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Preparedness for an Uncertain Future

"The Only Thing We have to Fear is Fear Itself"

by Professor Mark Meirowitz

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"ADVANCING DIVERSITY"

Contents

EU LAW vs UK LAW

The Primacy of EU Law over National Law: Great Britain's Response

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Introduction

This essay deals with whether the United Kingdom (UK) has accepted the supremacy of European Union (EU) law. It first establishes the sovereignty of the British Parliament. Then it analyses the UK Act that merged the two sovereign powers (the EU and the UK). Finally, it deals with the UK courts' reaction towards the notion of the primacy of EU law. The timeline covered, incidentally, is six decades: from 1960 to 2020.

This paper is my second one in a row of essays that deal with the primacy of EU law over national law. The first essay – published in February 2020 by *Political Reflection Magazine* and entitled 'The Supremacy of EU Law over National Law: The ECJ's Perspectives' – dealt with how the ECJ established the superiority of EU law over national law. That essay (alongside my article entitled 'Shall the Court Subject Counter-Terrorism Law to Judicial Review: National Security vs Human Rights') also explain why the series of the essays (and the article) are relevant to both Law and International Relations Courses, especially in the current era where the UK is preparing to exit the EU following the 2016 EU Referendum.

The Sovereignty of British Parliament

An Act of Parliament is the highest law in the UK, as 'the British Parliament…is a sovereign law maker' (Loveland, 2003: 21). Parliament became supreme since the Glorious Revolution 1688. The definition of Parliament sovereignty by Professor A V Dicey (who had a great influence on British constitution), which has two limbs (positive and negative), is: Parliament has the right (positive limb) 'to make or unmake any law…and no person or body' has the right to (negative limb) 'override or set aside the legislation of Parliament' (Loveland, 2003: 21). In *Ellen Street Estates Ltd* (1934), which supported its judgment by reference to *Vauxhall Estates Ltd*

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(1932), the court held that if Parliament had not expressly repealed the previous incompatible Act, the Act would have been assumed to have been impliedly repealed by Parliament. No body, including the courts, had the power to interfere or question the legality/validity of an Act of Parliament (*Lee*, 1871; *Pickin*, 1974; *Prebble*, 1995). '[I]f an Act of Parliament has been obtained improperly it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it' (*Lee*, 1871). The above authorities establish that Parliament was the sovereign law making body, and the rule of 'non- interference' was absolute.

As a result of this notion of Parliament sovereignty, Great Britain faced some initial difficulties when it considered joining the EU: a) it had an unwritten constitution and hence a 'provision for membership could not be made by means of constitutional amendment' (Hartley, 1999: 250); b) its approach to EU law was dualist, which meant that EU law and UK law were two different systems and EU law or any international law only became part of national law when it was incorporated into national law through Parliament; c) the primacy of EU law would not be guaranteed since the Act incorporated EU law would not be immune from a subsequent incompatible Act due to the continuing nature of parliamentary sovereignty. The continuing nature of parliamentary sovereignty, incidentally, meant today's Parliament could not bind tomorrow's Parliament.

However, the European Community Act (ECA) 1972, which incorporated the EEC Treaty (later known as the Treaty of Rome, and in 1993 was changed to the EC Treaty), whereby the UK joined the EU, overcame the first and second problems. It is the third problem – namely, whether the UK joined the EU at the cost of its sovereignty – which is the focus of this paper. To examine this issue, it is necessary to take a look at the ECA 1972 itself, which was (in most parts) repealed by the EU Withdrawal Act 2018.

The ECA 1972

The main sections dealing with the issue of supremacy were: 2(1), 2(2), 2(4) and 3(1). Section 2(1) provided for all directly effective EU law, including the then and future EU treaties and EU legislation to be operated in the UK without further enactment (Hartley, 1999: 252). Section 2(2) empowered the government to implement those EU provisions not directly effective (i.e. directives) either by Order in Council or statutory instruments, which 'must be approved by Parliament' (Hartley, 1999: 252). Section 2(4) provided that all national law, passed or to be passed, be interpreted in a way subject to section 2(1), which facilitated for the direct application of directly effective EU law. Section 3(1) stated that the judiciary should resolve issues relating to EU law in light of the ECJ's case law. If they could not or had queries, they should seek guidance from the ECJ. Section 2(4) suggested that subsequent Acts would also be subject to EU law.

