremacy on some provision in the national constitution, or did it accept the more *communautaire* reasoning of the ECJ which grounds supremacy on the very nature of the Community legal order? Thirdly, what position does a Member State take on the issue of *Kompetenz-Kompetenz*? It is clear that the EU is based on attributed competences, and that it only has the powers accorded to it in the constituent treaties. The very scope of those competences is however open to differing interpretations. The key issue is therefore who should have ultimate authority to decide whether some action is *intra* or *ultra vires* the Community? Should this power reside with the ECJ or with national courts? Fourthly, it is important to understand that supremacy in continental national legal systems will often be connected with a related but distinct issue. This concerns the court before which the matter can be raised. It is common in such legal systems that only the constitutional court can pronounce on the validity of national legislation. The case law concerning, for example, Italy can only be understood against this background. The objections of the defendants were as much concerned with the court before which the issue could be raised, as they were with supremacy itself.

*Belgium* provides a suitable point of departure since it furnishes one of the best examples of acceptance of the supremacy of Community law based upon reasoning which is closest to that employed by the ECJ itself. There have been numerous unsuccessful attempts to insert a provision in the Belgian Constitution which would provide for the primacy of treaties over conflicting statutes. Notwithstanding the absence of any such provision the Cour de Cassation accorded supremacy to EC law in the famous *Le Ski* case.<sup>5</sup> The case concerned a conflict between Article 12 of the EC Treaty, which forbade the introduction of new customs duties, and a later Royal decree which imposed taxes on milk products imported from EC countries. The Cour held that in the event of a conflict between a norm of international treaty which produces direct effect in the domestic legal order and domestic law, the treaty must prevail. The primacy of the treaty flowed from the very nature of international law. This reasoning applied, said the Cour, with particular force in the event of a clash between Community law and national law, since the EC treaties instituted a new legal system in whose favour the Member States have restricted the exercise of their sovereign powers in the areas determined by those treaties. The Cour was strongly influenced by the submissions of the Procureur General Ganshof van der Meersch. He argued that the very nature of international law implied its superiority: the subjects of international law were the states, and it followed that the international legal order was superior to national legal orders. The argument was premised on a strong monist view of the relation between international law and national law: both comprised a single legal order and hence a norm could not be valid and invalid at the same time. While the reasoning in *Le Ski* is very *communautaire* there are indications of a more circumspect approach being taken by other Belgian courts. The Cour d'Arbitrage, which is the Constitutional Court, has indicated that the constitution is superior to international treaties, and interpreted *Le Ski* to apply only to the clash between national laws and the EC Treaty. It has been argued that the logic of the approach adopted by the Cour d'Arbitrage is that it regards the issue of *Kompetenz-Kompetenz* as lying within its jurisdiction, not that of the ECJ.<sup>6</sup>

<sup>5</sup> *Fromagerie Franco-Suisse Le Ski v. Etat Belge* [1972] CMLR 330.

<sup>6</sup> H. Bribosia, 'Report on Belgium', in A-M Slaughter, A. Stone Sweet, and J. H. H. Weiler (eds.), *The European Court and National Courts, Doctrine and Jurisprudence* (Oxford: Hart Publishing 1998), pp. 21-22.

In *France*, the *Cour de Cassation* accepted the supremacy of Community law over French law as early as 1975.<sup>7</sup> It held that the question was not whether it could review the constitutionality of a French law. Instead, when a conflict existed between an ‘internal law’ and a properly ratified ‘international act’ which had thus entered the internal legal order, the Constitution itself accorded priority to the latter. The *Cour* thus based its decision on Article 55 of the French Constitution,<sup>8</sup> rather than adopting the *communautaire* approach advocated by Procureur Général Adolphe Touffait. The Conseil d’Etat took a different view in *Semoules*,<sup>9</sup> where the problem was cast in jurisdictional terms. The Conseil d’Etat ruled that, since it had no jurisdiction to review the validity of French legislation, it could not find such legislation to be incompatible with Community law, nor could it accord priority to the latter.<sup>10</sup> It was not until 1989 that the *Conseil d’Etat* shifted its position in the *Nicolo* case.<sup>11</sup> Commissaire du Gouvernement Frydman took the view that Article 55 of itself necessarily enabled the courts, by implication, to review the compatibility of statutes with treaties, and that, therefore, treaties should be given precedence over later statutes. Although it did not expressly adopt the view expressed by the *Commissaire*, the *Conseil d’Etat* appeared to accept the premises on which that view was based. It ruled that the relevant French statutory rules were not invalid on the ground that they were ‘not incompatible with the clear stipulations of the above mentioned Article 227(1) of the Treaty of Rome’. The *Conseil d’Etat* has also, more recently, recognized the priority of both Community regulations and directives over French statutes, without discussing the theoretical basis for that supremacy.<sup>12</sup> However, as in the case of Belgium, so too in the case of France the Conseil Constitutionnel has made it clear that there are limits to France’s acceptance of supremacy. In its *Maastricht I*<sup>13</sup> decision it confirmed that France could transfer competence to an international organization, provided that it did not thereby violate the essential conditions for the exercise of national sovereignty, and provided that the international agreement did not contain clauses contradictory to the Constitution. If the government does wish to transfer power not allowed by the existing constitutional norms it will therefore have to modify the Constitution. Moreover in its *Maastricht II* decision<sup>14</sup> the Conseil Constitutionnel made reference to Article 89 of the French Constitution which stipulates that the republican form of government may not be open to revision. While the issue of *Kompetenz-Kompetenz* has not been squarely addressed by the French courts the indications are that the Conseil Constitutionnel regards the final competence as residing within the Member States.<sup>15</sup>

