

**Community Competence and Residual National Competences:
The Limits for National Legislative Activity Set by
Community Law**

by

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In 1957 the Treaty of Rome was signed by six European countries—Belgium, France, Germany, Italy, Luxembourg, and the Netherlands—thereby establishing the European Economic Community (hereafter referred to as the EEC). In 1972 a Treaty of Accession was signed and Denmark, Ireland, and the United Kingdom became members of the community. Fundamentally the Treaty sets up a community of the member-states and their people, and creates institutions to which are transferred certain legislative, regulatory, and executive powers to be exercised for the purpose of giving effect to the aims and policies of the Treaty. In counterpart the member-states have engaged to abstain from certain corresponding activities, to exercise other activities only in a concerted manner, to submit themselves to the Community rules and decisions, and to facilitate the achievement of Community tasks.¹

The EEC Treaty was described by the Italian Constitutional Court in *Frontini v. Ministero delle Finanze*² as providing, by its content and its objectives, the constitution of the Community, although some commentators have disputed the accuracy of such a description.³ Like most international agreements, the EEC Treaty contains a certain number of provisions that can be described as self-executing in that they confer certain rights upon individual citizens which partake of

¹ Donner, "The Constitutional Powers of the Court of Justice of the European Communities", (1974), 11 C.M.L.R., 127.

² [1974] 2 C.M.L.R., 372, 387.

³ Donner, *loc. cit.*; cf. Bebr, "Directly Applicable Provisions of Community Law", [1970] I.C.L.Q., 257, 261.

the nature of municipal law. They are capable of being applied immediately by the courts without implementing legislation or procedures. While they constitute one of the main sources of Community law they are nevertheless relatively rare. By far the majority of Treaty articles contemplate that some further action is to be taken in order to obtain the objectives specified. In such cases the provisions cannot be applied by the national courts so long as these implementing measures have not been taken.

However, the Treaty is not simply a source of specific rules for the functioning and development of the Common Market that give rise to reciprocal rights and obligations in international law. Unlike most other international instruments, the EEC Treaty does not depend solely upon the institutions of the contracting states for implementation but has a direct impact within the municipal legal order of each member-state. As opposed to other international treaties, the Treaty of Rome has created, by reason of its objectives and its institutional structure and the consequences thereof, its own legal order; one which was integrated with the national legal order of each member-state, the moment the Treaty came into force.

Specific Community institutions are created and a power given to them to achieve the Treaty's objectives by means of legislation. The law embodied in the Treaty (primary Community law) is constantly being expanded, made specific, implemented and applied by the various acts of the institutions of the Community in pursuance of the powers transferred to them by the member-states (secondary Community law). Such legislation is of three basic types: regulations, directives, and decisions.

This body of law constitutes a separate legal order whose provisions belong neither to international law nor to the municipal law of the member-states. The member-states have, by creating such a Community of unlimited duration endowed with its own institutions, with legal personality and its own capacity in law, having the capacity of international representation and more particularly with real powers resulting from a transfer of powers from the member-states to the Community, restricted their own sovereign rights, albeit within limited spheres, and created a body of law applicable both to themselves and to their nationals. Community law and national law constitute two independent and separate legal orders vis à vis both the national authorities and the national laws, with the result that rights can be conferred and obligations imposed by the Community provisions, upon the national authorities and upon the citizens of the member-states without the opportunity, or the necessity, for the member-states to intervene in order that these provisions have a binding effect. The direct and immediate application of Community

regulations, which need for their application neither to be approved nor ratified by member-states, is an illustration of this. Control of the legality of these Community acts, and their application and interpretation, is exercised by the European Court of Justice upon the initiative of the Commission, Council, member-states, or individuals.⁴

The concepts of the supremacy of Community law and the principle of direct applicability are, in the words of Lord Denning MR, the⁵ "twin pillars on which Community law rests. They uphold the standing of Community law as an independent legal order". The one however cannot be seen without the other, and the supremacy of Community law stands or falls with the notion of directly applicable provisions. Although the European Court is the ultimate authority on the interpretation of the Treaty and of any Community instrument, actual responsibility for the application and enforcement of Community law between individuals or between individuals and their national governments rests primarily with the national courts and the supremacy of the Community law depends upon their readiness to follow the case law of the court. This in turn depends on the constitutional law of each member-state.