That suggestion or interpretation was argued to be constitutionally

impossible as Parliament neither could bind itself nor its successor. It was against the positive aspect of Diceyan definition, as later Parliament would not 'unmake' the ECA 1972 (Marshall, 1997: 1). Section 3(1) established the ECJ as arbiter or higher authority, which had the power to ask national courts to set aside the incompatible national law.[1] This was claimed to be against the negative limb of Diceyan definition, as nobody was recognised under the UK constitution to set aside or interfere with legislation (Marshall, 1997: 1). However, it was argued that section 2(4) provided for a rule of construction rather than the primacy of EU law (Craig, 2002: 304; *Factortame*, 1991).

While the disputed sections demonstrated that the UK Parliament to a certain extent accepted the primacy of EU law, what the law meant in practice, however, was dependent on the court. The question, therefore, was whether the UK courts accepted the superiority of EU law over national law.

The UK Courts

Initially, the UK courts were reluctant to accept the doctrine of the supremacy of EU law, as Lord Denning said once a statute was passed the courts would disregard EU law (*Bulmer*, 1974; *Felixstowe Dock*, 1976). However, three years later his view changed, stating:

> '[i]n construing our statute, we are entitled to look to the EC Treaty as an aid to its construction; but not only as an aid but as an overriding force. If…our legislation…is inconsistent with Community law…then it is our bounden duty to give priority to Community law' (*Macarthys Ltd*, 1979: 329).

Denning adopted the rule of construction and in doing so he relied on section 2(4). However, it was argued that 'he took a rather broader view of construction than… [was] usually taken in construing international agreements' (Steiner, 2003: 73), giving 'the ECA a …special status' (Loveland, 2003: 385). Denning also made clear that section 2 abolished the doctrine of implied repeal regarding statutes affecting EU issues: an indication his lordship recognised a 'weak manner and form entrenchment of the supremacy of …EU law' (Loveland, 200: 385-6). The principle of 'manner and form' is elaborated below.

Following *Macarthys Ltd*, the House of Lords (HL) (since October 2009 known as the Supreme Court) added in *Garland* (1983) that the rule of construction should be used 'no matter how wide a departure from the prime facia meaning [of the statute] may be needed to achieve consistency' (Hanlon, 2003: 67). However, in *Duke* (1988), approved by *Finnegan* (1990), the HL refused to adopt the rule of construction for three reasons, the third of which was the main one: a) the EU directive concerned was not directly effective; b) the Sex Discrimination Act (SDA) 1972 was unambiguous; and, c) *Von Colson* (1984) did not require the court to adopt

the rule of construction since the SDA1972 had not been passed with the intention to give effect to the directive (Loveland, 2003: 401).[2]

But in *Pickstone* (1989) and *Litster* (1989), the HL was again prepared to accord supremacy to EU law by adopting the rule of construction or a purposive approach. Lord Templeman in *Pickstone*, the *leading judge* in *Duke*, said this time that he could see no difficulty in adopting a purposive approach to achieve 'consistency with the objective of the EC Treaty.' Further, he continued, the UK 'must imply words into domestic legislation to make it consistent with EC law' provided that the Act had been passed with the intention to comply with EU law (Hanlon, 2003: 69). The HL was obliged to adopt purposive approach because of section 2(4) in order to give effect to the 'manifest broad intentions of Parliament' (Lord Keith in *Pickstone*, found at Steiner, 2003: 74).

However, those rulings could not be justified on the basis of section 2(4), as it only provided for directly effective law. The basis for them could be the ruling in *Von Colson*, which stated that national courts should 'create new common law principles to give practical effect to EC directives' (Loveland, 2003: 400). In addition to obeying *Von Colson*, the HL also accepted the ruling in *Marleasing* (1990), in which the ECJ had persuaded the national courts to disregard so far as possible the issue of whether the Act was passed before or after a directive (Steiner, 2003: 76).[3]

The UK courts might have followed *Von Colson* and *Marleasing* so far, they did not, however, follow *Costa* (1964) and *Simmenthal* (1978), which required the immediate enforcement of EU law at the cost of overriding the conflicting domestic law: up to 1990 the 'thinking… [of domestic judges] was still not highly 'Europeanised"(Douglas-Scott, 2002: 276). As an illustration, by 1990 *Costa* had been cited only in four cases (*Blackburn*, 1971; *R v Attorney General, Ex parte ICI, Queen's Bench Division*, 1985; *Sun International*, 1986) by the English courts (O'Neill, 1994: 38). It was not long, nonetheless, before *Costa* and *Simmenthal* cast its magic over the UK courts in *Factortame* (1991).