The approach of the *Italian* courts has been affected by their dualist perspective on the relationship between national and international law. On this view national and international norms are separate, each regulates its own sphere of competence, and the latter do not become part of national law until they have been transformed or adopted into the national legal system. The national jurisprudence has also been shaped by Article 11 of the Constitution which provides that Italy can accept, on the same conditions as other countries, those limitations of sovereignty that are necessary to take part in international organisations aimed at fostering peace and justice among nations. The initial approach of the Italian courts nonetheless denied supremacy to Community law, the Constitutional

<sup>7</sup> Decision of 24 May, 1975 in *Administration des Douanes v. Société ‘Cafés Jacques Vabre’ et SARL Weigel et Cie.* [1975] 2 CMLR 336.

<sup>8</sup> ‘Treaties or agreements duly ratified or approved possess, from the moment of their publication, a superior authority to those of laws under the condition, for each treaty or agreement, of its application by the other party’.

<sup>9</sup> Decision of 1 Mar., 1968 in *Syndicat Général de Fabricants de Semoules de France* [1970] CMLR 395.

<sup>10</sup> Although the French Constitution provided for the primacy of certain international treaties over domestic law, the Conseil d’Etat was of the view that decisions on the constitutionality of legislation were matters for the Conseil Constitutionnel to make before the legislation was promulgated.

<sup>11</sup> [1990] 1 CMLR 173.

<sup>12</sup> See *Boisdet* [1991] 1 CMLR 3, on a reg. which was adopted after the French law, and *Rothmans and Philip Morris* and *Arizona Tobacco and Philip Morris* [1993] 1 CMLR 253 on a dir. adopted before the French law.

<sup>13</sup> C.C., 9 April 1992.

<sup>14</sup> C.C., 2 September 1992.

<sup>15</sup> J. Plottner, ‘Report on France’, in Slaughter, Stone Sweet, and Weiler (eds.), n. 6, pp. 52-54.

Court holding that in the event of a clash between two norms the one later in time should take precedence.<sup>16</sup> It was indeed this national decision which prompted the ECJ to give its famous ruling in the *Costa* case.<sup>17</sup> During the 1970s the Constitutional Court modified its position. It was willing to accord primacy to Community law if it was later in time than the relevant national law. Where the Community norm preceded the national law the former would be applied only after a finding of unconstitutionality by the Constitutional Court. This too did not satisfy the ECJ and led to the *Simmenthal* ruling<sup>18</sup> wherein the ECJ made it clear that every national judge must be able to give full effect to the supremacy of EC law. It was not until 1984, and the decision in *Granital*,<sup>19</sup> that the Constitutional Court modified its approach. It accepted that Community norms which had direct effect should take precedence over national norms, and should be applied by ordinary judges, irrespective of the time when two norms were enacted.<sup>20</sup> However it is clear from the case, and from subsequent jurisprudence,<sup>21</sup> that the Constitutional Court has limited its acceptance of Community law supremacy. It will not bow to the ECJ, or indeed to Community legislation, where this transgresses the fundamental values of the Constitution, such as fundamental rights, democratic principles and the like, (Gaja 1990). It seems that Community norms can derogate from national constitutional provisions provided that they respect the fundamental values of the constitutional system as a whole.<sup>22</sup> Moreover, the Constitutional Court appears to assert that it has the competence to decide on the division of competence between national law and Community law.<sup>23</sup>

In *Germany* there have been different problems. Article 24 of the German Constitution allows for the transfer of legislative power to international organizations, but there have been questions as to whether this Article permitted the transfer to the EC of a power to contravene certain basic principles protected under the Constitution itself. This question arose in *Internationale Handelsgesellschaft mbH*.<sup>24</sup> The German Federal Constitutional Court held that Article 24 nullified any amendment of the EC Treaty which would destroy the identity of the valid constitutional structure of the Federal Republic of Germany by encroaching on the structures which constituted it. The part of the Constitution which dealt with fundamental rights was an inalienable, essential feature of the German Constitution. The Court held that the Community at that time did not have a codified catalogue of fundamental rights. Given this state of affairs the guarantee of fundamental rights in the Constitution prevailed as long as the competent organs of the Community had not removed the conflict of norms in accordance with the Treaty mechanism. However, by 1986, having considered, *inter alia*, the development by the ECJ of the fundamental rights doctrine,<sup>25</sup> the German Federal Constitutional Court ruled that<sup>26</sup> *so long as* the EC generally ensured effective protection of fundamental rights, which was to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the German Constitution, the Federal Constitutional Court would no longer review Community legislation by the standard of the fundamental rights contained in the Constitution.<sup>27</sup>

<sup>16</sup> *Costa/ENEL*, Dec. 14, 7 March 1964.