In order to give effect to its obligations under the EEC Treaty, the United Kingdom enacted the European Communities Act 1972. The direct effect of the Community law and its primacy are recognised in section 2 which makes general provision for all rights and obligations arising under the EEC Treaty, and which gives the force of law in the United Kingdom to present and future Community law which is to be given legal effect without further enactment. This includes not only those provisions of the Treaty itself but also such provisions of the secondary legislation as are without further enactment to be given legal effect. Section 2(4) makes it clear that the directly applicable Community provisions are to prevail not only over existing, but also over future Acts of Parliament in so far as these provisions may be inconsistent with such enactments. By section 3(1) it is enacted that in all matters relating to the EEC, recognition is to be given to the principles laid down by the European Court.

In the United Kingdom the existence of the doctrine of the absolute supremacy of Parliament has proved to be an obstacle to a complete recognition of the principles of the primacy and direct effect of Community law. The possibility exists that the United Kingdom Parliament may by some statute later in date than the European Communities Act 1972 enact something clearly inconsistent with the Community law. Although Parliament sought to establish the priority on

⁴ Article 172 EEC Treaty.

⁵ *Shields v. E. Coomes (Holdings) Ltd* [1978] 1 W.L.R., 1408.

section 2(4) of the European Communities Act 1972, the question remains open whether that subsection is effective for this purpose. The EEC Treaty contains no explicit provision regarding the resolution of a conflict between Community law and national law, and national judges can only solve such conflicts in accordance with the provisions of their national law. By the doctrine of Parliamentary sovereignty no Parliament has the power to bind any future Parliament; therefore any subsequent Act would prevail over Community law.

Assuming that it is possible to establish Community law as a separate and independent legal order, questions necessarily arise as to the relationship between Community law and the national legal orders: how far does the doctrine of the supremacy of Community law penetrate into the national legal order, and to what extent must it be given effect by the national courts? Since it is established that certain Community provisions have direct effect the central issue is the application and interpretation of secondary Community law. The various Community Acts differ not only as to content but also as to their effect on the national legal order. According to Article 189 only Regulations are directly applicable in all member-states. Directives do not have as far reaching an effect: they only bind the member-state as to the result to be achieved, while leaving to the national authorities the determination of the form and means. Directives do not appear, at least *prima facie*, to take effect with regard to individuals until and unless the appropriate measures have been taken to implement them. It may be however that in some instances national courts will be called upon to apply them directly. The question has not yet been resolved by any United Kingdom court but when it is, the conclusion reached will reflect the extent to which the supremacy of the Community legal order has been accepted in the United Kingdom.

AN INDEPENDENT LEGAL ORDER

In the words of the European Court of Justice the supremacy of the Community law is the legal foundation of the Community without which its legal order could not function effectively,⁶ a principle which it has reiterated in many of its later rulings. There does not however appear to be any precise legal foundation on which this clearly very important concept is based. The EEC Treaty lays an obligation on member-states to adapt their legal systems to that of the EEC (Article 5), and Articles 169 and 170 provide procedures by which the Commission or any member-state can bring any infringement of the Treaty obligations before the Court of Justice; but nowhere is there any

⁶ *Costa v. E.N.E.L.* [1964] C.M.L.E., 425.

precise statement on the European legal order or any specific clause decreeing the supremacy of the Community law over the legal orders of the member-states.

There are two alternative arguments on which the supremacy of the Community legal order can be justified. The first analogizes Community law, from the point of view of internal application, to treaty law in general. Such an approach does however jeopardize the uniform application of Community provisions; a solution hardly compatible with the operation of the Community. If the sole justification for the supremacy of Community law over national law were national law itself, this supremacy would be at the mercy of the next constitutional amendment. This would severely hinder the proper functioning of the concept of a common market which requires that the Community regulations not only be applied everywhere within the Community but also that this application takes place *de jure*, without any possible interference of the national authorities and in the same manner.