In *Factortame*, the claimants, Spanish companies, argued before the High Court that the Merchant Shipping Act (MSA) 1988 was in breach of EU law, and, therefore, should not be applied. The High Court referred the issue of compatibility to the ECJ, meanwhile, granting interim relief to suspend the MSA (*Factortame*, 1989: 277). On appeal, the Court of Appeal quashed the interim relief, holding that 'there was no authority in either Community law or English law allowing national courts to interfere…with primary or secondary legislation' (Szyszczak, 1990: 252). Further, to stop the Secretary of State from applying an Act of Parliament was 'a constitutional enormity.' On appeal, in firmly agreeing with the decision of the Court of Appeal, the HL stated that there were two Jurisdictional obstacles to granting the injunction: firstly, there was a presumption that an Act of Parliament was valid unless and until it was held incompatible with EU law; secondly, there was no jurisdiction to grant an injunction against the government –

however, the HL felt obliged, owing to the 'overriding principles of Community law'(Gravells, 1989: 576-8), to make a preliminary reference to the ECJ asking, inter alia, whether EU law empowered the HL to grant an injunction against the government before the ECJ decided on the preliminary reference.[4] The ECJ answered in the affirmative regardless of Lord Bridge's two jurisdictional obstacles stated above. The HL consequently did set aside the MSA.

The courts now (evidently) possessed the power to set aside an Act of Parliament, which they never had before under the British Constitution; a fact that Lord Bridge at first admitted himself. Such power brought a revolution into the British Constitution, as 'the practice of the courts changes, so too does the unwritten constitution' (O'Neill, 1994: 42). Professor Wade called it a technical revolution, occurring '…when a new source of authority was acknowledged by the courts… which was not justified by the existing rules, from which the courts have for whatever reason withdrew their allegiance'(Allen, 1997: 444). It was a demonstration of a change in the rule of recognition: a concept used by professor Hart denoting secondary rules, i.e. statute or custom. The importance of the rule of recognition was the acknowledgement of reference to the writing on inscription as authority, i.e. the previous rule was that earlier Parliament could not bind later Parliament. But now the HL referred to EU law to support its judgment as opposed to the statute. (Though the judges in *Factortame* did not accept this, as is explained below.) The rule of recognition was a political one, and the judges could change it if they were 'confronted with a new situation which so demand[ed]', or where it appeared to them to be 'good legal reasons.' Sovereignty '[was] a freely adjustable commodity', Wade continued, whenever the courts choose, they could impose limitations (Wade, 1996: 573-4).

While Wade argued that the ruling of *Factortame* was revolutionary, other critics perceived it as devolutionary. To discuss this issue, it is important to analyse their contrasting viewpoints.

Revolution or Devolution?

In refusing to call the decision revolutionary, Lord Bridge, one of the ruling Judges in *Factortame* in the HL, stated that they granted the interim relief since it was the duty of national courts under section 2(4) of the ECA 1972, which expressly stated that all national law 'passed or to be passed' should be construed subject to EU law (Weatherill, 1993: 321).

Lord Bridge's reasoning for the judgement could hardly be section 2(4) of the ECA 1972, many argued, however, as the said section was available at the first stage of the case in the HL where he felt that there was no jurisdiction under the English constitution to suspend an Act of Parliament (Gravells, 1989: 576). Why did he not adopt section 2(4) as an authority then? He only suspended the domestic Act when he was ordered by the ECJ. Once ordered, why did his lordship not go on to 'say on what basis

such interim relief was to be ordered?'(Hanlon, 2003: 72) He clearly regarded the ECJ higher than Parliament, and it was 'clear that the national court [was] only under Community law obligations' (Hanlon, 2003: 72). To claim that it was the duty of the UK courts under the ECA 1972 rather than EU law to suspend an Act of Parliament, was, therefore, 'somewhat disingenuous of Lord Bridge'(O'Neill, 1994).