<sup>17</sup> N. 1.

<sup>18</sup> N. 2.

<sup>19</sup> *SpA Granital v. Amministrazione delle Finanze*, Dec. 170, 8 June 1984.

<sup>20</sup> National law was not held to have been repealed in such cases. The rationalisation was rather that national law was deemed not to be relevant in such cases.

<sup>21</sup> *SpA Fragd v. Amministrazione delle Finanze*, Dec. 232, 21 April 1989.

<sup>22</sup> M. Cartabia, 'Report on Italy', in Slaughter, Stone Sweet, and Weiler (eds.), n. 6, Chap. 4.

<sup>23</sup> R. Petriccione, 'Italy: Supremacy of Community Law over National Law' (1986) 11 *European Law Review* 320.

<sup>24</sup> *Internationale Handelsgesellschaft mbH. v. Einfuhr und- Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

<sup>25</sup> P. Craig, and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford: Oxford University Press, 3<sup>rd</sup> ed. 2002), Chap. 8.

<sup>26</sup> *Re Wünsche Handelsgesellschaft*, Dec. of 22 Oct. 1986 [1987] 3 CMLR 225, 265.

<sup>27</sup> J. Frowein, 'Solange II' (1988) 25 *Common Market Law Review* 201.

However the German court has since then indicated limits to its acceptance of Community law supremacy in its ‘Maastricht judgment’,<sup>28</sup> in which it ruled on the constitutional relationship between European Community law and German law when the constitutionality of the State’s ratification of the Treaty on European Union was challenged. It held that ratification was compatible with the Constitution. It did however make it clear that it would not relinquish its power to decide on the compatibility of Community law with the fundamentals of the German Constitution, and that it would continue to exercise a power of review over the scope of Community competence. In the course of its decision the court stated that ‘if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty’.<sup>29</sup> The court also gave a similar warning to the Community judicial institutions, saying that the Union Treaty distinguished between the exercise of a sovereign power conferred for limited purposes and the amendment of the Treaty. Treaty interpretation which had effects equivalent to an extension of the Treaty would not produce any binding effects for Germany.<sup>30</sup> The case generated much comment in the academic literature.<sup>31</sup>

The supremacy of Community law was always felt to pose particular problems for the UK. This is because Parliamentary sovereignty is a cornerstone of UK constitutional law. The traditional formulation of this doctrine holds that Parliament has the power to do anything other than to bind itself for the future, (Wade 1955). Moreover, the UK has always adopted a dualist view about the relationship between international treaties and national law. Such treaties, although signed and ratified by the United Kingdom, are not part of the domestic law of the United Kingdom. To be enforceable at the domestic level, they must be domestically incorporated in an Act of Parliament. This then makes it very difficult to guarantee the supremacy of Community law over later national statute, since the Act of Parliament which incorporates EC law and makes it domestically binding would seem vulnerable to any later Act of Parliament which contravenes or contradicts it. The traditional principle of Parliamentary sovereignty would not permit the earlier statute to constrain the Parliament, which might wish to contradict its earlier measure in a later statute. The courts would be obliged to give effect to the latest expression of the will of Parliament and to treat the earlier statute as having been repealed or disapplied by implication.

The European Communities Act 1972 incorporated EC law in domestic law. It provides through section 2(1) that Community rights and obligations will be recognised and enforced. There need not be a fresh act of incorporation to enable UK courts to enforce each EC regulation. Section 2(4) stipulates that ‘any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section’.

The leading decision on the supremacy issue is now *R. v. Secretary of State for Transport, ex p. Factortame Ltd.*<sup>32</sup> in which Spanish fishermen claimed that the criteria for registration of vessels under the Merchant Shipping Act 1988 were discriminatory and incompatible with the EC Treaty. Whether the 1988 statute was in fact in breach of EC law was clearly a contentious question, and all agreed that a reference should be made to the ECJ under Article 177 (now 234). The question which remained for decision in the first *Factortame* case concerned the status of the 1988 Act pending the decision on the substance of the case by the ECJ. The House of Lords decided that there was no jurisdiction under English law to grant interim injunctions against the Crown, and the applicant claimed that this was itself

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<sup>28</sup> *Brunner v. The European Union Treaty* [1994] 1 CMLR 57.

<sup>29</sup> *Ibid.* para. 49.

<sup>30</sup> *Ibid.* para. 99.

<sup>31</sup> M. Zulegg, ‘The European Constitution under Constitutional Constraints: The German Scenario’. (1997) 22 *European Law Review* 19; M. Herdegen, ‘Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union’ (1994) 31 *Common Market Law Review* 235; J. Kokott, ‘Report on Germany’, in Slaughter, Stone Sweet, and Weiler (eds.), n. 6, Chap. 3; J. Weiler, ‘Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision’ (1995) 1 *European Law Journal* 219; N. MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1 *European Law Journal* 259.