The second approach, and the one preferred by the European Court, distinguishes the rules governing the relationship between EEC and national laws and those that apply between international treaties in general and national laws. There are two main grounds put forward on which this recognition of the supremacy of the Community legal order can be based. The first deduces the supremacy from the legal nature of the Community and its autonomous powers, created by the member-states' limitation on their sovereign powers, otherwise referred to as a transfer of competence to the Community. By signing the EEC Treaty, the member-states have given up a part of their sovereignty and these relinquished rights may be exercised by Community institutions, with immediate effects within the territory of each member-state. By relinquishing their sovereign rights in these specified areas and transferring them to the Community, the member-states have removed the obstacles, based upon national sovereignty and reflected in national constitutional practice, that would otherwise stand in the way of direct effect of the Treaty in national law.

The sovereign rights thereby transferred to the Community were amalgamated in the new legal person that had been created, thus resulting in a division of jurisdiction with respect to subject matter between the Community on the one hand and the member-states on the other. A member-state, purporting to regulate on a matter falling within the scope of this transfer of sovereignty would be attempting to do something it has no power to do, acting beyond and outside its jurisdiction as well as violating its international obligations. Consequently any such law must be considered null and void by the national

courts. This is in contrast to the ordinary rules of international law where a state enacts a law contrary to an ordinary treaty. While this is itself a violation of international law, the actual law is still valid. If a national law conflicts with a Community law (as interpreted by the European Court) the national courts cannot apply the national law, even though the European Court has no jurisdiction to determine the validity of a national law but only to declare it contrary to the Treaty in a proceeding under Articles 169 or 170 without directly affecting its validity.

The second ground for rejecting the international law concept of a treaty—national law relationship, is based on the proposition that the EEC Treaty itself embodies the principle that Community law is to supersede national law. The very essence of the Economic Community is⁷ “the creation of one single area within which not only goods, persons, services, capital and payments can freely move, but wherein undertakings enter the market under identical conditions at their own risk and on the basis of their own resources.” This necessarily requires that rules be made centrally and operate in identical terms throughout the area of the market to secure both fairness and consistency, and to avoid the divergencies and discriminations that might arise from the differing national constitutional practices if the rules were to be determined according to national law by the national courts. To avoid this the Treaty provisions are to be interpreted within the framework of, and in relation to, the Community legal order and its objectives. The rule of the supremacy of Community law is thus derived from the Treaty through a principle of interpretation whereby it is said to be an implied provision which member-states accepted when they ratified the Treaty. It has therefore become a part of the state’s national law.

Both lines of reasoning are reflected in the decisions of the European Court. In Case 9/65, *San Michele Order Case*, the Court felt that it was imperative that there be a complete and uniform application of the Treaty and rejected the conclusion that⁸ “citizens could escape the integral and uniform application of the said Treaty and so receive a different treatment from the other citizens of the Community”. The realisation of the aims envisaged by the Treaty in Article 5 would be endangered if the executive strength of Community law was to vary from one member-state to another in favour of later internal laws with the result that the obligations undertaken under the Treaty would not be unconditional but merely potential if they could be affected by

⁷ Mathijson, *A Guide to EEC Law* (2nd Ed. 1976), 14.