The best authority to be found for the judgement in *Factortame* was *Simmenthal* in which the ECJ had said that in case of a conflict between EU law and a subsequent national law, the national court should apply EU law, and it was 'not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means' (Steiner, 2003: 69). In doing so, Stephen Weatherill argued, the HL 'implicitly accepted the supremacy of…Community law…over…clear provisions of later United Kingdom primary legislation' (1993: 321).

However, John Laws, with whom Trevor Allen agreed (Allen, 1997: 447), rejected the claim that the decision in *Factortame* was revolutionary or its authority was derived from *Simmenthal* (found at Wade, 1996: 569). Section 2(4) established a rule of construction for later statutes so that any such statutes be read in a way to be consistent with EU law. According to Laws, *Factortame* demonstrated devolution of legislative power as opposed to devolution of sovereignty to Europe. For him, EU law was not supreme over domestic law since Parliament had delegated power to the EU and it was in the hand of Parliament to regain it (Wade, 1996: 576). In *Miller* (2017) the Supreme Court relied upon similar reasoning, arguing that the domestic courts' duty to disapply domestic legislation would not apply to Acts that changed the constitutional status of EU institutions or EU law. Put differently, the duty to disapply was not absolute. The European Union Act 2011 likewise stated that EU law was superior over domestic law owing to the continued presence of the ECA 1972.

Laws (and the Supreme Court) seemingly relied on Lord Bridge's argument that Parliament had delegated power to the EU through the ECA 1972. He also agreed with Lord Bridge's claim that section 2(4) had the same effect as if it was incorporated in the MSA (Wade, 1996: 570). If the section had such an effect, then this argument was similar to the principle of 'manner and form',[5] which meant that the MSA was disapplied, because it had not been passed with the manner and form stated by the ECA 1972. It contradicted the Diceyan's definition of parliamentary sovereignty, as it meant that Parliament of 1972 bound the parliament of 1988, which had been impossible previously because of the continuing nature of Parliamentary sovereignty: 'If this [was] not revolutionary, constitutional lawyers…[were] Dutchmen'(Wade, 1996: 568, 570, 573).

Allen claimed that Wade's argument that the outcome of *Factortame* was similar to those of the colonial cases was misconceived. In those cases, Parliament had expressly repealed the earlier legislation but the courts still refused to obey and 'expressly rejected legal continuity in favour of

'autochthony'...[and] signalled their unconditional repudiation of Parliament's sovereignty' (Allen, 1997: 449). Whereas in *Factortame* Parliament had never expressly repealed the ECA 1972 and the judges did not reject legislative competent. Further, in *Factortame* the HL only used the rule of construction and constantly insisted that it was for Parliament to put the incompatible Act right, but in *Harris* (1952), for example, the colonial court declared the later incompatible Act illegal and unconstitutional (Allen, 1997: 450). In reality, the judiciary used the construction view as 'a plausible escape from the constitutional dilemma'; it was to disguise the fact that the courts accepted the primacy of EU law (Wade, 1996: 575).

The next question this essay asks is: who was responsible for the ruling in *Factortame*, that is, for the limitation on Parliament's sovereignty: Parliament itself or the courts?

Who was Responsible?

An Act of Parliament was no longer sovereign owing to the new ties with the EU, which demanded concession of 'sovereignty for obvious political reasons' (Wade, 1996: 574). Lord Bridge, though he refused to call the decision in *Factortame* a political one, admitted the limitation of parliamentary sovereignty by saying 'the supremacy within the European Community of Community law over the national law... was... well established in the jurisprudence of the ECJ long before the United Kingdom joined the Community' (*Factortame*,1991: 658). According to Lord Bridge's reasons for the ruling of *Factortame*, by joining the EU, Parliament had voluntarily accepted the primacy of EU law over national law (Wade, 1996: 572). Therefore, the court was obliged to grant the injunction. Mrs Margaret Thatcher's criticism (the then Prime Minister) that the *Factortame*'s outcome was a surrender of sovereignty from the UK to the Commission was misconceived since Parliament itself ordered the courts to respect this limitation to Parliament's sovereignty through the ECA 1972, in particular sections 2(4) and 3(1) (Loveland, 2003: 407). Lord Bridge's language suggested that he did not use the rule of construction but simply accorded supremacy to EU law, and 'there was nothing in any way novel' in the decision because parliament had accepted a limitation of its sovereignty (Wade, 1996: 572-3).