<sup>32</sup> [1990] 2 A.C. 85.

a violation of Community law. The ECJ decided this issue in favour of the applicants.<sup>33</sup> It held that, the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief.<sup>34</sup>

The case then returned to the House of Lords to be reconsidered in the light of the preliminary ruling given by the ECJ, *R. v. Secretary of State for Transport, ex p. Factortame Ltd (No.2)*.<sup>35</sup> Lord Bridge had this to say.<sup>36</sup>

Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of the 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. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

The *EOC* case<sup>37</sup> serves to demonstrate the ease with which the highest national courts have slipped into their new role. The case concerned the compatibility of UK legislation on unfair dismissal and redundancy pay with EC law. Under the relevant UK law<sup>38</sup> entitlement to these protections and benefits operated differentially depending upon whether the person was in full-time or part-time employment. Full-time workers were eligible after two years; part-time workers only after five. The great majority of part-time workers were women and the Equal Opportunities Commission took the view that the legislation discriminated against women, contrary to Article 119 EC (now Article 141) and to certain Community directives. The EOC sought a declaration that the UK legislation was in breach of EC law. The House of Lords found for the applicant. It held that the national legislation was indeed in breach of Article 119 and the directives. The House of Lords went on to make it clear that this power to review primary legislation resided in national courts. It was not only the House of Lords itself which was to have this species of authority. The Divisional Court could itself exercise this power.<sup>39</sup>

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<sup>33</sup> Case 213/89, *R. v. Secretary of State for Transport, ex p. Factortame Ltd*. [1990] 3 CMLR 867.

<sup>34</sup> [1990] 3 C.M.L.R. 867, para. 21.

<sup>35</sup> [1991] 1 A.C. 603.

<sup>36</sup> [1991] 1 A.C. 603, 658-659.

<sup>37</sup> *R. v. Secretary of State for Employment, ex p. Equal Opportunities Commission* [1994] 1 All E.R. 910.

<sup>38</sup> Employment Protection (Consolidation) Act 1978.

<sup>39</sup> *Ibid.* p. 920.

Space precludes a thorough analysis of the effects of these cases on the traditional concept of sovereignty. This can be found elsewhere.<sup>40</sup> A distinction should be made in this respect as between the substantive impact of the decision and its conceptual foundation.

In terms of its substantive impact, it seems that the concept of implied repeal or disapplication, under which inconsistencies between later and earlier norms were resolved in favour of the former, will no longer apply to clashes concerning Community and national law. If Parliament ever does wish to derogate from its Community obligations then it will have to do so expressly and unequivocally. Whether our national courts would then choose to follow the latest will of Parliament, or whether they would argue that it is not open to our legislature to pick and choose which obligations to subscribe to while still remaining within the Community, remains to be seen. It is also unclear precisely how are courts would deal with the *Kompetenz-Kompetenz* issue which will be discussed more fully below.

There is more dispute as to the conceptual foundation for, or explanation of, what the courts have done. For some it is possible to rationalise what the courts have done merely as a species of *statutory construction*. All would agree that if a statute can be reconciled with a Community norm through construing the statutory words without thereby unduly distorting them then this should be done, more especially when the statute was passed to effectuate a directive. However the species of statutory construction being considered here is more far-reaching. On this view accommodation between national law and EC law is attained through a rule of construction to the effect that inconsistencies *will* be resolved in favour of the latter *unless* Parliament has indicated clearly and ambiguously that it intends to derogate from Community law. The degree of linguistic inconsistency between the statute and the Community norm is not the essential point of the inquiry. Provided that there is no unequivocal derogation from Community law then it will apply, rather than any conflicting domestic statute. Counsel for the applicants framed their argument in this manner in the first *Factortame* case.<sup>41</sup> This view was posited by Lord Bridge in the same case where he stated that the effect of section 2(4) of the European Communities Act 1972 was that the Merchant Shipping Act 1988 should take effect as if a section were incorporated in the later statute that its provisions would be without prejudice to directly enforceable Community rights.<sup>42</sup> His Lordship relied on the effect of the 1972 Act as part of his argument in the second *Factortame* case.<sup>43</sup> The construction view is said to leave the essential core of the traditional view of legal sovereignty intact, in the sense that it is always open to a later Parliament to make it unequivocally clear that it wishes to derogate from EC law. In the absence of this, section 2(4) serves to render EC law dominant in the event of a conflict with national law. The attractions of this approach are self-evident. Clashes between EC law and national law can be reconciled while preserving the formal veneer of legal sovereignty. This approach is, however, not unproblematic.

A second way in which it is possible to conceptualise what the courts have done is to regard it as a *technical legal revolution*. This is the preferred explanation of Sir William Wade who sees the courts' decisions as modifying the ultimate legal principle or rule of recognition on which the legal system is based. On this view the 'rule of recognition is itself a political fact which the judges themselves are able to change when they are confronted with a new situation which so demands'.<sup>44</sup>

There is however a third way in which to regard the courts' jurisprudence. This is to regard decisions about supremacy as being based on *normative arguments of legal principle the content of which can and will vary across time*. This is my own preferred view. On this view there is no *a priori* inexorable reason why Parliament, merely because of its very existence, must be regarded as legally omnipotent. The existence of such power, like all power, must be justified by arguments of principle which are

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<sup>40</sup> P. Craig, 'United Kingdom Sovereignty after *Factortame*'. (1991) 11 *Yearbook of European Law* 221 and 'Britain and the European Union', in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford: Oxford University Press, 2000), Chap. 2; T. Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 *Law Quarterly Review* 443; Sir W. Wade, 'Sovereignty – Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568-75.