⁸ Brinkhorst/Schermer, *Judicial Remedies in the European Communities* (1969), 105.

subsequent legislative acts of the signatories of the Treaty.⁹

That Community law is independent of the laws of the member-states and can create rights and obligations for private parties independently of the legislatures of the member-states was first articulated by the European Court in Case 26/62, *Van Gend en Loos v. Netherlands Fiscal Administration*.¹⁰ The Court there held that the EEC Treaty was¹¹ “more than a treaty imposing mutual obligations upon the contracting governments only” and went on to say that Community law¹² “just as it creates obligations binding upon individuals is also designated to create rights which enter into their legal patrimony”. This was further extended in *Costa v. E.N.E.L.*¹³ where the Court was faced with a conflict between Community law and a later national law which it resolved by holding that Community law is superior to national law, including national constitutions, not only in the Community legal order, but also in the national legal orders. The supremacy rule is directly and immediately applicable by national courts, any contrary national provisions notwithstanding. In the words of the Court¹⁴:

the integration, within the laws of each member-state, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility for the member-state to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity.

The Court nevertheless recognized the limits of its judicial power derived from the allocation of jurisdiction between it and the national courts under Article 177; the European Court, on reference from a national court, can only interpret the Treaty provisions and cannot declare a specific national law void as contrary to Treaty law. This function under the Treaty is reserved to the national court.

It has been suggested that the European Court could have avoided deciding the issue of supremacy¹⁵ yet it chose to devote an important part of its decision to that question. The pre-eminence of Community law was seen by the Court to be confirmed by Article 189, which prescribes that Community regulations have an ‘obligatory’ value and are ‘directly applicable within each member-state’. It permits of no reservations and would be wholly ineffective if a member-state could unilaterally nullify its purpose by means of a law contrary to Community dictates.

⁹ *Costa v. E.N.E.L.*, supra.

¹⁰ [1963] C.M.L.R., 105.

¹¹ *Ibid.*

¹² [1964] C.M.L.R. 425.

¹³ Supra.

¹⁴ *Ibid.*

¹⁵ Waelbroeck, “The Application of EEC Law by National Courts” (1966-1967) 19 *Stanford Law Rev.*, 1248, 1264.

In an article written prior to the *Costa* case Judge A. M. Donner questioned the competence of the European Court to rule on the question of the supremacy of Community law over national law in the domestic sphere at least.¹⁶ He underlined the fact that in the *Van Gend en Loos*¹⁷ case the Court had held that this question must be determined by the domestic courts. The issue however would seem to have been resolved in favour of the European Court in the light of more recent decisions and the pre-eminence of Community law over national law would seem to be well established and accepted, in theory if not in actual fact.

The more recent decision of the European Court in Case 106/77, *Amministrazione Delle Finanze Stato v. Simmenthal SpA (No. 2)*¹⁸ reinforces the Court's earlier decisions that in creating an independent legal order the member-states have limited their sovereign rights, albeit within limited fields. The case had been referred to the European Court from Italy to determine the direct applicability of a regulation prohibiting the charging of fees for veterinary and public health inspection on the importation of beef for human consumption into Italy from France. It was held that the provisions of the EEC Treaty and the directly applicable measures of the Community institutions not only by their entry into force render automatically inapplicable any conflicting provisions of current national law but in so far as they are an integral part of, and take precedence in, the national legal order applicable in the member-states, also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.¹⁹

The obligation of national courts to apply Community law is of course limited to those provisions which produce direct effects in the legal relations existing between member-states and their citizens, between the Community and member-states or natural or legal persons, and finally between citizens themselves. This raises one of the most important issues in connection with the supremacy of the Community legal order and that is, whether, and to what extent, provisions of Community law are applicable in the national legal order. There are two different levels on which a provision may be directly applicable.²⁰ On the one hand a Treaty provision may be directly applicable within the national legal order, or it may only be directly applicable within the Community legal order. In this last case the question is only

¹⁶ Donner, "National Law and the Cases of the Court of Justice in the European Communities" (1963-1964), C.M.L.R. 8, 14.

¹⁷ *Supra*.

¹⁸ [1978] 3 C.M.L.R., 263.

¹⁹ *Ibid.*, 283.

²⁰ Bebr, *loc. cit.*, 266-267.

whether a Community provision is so clear and complete in its wording as to permit its immediate application by the competent Community institution.