Lord Bridge's claim that Parliament was aware of the supremacy of EU law was a strong one. Indeed, many academics had predicted that the UK's sovereignty would be affected if it joined the EU (Keenan, 1962: 332). Keenan, writing ten years before the UK joined the EU, anticipated a situation exactly like the one in *Factortame* (Keenan, 1962: 333),[6] but failed to come up with a solution. Parliament likewise failed to offer a solution in the ECA 1972, leaving the issue to the courts to resolve. The courts fitted in 'with this new understanding of parliamentary sovereignty' and changed the balance of power (between Parliament and the courts) in favour of themselves through sections 2(4) and 3(1) (Boyron, 2002: 774,

778).[7] Consequently, one could not only blame the courts but also Parliament.

The courts exercised its new power by 'invalidating' legislation' (Nicol, 1996: 582)[8] in *EOS* (1995). The HL, in deciding the case was confident to the extent that it even did not make a preliminary reference to the ECJ (Nicol, 1996: 584). This new power was partly as a result of the ECJ's rulings, which always maintained that 'invalidation [was] the preserve of national courts' (Nicol, 1996: 580). The HL acted as a 'constitutional' court in *EOS*, as Bernard Jenkin, a MP, who criticised the outcome of the case, said:

> 'When we wanted to join the European Community, it was not explained that we would be setting up our own courts to compete with us…the Law Lords treated Parliament no differently from an errant local authority that has passed some unreasonable bye-laws or an employment scheme run by a private company' (Nicol, 1996: 584).

Indeed, the 'incoming tide [a phrase used by Lord Denning for the force of EU law] of EC reached the Palace of Westminster' (Hood, 2001: 167), and the 'dismantling of parliament sovereignty advanced step-by-step' (Nicol, 1996: 589). Firstly, the judges suspended legislation (*Factortame*, 1991: 70); then 'invalidated' it (*EOS*, 1995); and finally lower courts were given 'constitutional' status in a sense that they could, too, issue a declaration of incompatibility (this argument is elaborated below) (Nicol, 1996: 589). In doing so, they did not have to justify their decision by making a preliminary reference to the ECJ, as the domestic legislation was subordinate to EU law anyway (Nicol, 1996: 589). The courts were equally responsible for these changes, Sophie Boyron argued, and with their newly active role in politics 'a general re-think of …constitutional law… [was] highly desirable' (2002: 774).

However, in *Factortame* the HL claimed that they relied on section 2(4) for their judgment, but in *EOC* (below) the HL used *Factortame* as authority to justify its ruling. The question was whether *Factortame* was a one-off case.

Did Factortame Set a Precedent for Later Cases?

In addition to its effect of the increase on references made by the UK courts to *Simmenthal*, *Factortame* itself was now 'increasingly sited as authority for domestic application of the Simmenthal doctrine', that is, 'national law should be *disapplied* in the face of the contrary authority of Community law' (O' Neill, 1994: 47).[9]

In *EOC*, Lord Keith, the ruling judge in the HL, said *Factortame* did suggest 'that judicial review of legislation was available' (Craig, 2002: 311) and, consequently, the HL declared the domestic legislation incompatible. The HL approved of the *Simmenthal* approach by saying it was for the Divisional Court 'to apply directly effective Community law in preference to

domestic law if the laws conflict' (Nicol, 1996: 583). Evidently, *Simmenthal* enabled the HL to empower all the UK courts to issue declarations of incompatibility to give effect to EU law. Even in one (unreported) case, where the Industrial Tribunal had held that the domestic legislation was contrary to EU law, the HL was reluctant to uphold this until it made a preliminary reference to the ECJ, making many believe that the Tribunal 'boldly strode where the House of Lords feared to tread' (Nicol, 1996: 586).