<sup>41</sup> [1990] 2 AC 85, 96.

<sup>42</sup> [1990] 2 AC 85, 140.

<sup>43</sup> [1991] 1 AC 603, 658-659.

<sup>44</sup> Wade, n. 40, p. 574.

normatively convincing. Possible constraints on Parliamentary omnipotence must similarly be reasoned through and defended on normative grounds. This approach fits well with the reasoning of Lord Bridge in the second *Factortame* case. His Lordship does not approach the matter as if the courts were making an unconstrained political choice at the point where the law stops. His reasoning is more accurately represented as being based on *principle*, in the sense of working through the principled consequences of the UK's membership of the EC. The contractarian and functional arguments used by Lord Bridge exemplify this style of judicial discourse. They provide sound normative arguments as to why the UK should be bound by EC law while it remains within the Community. These arguments would moreover be convincing and have force even if section 2(4) had never been included in the 1972 Act.

### 3. From Positive Law to Normative Evaluation: Four Central Issues

The discussion thus far has concentrated on positive law, in terms of how national courts have reacted to the claims to supremacy in the jurisprudence of the ECJ. It is important to stand back from this case law and to evaluate in normative terms four of the central issues which are of relevance in this area.

#### (a) *The Conceptual Basis for the Decisions of National Courts*

We have seen that one such issue is the conceptual foundation on which any particular national court chooses to accept the supremacy of Community law. A national court may base its decision on the *communautaire* reasoning of the ECJ. This emphasises the distinctive nature of the Community legal order and the fact that supremacy is necessary in order to ensure that the EC attains the tasks assigned to it. Acceptance of this reasoning is to be found most clearly in the judgment of the Belgian court in *Le Ski*.<sup>45</sup> The alternative formulation is to make acceptance of supremacy turn on the existence of a provision in the national constitution, or in a primary statute, such as Article 55 of the French Constitution, Article 11 of the Italian Constitution, section 2(4) of the UK European Communities Act 1972, or Article 93 of the Spanish Constitution.

It is clear as a matter of principle that there is nothing to *prevent* a national court from adopting the former 'route' should it wish to do so, and that this is so notwithstanding the existence of a provision such as Article 55 of the French Constitution.

It is equally clear that there is nothing to *compel* a national court to adopt the *communautaire* explanation for supremacy. It is moreover not surprising that most national courts have opted for some version of the second conceptual foundation for supremacy. National courts will, other things being equal, seek to reconcile the supremacy of EC law in a way which entails least disturbance of the existing constitutional order. It is therefore natural for courts to fasten upon provisions such as Article 55 of the French Constitution when adjudicating on this delicate matter. The logical consequence of doing so is that if the national constitution were to be changed, and the relevant provision were to be excised from it, then the supremacy of EC law would be undermined. This problem should nonetheless be kept within perspective. Even if this should occur, it would still be open to a national court, depending upon the precise form of the revised constitution, to continue to accept the supremacy of EC law, basing this on some version of the *communautaire* thesis.

#### (b) *Supremacy: 'Clear' Cases*

Much of the discussion about supremacy has focussed on clashes between EC law and constitutional norms, and on the issue of *Kompetenz-Kompetenz*. Both are important and will be considered below. Discussion of these issues should not, however, be allowed to cloud the more straightforward case.

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<sup>45</sup> N. 5.

This is where there is a clash between EC law and national law in circumstances where neither of the above problems is present. If the national law predates the EC norm then most legal systems would apply the *lex posterior* maxim, or rules of construction, in order to accord supremacy to the Community norm.

The more difficult instance is where the Community has enacted a regulation or directive which conflicts with a later national law in an area which is unequivocally within Community competence. This conflict may be inadvertent, the result of absence of fit between the two norms. In such cases national courts may be inclined once again to use principles of construction to 'square the circle' and make the two norms compatible.

This leaves the most difficult instance of all, which is where the conflict is intentional. What national courts would do, as a matter of positive law, in such a case would be for them to decide in the light of their national constitutional traditions. What is of relevance here is the position in normative terms. When viewed from this perspective the argument for the supremacy of Community law is a strong one.

A number of arguments combine towards this conclusion. In *functional* terms many of the central precepts of the EC are based on the uniform application of its laws in all the Member States. This would be seriously undermined if states could pick and choose as to the norms which they were willing to accept. In *contractarian* terms, for those Member States other than the original six, it can be argued that they joined the EC knowing full well the terms of membership, including the *acquis communautaire*, a central component of which is the supremacy doctrine. For such states to turn round later and to seek to depart from Community norms is therefore to act in breach of the terms on which they made their contract when joining the Community. The fact that successive Treaty amendments have not touched this cornerstone of Community case law provides a contractarian rationale as to why even the original six should be bound. To allow states intentionally to depart from Community norms which are unequivocally within the EC's competence would also *undermine the Community's legislative process* which has been agreed to by all the Member States. Where a norm has been properly enacted by qualified majority a state which has lost out in the EC's legislative arena should not be allowed to resile from that obligation through the intentional enactment of national legislation to the contrary. This is all the more so given that the legislative process itself may afford opportunities for states to secure some form of differential application of Community law in their own country. If they have been unable to do so they should not then be able to upset the stipulated legislative mechanisms by the intentional enactment of national legislation which is contrary to Community law.