The first situation raises the question of legal consequences of a provision originating in one legal system and having an effect in another one. The pertinent question is whether or not the legal consequences of a Community provision in another legal system are such as to become directly and immediately applicable and to enable an individual to invoke it. Yet a further aspect of the same question is the extent, if any, provisions of Community law that impose obligations upon member-states can be considered as giving to individuals a cause of action before national courts where the states do not observe their obligations. These questions arise not only with regard to Treaty provisions but also in respect of the various binding Community acts; the Treaty makes no distinction between litigation concerning secondary law or concerning primary law.

A directly applicable provision has been defined by the European Court as one having direct effects and giving rise to individual rights which the national courts must respect.²¹ Most Community provisions are addressed to the member-states and are not phrased in such a manner as to confer rights and obligations upon individuals. The Court however, sees the individual right as a reflection of Community obligations assumed by the member-states or Community institutions and the mere fact that member-states are designated as the subjects of obligations under the Treaty does not of itself imply that their nationals may not benefit thereby. Emphasis is put on the spirit and structure of the provisions as well as their wording as a guide to interpretation.

Before a provision can be directly applicable its nature must be such that it is conducive to the creation of a direct effect between the member-states and individuals. A provision is directly applicable in the view of the European Court if it is complete and legally perfect. This requires that the provision be specific, subject to no conditions and one which requires no further measures either on the part of the member-states or of the Community institutions, or if further measures are necessary, that member-states may have practically no discretion in taking them.

The fact that the member-states and the Commission have the authority to institute a proceeding for the bringing of a Treaty violation before the European Court under Articles 169 and 170 does not mean that individuals whose rights have been impaired by the same violation cannot pursue national remedies for that violation in the

²¹ *Costa v. E.N.E.L.*, supra.

national courts. Their right to do so is an added guarantee against Treaty violations.²² The Commission or the other member-states might not bring action against a violating state. Even if proceedings are instituted some time will elapse before the Court gives its judgment, and during this time the applicability of the state measures contrary to the Treaty is not suspended. Moreover, the Court's judgment will not require that the infringing state retroactively repeal the measures constituting a violation. Thus the aggrieved individual will not always obtain satisfaction even if the express procedure of the Treaty is followed.

Perhaps the most important and far reaching ruling by the European Court in respect of directly applicable Community provisions has been Case 57/65, *Lütticke v. Hauptzollamt Saarlouis*.²³ This was the first case to deal with the obligation of member-states to take positive measures instead of a mere obligation to abstain, and concerned the direct application of Article 95 of the Treaty, the purpose of which is to maintain an equality between turnover taxes on imported goods and those on similar national products. In itself an increase in the turnover tax on imported goods is not contrary to the Treaty; it is only contrary if, in comparison to the tax levied on domestic goods, it turns out to be higher. The German tax authorities had imposed a turnover tax on imported milk products, although milk products of German origin were exempted from the turnover tax. The German importing firm argued that Article 95 was directly applicable and therefore it did not have to pay the tax. The Court decided in favour of direct applicability.

By holding that a Treaty provision imposing an obligation upon the member-states to act could be directly enforceable by domestic courts as of the date the states should have acted, even though they did not in fact do so, the European Court departed from the traditional notion of a self-executing treaty provision, which generally recognizes that a provision can not be self-executing when it requires the contracting parties to take affirmative action for its implementation. The ruling of this case was confirmed in a later case in which the Bundesfinanzhof asked, in an Article 177 reference, whether the European Court still held the view expressed in the *Lütticke* case in view of the fact, inter alia, that this decision²⁴ "really gives private parties a more far-reaching remedy than the Community itself possesses, namely, to be put into the same position as if the member-state had fulfilled its Treaty obligations while the Community (Commission, under Article 169)

²² *Van Gend en Loos v. Netherlands Fiscal Administration*, supra.

²³ Brinkhorst/Schermers, *op. cit.*, 111.