Thoburn (2003) was another case that approved and followed *Factortame*.[10] The respondents in *Thoburn* made some interesting arguments, which indicated constitutional changes in Great Britain: firstly, the doctrine of parliamentary sovereignty was in abeyance as long as the UK stayed in the EU and, therefore, it was inapplicable to issues regarding EU law; secondly, the ECA 1972 enjoyed a constitutional status since it safeguarded the primacy of EU law and hence it could not be impliedly repealed; thirdly, Britain could not unilaterally withdraw from the EU even if it wanted to (Boyron, 2002: 771). The third argument was rejected by the judge because it precluded the doctrine of express repeal, but he did agree that the ECA 1972 enjoyed a constitutional status (because it determined the relationship between 'two legal orders', Boyron, 2002: 776-7), which could only be expressly repealed.

To argue that a particular statute was constitutional opposed the doctrine of Parliament supremacy since, according to the doctrine, 'all Acts of parliament… [had] equal status and no Act… [was] superior to another whatever its subject matter' (Boyron, 2002: 775). Such a claim, furthermore, would provide Great Britain with a written constitution since it was only possible under a written constitution to label an Act as constitutional (Boyron, 2002: 776).[11]

It is essential to mention, however, that the Divisional Court conceded that EU law was superior to domestic law, but this supremacy was only facilitated by the ECA 1972. Put differently, EU law originated its supremacy from Parliament and it was always open to Parliament to recover that supremacy by its express intervention: but it must be an express repeal as an implied one was already set aside in *Factortame* – even never considered (Boyron, 2002: 775-7). Although a number of academics and judges speculated that the best medicine to cure the notion of parliamentary sovereignty was the doctrine of express repeal, one might wonder whether Parliament was able to pass legislation to expressly repeal the ECA 1972.

The Doctrine of Express Repeal

According to Lords Denning and Bridge, if Parliament passed an Act to expressly repeal the ECA 1972, then it 'should be the duty of our courts to follow' that Act.[12] Craig and De Burca similarly argued that *Factortame* rested on no more than a development of the courts' 'role as interpreter of legislative intent' (Loveland, 2003: 411). If Parliament expressly repealed

the ECA 1972, there would be no reason for the courts to disapply the later Act (Loveland, 2003: 411). However, doubts were cast that even if Parliament included such an express clause, Lord Bridge might not have accepted it (Eekelaar, 1997: 185; Loveland, 2003: 412), owing to the force of Lord Bridge's judgment.

The second difficulty regarding the notion of express repeal was that such an Act would guarantee the UK's withdrawal from the EU. Such an important matter might be determined by a referendum. The referendum might be in favour of continuous membership, as it proved to have been in 1975 in which 67% of the population voted in favour of continuous membership (Loveland, 2003: 413). (However, today we know that a referendum took place in 2016 and, unlike what most scholars had predicted, it decided in favour of leaving the EU, resulting, as stated above, in the European Union (Withdrawal) Act 2018 which expressly repealed the ECA 1972.)

Thirdly, if the government chose to determine the issue through Parliament, it might be able to secure a majority (Loveland, 2003: 413).[13] But from the ECJ's perspective, Member States were not legally competent to unilaterally withdraw from the EU (Loveland, 2003: 411-12).[14] The ECJ would hold such an Act ineffective. In theory it was easily said but in practice it could not be easily done (Allen, 1997: 445).[15]

Conclusion

The UK courts evidently accepted the supremacy of EU directives. They gave precedence to the directives concerned in a number of cases (*Macarthys Ltd*, 1979; *Garland*, 1983; *Pickstone*, 1989; *Webb*, 1995) with one exception (*Duke*, 1988). However, since the *Marleasing* ruling and its acceptance by the UK courts in *Webb*, the *Duke* judgment was arguably weakened (if not repealed). The UK courts accepted the supremacy of the directly effective EU law too (*Factortame*, 1991; *EOC*, 1995; *Sunderland CC*, 2002; *Thoburn*, 2003).