The principal normative argument to the contrary is based on *democracy*: if the national legislature intentionally chooses to pass legislation which is in conflict with EC law then this should be upheld and applied by the national court since the legislature is the expression of that country's democratic will. This argument is however flawed. If a Member State should choose to exit from the Community because of disagreements with its policies so be it.<sup>46</sup> It is a good deal more difficult to sustain the argument from democracy where the state wishes to remain in the EC, albeit while not adhering to a norm which it has enacted. The very decision to join the EC made by the national Parliament is itself an expression of national democratic will. This decision has benefits, in terms of access to the single market, free movement etc. It also necessarily has costs, in terms of some loss of autonomy. This is indeed characteristic of any collective action. When viewed in this manner the democratically mandated decision to enter and remain in the EC must necessarily lead to some limitations on what the national Parliament is free to do.

It may of course be the case that the state can advance *other* normative arguments to justify its departure from Community law. It might, for example, wish to argue that compliance with Community law would place it in breach of other obligations derived from another international treaty. Claims of this nature would then have to be assessed in their own right in the light of the relevant norms which

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<sup>46</sup> There is in fact no explicit provision for such exit. Space precludes discussion of the relevant legal issues which arise in this context. Suffice it to say for the present that, in political terms, the other Member States would not seek to force such a state to remain within the EC.

govern the relationship between Community obligations and those based on other international treaties.

In the absence of any such argument it is difficult, in normative terms, to defend a state which seeks not to comply with a norm which it dislikes in an area which does fall four square within the sphere of Community law.

*(c) Supremacy: Clashes with National Constitutional Norms*

We have seen that, for the ECJ, the supremacy of EC law operates even against national constitutional norms.<sup>47</sup> Acceptance of this aspect of the supremacy doctrine has been felt to be particularly problematic for some, if not all, Member States. That clashes of this kind are problematic is undeniable. Closer analysis of this type of case is however helpful in order to distinguish the differing normative considerations which are at stake.

Let us begin by understanding what constitutions, for all their variety actually contain. Most constitutions will in some way or another address two types of issue which can be regarded as the core of the document. There will be what can be termed *structural constitutional provisions*. These are designed to identify the law-making organs of the state, the composition of the executive and the relationship between legislature and executive. In nation states which are federal, or where there is some measure of devolution, the structural provisions of the constitution will also identify the powers of the different tiers of government. There will often be *rights-based limitations* on what the organs of government thus specified are able to do. Not all constitutions contain rights-based limits on governmental action. Many constitutions do however have such provisions. The generality or specificity of such Bills of Rights varies significantly. Over and beyond these provisions constitutions vary enormously. Some are 'thin', containing little if anything else. Others are 'fat', with the consequence that many measures are thereby constitutionalised.

There may well be a number of legal consequences of having a written constitution. Two are especially worthy of note. The existence of such a constitution will have *implications for the powers of the courts*. It should however be recognised that the existence of a constitution does not inexorably mean that there should be only one form of constitutional review. There are a number of options, ranging from what can be termed strong constitutional review, connoting the power of a constitutional court to invalidate legislation which offends constitutionally enshrined rights, to a rule of construction that primary legislation will be deemed not to offend such rights. Legal systems can adopt a variety of positions along this spectrum. The existence of a written constitution will often also mean that *special rules apply for the modification of the constitutional document*. The nature of these rules will vary from legal system to legal system. Special majorities may be required for constitutional amendment. These may be combined with the need for a referendum, or some form of constitutional convention. The common theme is however that by denominating an issue as 'constitutional' we recognise that it is taken off the agenda of normal politics: the norms enshrined in a written constitution are not at the whim or mercy of the party or parties which happen to control the ordinary legislative agenda at that time. This does not mean that the constitutional norms are ossified and incapable of being changed. It does mean that they cannot be changed simply by the passage of ordinary primary legislation.

With this background we can begin to make some progress as to clashes between EC law and national constitutional law. It is useful to distinguish between four such types of case.

In the first type of case the state is *willing to accept the modification of its constitutional status quo*. This is exemplified by the French judicial and political reaction to the Maastricht Treaty. The Conseil Constitutionnel decided that the citizenship provisions of the Maastricht Treaty which gave a right to vote in municipal elections to non-French EU citizens infringed Articles 3, 24 and 72 of the French Constitution. The Constitution was amended to remove this difficulty. This type of case is further exemplified by the reaction of the Italian Constitutional Court which held that Community norms

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<sup>47</sup> N. 4.

could derogate in some way from national constitutional norms, provided that they respected the fundamental values of the constitutional system. In these types of case the inconsistency between EC law and national law is regarded as curable or acceptable, because the constitutional rules thereby affected are themselves perceived as open to change without thereby compromising the essential constitutional fabric of that state.