Throughout this essay, it has been seen that neither the courts nor the (pro and against EU) critics suggested that EU law was not supreme. The only conflict between the two contrasting viewpoints[16] remained was that on whose authority the domestic legislation (for example, in *Factortame*) was disapplied. Wade claimed that the authority for the ruling was EU law (Wade, 1996: 572), whereas Lord Bridge argued that it was section 2(4) of the ECA 1972, which provided for the rule of construction. Some critics favoured Lord Bridge's views (Allen, 1997: 443), while others sided with arguments made by Wade (O'Neil, 1994).

For Bridge's followers, it was only the rule of construction that the HL applied in *Factortame*. They disapplied legislation in breach of EU law because Parliament had voluntarily given sovereignty to EU law and ordered the courts to respect this. If Parliament ordered them to the

contrary, they would (as it is their duty)[17] obey the new order. Thus Parliament was still sovereign and it was possible to expressly repeal the ECA 1972 because what Parliament had given could take back. However, Wade and his followers argued that Parliament had not given sovereignty to the EU but it was rather taken by the EU with the assistance of the UK courts. If so, it would prove difficult, though not impossible, for Parliament to regain its lost sovereignty by expressly repealing the ECA 1972.

Whose arguments one favours is dependent on one's perception. However, it can be concluded that while the UK stayed within the EU, its sovereignty as a nation was 'curtailed' (Loveland, 2003: 424). But the 2016 EU referendum enabled the UK to regain its sovereignty – something that is not the case regarding Germany and France, which my next essays will be concentrating on.

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Case 26/62, NV. Algemene Transport- en Expedities Ondeneming Vand Gend en Loss v Nederlandse Administratie der Belastingen [1936] ECR 1.

Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629.

Duke v GEC Reliance [1988] 1 ALL ER 626.

Ellen Street Estates Ltd. v. Ministers of Health [1934] AC 765.

Felixstowe Dock and Rly Co and European Ferries Ltd v British Docks Board (1976) 2 CMLR 655.

Finnegan v Clowney Youth Training Programme [1990] 2 AC 407.

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

Harris v Minister of Interior (1952) AC 526.

Lee v Bude and Torrington Junction Rly Co (1871) LR 6 CP 576.

Litster v Forth Dry Dock [1989] 1 ALL ER 1134.

Macarthys Ltd v Smith (1979) 3 ALL ER.

Mediguard Services Ltd v Thame (unreported).

Merchant Shipping Act 1988.

Miller v Secretary of State for Exiting the EU [2017] UKSC 5.

NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62.

Pickin [1974] BRB AC 765.

Pickstone v Freemans plc [1989] AC 68.

Prebble v Television New Zealand (1995) (access via http://web.lexis-nexis.com/prefesional).

R v Attorney General, Ex parte ICI, Queen's Bench Division, 60 Tax Cases 25 January 1985.

R v Secretary of State for Employment, ex parte Equal Opportunities Commission (1995) 1 AC 1.

R v Secretory of State for Transport ex parte Factortame Ltd [1989] 1 CMLR 277 (QBD).

R v Secretary of State for Transport ex parte Factortame Ltd (No 2) [1991] 1 ALL ER 70.

Sex Discrimination Act 1972.

Sun International v Sun Oil Trading Company and another Queen's Bench Division (unreported judgment of 30 July 1986).

The Colonial Validity Act 1865.

The Employment Protection Act 1978.

The European Community Act 1972.

The European Economic Community Treaty 1957.

The European Union Act 2011.

The European Union Withdrawal Act 2018.

The MSA 1988.

The Statute Westminster 1931.

Thoburn v Sunderland City Council [2002] 1 CMLR 50.

Vauxhall Estates Ltd. V. Liverpool Corpn (1932) 1 KB 733.

14/83 Von Colson v Land Northern - Westfalen [1984] ECR 1891.

Webb v EMO [1995].

[1] Although the ECJ under the preliminary ruling only interpreted the law it did not directly ask the national courts to apply EU law. However, if the national court disregarded the ECJ's ruling and a claim was brought against the national court under Article 226(ex169), then the Member State of that court would be held in breach of its obligations under Article 249(ex 189). Therefore, section 3(1) acknowledged this fact, suggesting that the U.K courts were obliged to obey the ECJ's rulings.

[2] The HL argued that *Von Colson* (1984) only allowed the court to 'distort' domestic statutes passed to give effect to pre-existing EU law. In *Duke* the SDA had not been passed to comply with the directive concerned. Thus one way to

distinguish *Duke* and *Finnegan* from *Garland* and *Macarthys Ltd* was in the latter cases the domestic Acts had been passed to comply with the directives concerned (Loveland, 2003: 401; Steiner, 2003: 76).

[3] Steiner (2003: 76) argued that the HL in *Webb* (1992) distorted the meaning of the statue so that the purposive approach of *Marleasing* was ensured.

[4] A similar question to that of *Simmethal* was asked in *Factortame* and a similar answer was given by the ECJ.

[5] The phrase derived from the Colonial Validity Act 1865. In *Harris* (1952) the colonial court held that the later inconsistent Act was unconstitutional, as it had not been passed according to the section 35 of Westminster Act 1931. Wade compared *Harris* with *Factortame*, claiming that the MSA 1988 was held inapplicable since it had not been passed in accordance with section 2(4) of the ECA 1972 (1996: 571).

[6] He said that parliament could insert a clause stating that the Act incorporating the Treaty could only be repealed expressly. However, he thought it would be ineffective as Parliament could not bind its successor. One could, therefore, assume that Parliament must have known this fact.

[7] The courts benefited in a sense that it established themselves more powerful than before. For example, before 1688 when there was a conflict between the King and Parliament the courts were more powerful than the King and Parliament. It continued until supremacy was established in favour of Parliament by the Glorious Revolution 1688. Similarly, there was now a conflict between Parliament and the EU and the judges were argued to have benefited from this conflict until one was established as a sovereign power (if the EU was not already established).

[8] Nicol claimed that the HL invalidated the legislation concerned (the Employment Protection Act 1978), as there was no difference between invalidation and declaration of incompatibility because the lower courts would be obliged to follow the decision of the HL. Indeed, the ruling of *EOC* was followed by lower courts in a number of cases, i.e. *Mediguard Services Ltd* (1996: 586).

[9] O'Neill reported that by the end of 1993 *Factortame* had been cited on 53 occasions, namely on the question of whether the courts had power to grant an injunction against the Crown in both EU and non-EU cases. *Factortame* established that the courts had such a power in both types of cases (1994:45-6).

[10] The Divisional Court would have followed *Factortame* if the directives concerned were inconsistent with the Weight and Measure Act 1985.

[11] Boyron concluded that as a result of the ECA 1972 the notion of parliamentary sovereignty was modified.

[12] Lord Denning in *Macarthys Ltd* (Loveland, 2003: 386); Lord Bridge made a similar claim in *Factortame* (Allen, 1997: 445); Sir John Laws in *Thoburn* (Boyron, 2002: 777); see also (Wade, 1996: 570).

[13] Loveland gives as an example Mrs Thatcher whose opposing views were one of the main reasons in her failure to win the majority in the election held among the Conservative MPs. Secondly, the form of 1688 Parliament was designed to represent national interests, but today's Parliament operated to promote party interests. Thus, EU law truly represented national interests for which the 1688 Revolution fought (Loveland, 2003: 396, 410).

[14] Loveland used *Van Gend en Loos* for this claim in which the ECJ had held that Member States could not unilaterally withdraw from the EU. However, it was claimed that if Parliament expressly repealed the ECA 1972, the ECJ would not have the power to hold it ineffective since the ECA 1972 was not part of 'European legal order' (Campbell and Young, 2002: 402).

[15] Allen said '[t]he possibility of such express enactment is unrealistic, as inconsistent with membership of Community, as a matter of practical politics….but

may be possible as a matter of legal theory.'

[16] Wade on the one hand, and, Lord Bridge on the other. Those two are chosen for the sake of argument as both have very different views regarding the ruling in *Factortame*.

[17] Lord Denning in *Macarthys Ltd* (Loveland, 2003: 386); Lord Bridge in *Factortame* (Allen, 1997: 445); Sir John Laws in *Thoburn* (Boyron, 2002: 777). This also suggested that the judges still considered themselves as interpreters of the will of Parliament and hence they acted within the scope of their power.

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