The second type of case is that in which the *state is willing to accept restraint in the exercise of national constitutional norms, provided that EC law develops protections regarded by the state as essential in a democratic polity*. This is exemplified by the jurisprudence of the German Federal Constitutional Court in the fundamental rights' cases. The effect of the decision in *Solange II*<sup>48</sup> is not that the German Court gave up its jurisdiction in such cases. It is rather that it decided that it would no longer control Community regulations and the like on the basis that they infringed rights contained in the German Basic law, provided that the EC itself ensured effective protection for such rights. In this type of case the provisions contained in the national constitutional norms are regarded as sacrosanct, but the state is willing to accept that national enforcement thereof can be held in abeyance where sufficient protection exists at the EC level.

The third type of case is where the *state signals its refusal to accept the supremacy of EC law in the event of a conflict with 'essential' national constitutional norms*. There are judicial utterances from, for example, the French and Italian courts, that EC law will not be allowed to undermine the republican form of government, or derogate from the fundamental principles of the constitutional system, respectively. In these cases the courts are providing a 'long stop' to ensure that the core essence of that state's constitutional tradition is not undermined. There are analogous statements to be found in the Spanish case law where the Constitutional Court has made it clear that Community law does not take priority over the Spanish Constitution. Precisely which issues come within this is, of course, inherently contestable. It has moreover been argued by MacCormick that supremacy of Community law should not be confused with all-purpose subordination of Member State law to Community law, and in particular that it should not necessarily be taken to mean the subordination of the entirety of the state's constitution.<sup>49</sup>

The final type of case is that in which *the state signals its refusal to accept supremacy of EC law because it believes that the subject-matter of the dispute is not within the Community's competence*. This raises the general problem of *Kompetenz-Kompetenz* which will be discussed more generally below. It can arise in a constitutional context where the essence of the national argument is that the EC does not have competence over a particular area because the national constitution reserved this for state itself, and prevented the matter from being delegated or surrendered to any other institution.

#### (d) *Kompetenz-Kompetenz*

We have seen that a number of the national courts, explicitly or implicitly, have assumed that the ultimate power to decide on the limits of the Community's competence resides with them. The Danish Supreme Court has adopted the same view.<sup>50</sup> The ECJ for its part has, not surprisingly, taken the opposite view, and has indeed denied that national courts have the power to invalidate Community legislation.<sup>51</sup> Some believe there is no legal way of resolving this dilemma. There has however been a lively doctrinal debate on just this issue.

Schilling has defended the Member State view and argued that the ECJ is wrong to regard itself as the ultimate authority on the scope of Community competence.<sup>52</sup> He considers that international law

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<sup>48</sup> N. 26.

<sup>49</sup> N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

<sup>50</sup> Case 1 361/97, *Carlsen v. Rasmussen*, 6 April 1998.

<sup>51</sup> Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199.

<sup>52</sup> T. Schilling, 'The Autonomy of the Community Legal Order --- An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389.

is the only viable foundation for the Community legal order. From this he concludes that the ultimate *Kompetenz-Kompetenz* must reside with the states. Schilling's argument is that, in the absence of treaty institutions, the accepted method for the interpretation of international treaties is autointerpretation by the contracting states. He acknowledges that a reading of Articles 220, and 226-240 could be taken to mean that the ECJ has a judicial *Kompetenz-Kompetenz*. Schilling nonetheless rejects that view, arguing that because the Community is limited to the purposes set out in Article 2, the Treaties taken as a whole should not be interpreted so as to accord the ECJ a judicial *Kompetenz-Kompetenz*. On his view the states have preserved their right to autointerpret the Treaties, with the consequence that they, individually have the final word on the scope of the competences which they have delegated to the Community.

This view has been vigorously challenged by Weiler and Haltern.<sup>53</sup> They accept for the sake of argument that the Community can be regarded as being grounded in international law.<sup>54</sup> They do not accept that autointerpretation is the accepted method of treaty interpretation in international law, and argue that there is much authority for the view that claims of unconstitutionality are decided by the organs whose acts were challenged. Weiler and Haltern then turn their attention to the interpretation of the EC Treaties. The plain meaning of Articles 220, and 226-240 taken as a whole, and in particular the wording of Articles 226, 227, 230 and 234, is to accord the ECJ the ultimate authority to decide on the issue of Community competence. They then reveal the flaw in Schilling's argument that this natural construction should be rejected because the Community only has authority in the areas assigned to it under Article 2. The argument that a Community without legislative *Kompetenz-Kompetenz* cannot possess a court with judicial *Kompetenz-Kompetenz* is the real centre of Schilling's argument. The argument is however flawed. There is, as Weiler and Haltern state, no reason why an international organization with limited powers, and hence no *legislative Kompetenz-Kompetenz*, should not contain a court with *judicial Kompetenz-Kompetenz*, which would be the ultimate arbiter of disputes concerning the extent of those limited competences.

There is a further, more theoretical, dimension to the debate about *Kompetenz-Kompetenz*. MacCormick's work is of real significance here.<sup>55</sup> He has addressed the relationship between national and Community legal orders. Space precludes any detailed treatment of MacCormick's thesis, but the essence of his argument and its relevance to the present debate is as follows. The theoretical starting point is one of legal pluralism, the idea that there can coexist distinct but genuinely normative legal orders. Law, as institutional normative order, is clearly to be found in the EC as well as in Member States. Both legal orders possess constitutions, in the sense of norms which establish and empower their regime's institutions. Where 'there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant government powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another'.<sup>56</sup> MacCormick terms this constitutional pluralism. While he accepts that there are other ways in which the relationship between legal orders could be conceptualized, he argues that the pluralistic reading is the most convincing. The consequences of this reading are important.

On the one hand, it means that the doctrine of supremacy of Community law 'should by no means be confused with any kind of all-purpose subordination of member-state-law to Community law',<sup>57</sup> since to hold that membership of the Community necessarily entailed subordination of the state's entire constitution to Community law would be wrong.<sup>58</sup>

<sup>53</sup> J. Weiler, and U. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411.

<sup>54</sup> They do however argue correctly in my view that there are many features of the Community legal order which warrant its characterization in constitutional terms.

<sup>55</sup> N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259 and *Questioning Sovereignty, Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), Chap. 7.

<sup>56</sup> N. MacCormick, *Questioning Sovereignty*, Chap. 7.

<sup>57</sup> *Ibid.* p. 117.

<sup>58</sup> *Ibid.* p. 116.

On the other hand, the systems are properly to be regarded as interacting; each constitutes in its own context and over the relevant range of topics a source of law superior to other sources. Thus the ECJ should be held to have the ‘competence to interpret the norms conferring this interpretative competence, and thus an interpretative, as distinct from a norm-creating, competence-competence’.<sup>59</sup> But equally the highest national courts must be able to interpret their national constitutional and other norms and ‘hence to interpret the interaction of the validity of EC law with higher level norms of validity in the given state system’.<sup>60</sup>

The view proffered by MacCormick does of course mean, as he himself admits, that not every problem may be susceptible to simple legal resolution. The ECJ would have an interpretative, but not a norm-creating, *Kompetenz-Kompetenz*, while the supreme national courts would retain authority to test the validity of EC law with their own higher level norms. He does however make it clear that national determinations as to whether EC law is consistent with the essentials of a national legal order should be undertaken ‘in accordance with international obligations to other member states and in accordance with essential commitments of the national legal order including the commitment to good faith observance of international obligations’.<sup>61</sup> This should affect the standard of review which a national court employs when thinking of rejecting a Community norm which it believes to be ultra vires. The national court should only adopt such a course of action if it believes that the Community illegality is manifest.

It should moreover be pointed out that others have sensed the need for moderation in this context. Thus Kumm has also argued for a pluralist reading of the relationship between the Community and national legal orders.<sup>62</sup> In a different vein, while Weiler and Haltern have argued for the existence of a *Kompetenz-Kompetenz* power in the ECJ, they nonetheless maintain that the legitimacy of decisions about Community competences would be enhanced if a new body were to be created to adjudicate on such matters, which would be composed of representatives from national judiciaries as well as from the ECJ.<sup>63</sup>

#### 4. The Preliminary Draft Constitutional Treaty

It is clear that the EC has posed, and continues to pose, real problems for the relationship between the Community legal order and those which subsist within the Member States. The broad claims to supremacy contained in the ECJ’s jurisprudence have been accepted only in part by the Member States. National courts have, by and large, not adopted the conceptual rationale for supremacy preferred by the ECJ, but have based their acceptance on provisions within their own domestic legal order which have been interpreted as according priority to EC law in the event of a clash. National courts have, moreover, imposed a variety of substantive limitations on their acceptance of supremacy.

When considering this material it is important to be clear as to the positive law enunciated by the various national courts. We must, however, also press further and take on board the normative dimension of the debate, since without this it is impossible to come to any satisfactory conclusion on the issues raised in this chapter.

We should also keep the tensions revealed by this discussion within perspective. The ECJ and national courts have always engaged in a discourse which has shaped the doctrine which now exists. They will continue to do so. The fact that some Member States send strong signals to the ECJ to the effect that they will not accept Community legislative or judicial determinations which they believe to be ultra vires does not mean that they will readily find them to be so. Such national judicial statements

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<sup>59</sup> *Ibid.* p. 117.

<sup>60</sup> *Ibid.* p. 118.

<sup>61</sup> *Ibid.* p. 120.

<sup>62</sup> M. Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’ (1999) 36 *Common Market Law Review* 351.

<sup>63</sup> N. 53.

are intended to serve as a warning to the Community institutions, which the latter will recognise as such. Neither the Community legislature, nor the ECJ has an interest in provoking a clash with the essential provisions of Member State constitutions.

It remains to be seen whether the formulation found in Article 8 of the Preliminary Draft Constitutional Treaty, which accords primacy to Union law in the exercise of the competences conferred on the Union, is retained in any final constituent document. The detailed wording of any such provision will be of considerable importance. This will still leave open the issue as to whether such a provision would be accepted by national constitutional courts. We should not, moreover, forget the normative dimension of this debate, and more particularly the argument for value pluralism articulated by MacCormick.