²⁴ Case 28/67, *Molkerei-Zentrale v. Hauptzollamt Paderborn* [1968] C.M.L.R. 220.

can only seek a declaratory judgment which demands their fulfilment?" The Court answered in the affirmative and reiterated its view that²⁵ "the legal nature of directly applicable provisions cannot be changed by difficulties which may occur in one of the member-states; this can be even less so as Community law claims the same force in all member-states".

Legislative power as a means to achieve the Treaty's objectives is given to the Community in Article 189 which provides that 'in order to carry out their task the Council and the Commission shall, in accordance with the provisions of the Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions'. Whether a Community act is a regulation rather than e.g. a directive, is relevant in more than one respect. They differ not only as to their content but as to their effect in the national legal order as well. Different procedural rules apply to the various categories and the extent of legal protection afforded individuals varies widely from one category to another. The Court has stated clearly on several occasions that it is not the name given by the institutions to any act which classifies it in one of the above categories but rather the contents and objectives of its provisions.

It has been said that regulations may be likened to national legislation and may be applied in the national courts, but that directives and decisions by their very nature require legislative implementation if they are to affect the legal position of persons other than those to whom they are addressed.²⁶ While this will in the great majority of situations be true, it is not true to say that provisions of regulations will always give rise to rights which national courts must safeguard, and, contrariwise, that provisions of decisions and directives are always dependent on national implementation.

Article 189 of the EEC Treaty provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all member-states'. This does not mean that every provision of every regulation confers rights on the citizens of member-states that they can rely on in their national courts, or imposes obligations on them that can be enforced in those courts. Its provisions have direct effect in the sense of creating personal rights and obligations enforceable by national courts only in so far as they satisfy the tests of being unconditional and of requiring no further legislative action, either on the part of the member-state or on the part of a Community institution, for their implementation. An Act is of 'general applica-

²⁵ *Ibid.*

²⁶ Wyatt, "Directly Applicable Provisions of EEC Law" [1975] N.L.J., 575.

tion' if it applies to situations which are²⁷ "objectively defined and has legal effect for categories of individuals which are defined in a general and abstract way".

Yet it is frequently the case that a regulation needs implementation by national provisions before it can be applied. Various explanations have been put forward for this apparent discrepancy between the description in Article 189 of a regulation as being 'directly applicable' and the fact that the nature, scheme and wording of some provisions of regulations does not accord with the definition of direct applicability as laid down in the case law.²⁸ The Court has adopted the attitude that although the regulation may necessitate some measure of national implementation before it can be applied, nevertheless the regulation as such does not have to be transformed into national law by a national measure to become applicable²⁹:

To enable them to have the efficacy vis-à-vis the citizens of all the member-states, the Community regulations become part of the national legal system, which must make possible the direct efficacy mentioned in Article 189, so that individuals may invoke them without being met with provisions or practices of a national nature.

Directives do not have as far reaching an effect; they are only binding, according to Article 189, as to the results to be achieved, while leaving to the national authorities a competency as to form and means. Directives can be issued by the Council³⁰ or by the Commission³¹ and constitute the appropriate measure when existing national legislation must be modified or provisions enacted. Member-states are free to decide the form and method by which the result is to be achieved. This does not mean that directives may not prescribe in a precise and specific manner the 'result to be achieved'; the choice as to 'form and means' is one as to whether implementation of the prescribed measures is to be by means of a legislative act, a regulation, or an administrative act.

The question has been raised many times whether directives may have an internal effect in that they create rights for the private citizen which national courts must uphold, or whether they give rise exclusively to rights and obligations in those to whom they are addressed. It may be deduced from the system applicable to Community law under the Treaty as laid down in Article 189 that direct legislation by the Community institutions is only possible in the form of regulations, because in respect of them alone it is provided that they apply directly in the member-states. In all other cases, on the other hand, it is only

²⁷ Case 6/68, *Zuckerfabrik Watenstedt GmbH v. Council of the European Community* [1969] C.M.L.R., 37.

²⁸ See Wyatt, *loc. cit.*, 671.

²⁹ Case 93/71, *Leonisio v. Italian Ministry of Agriculture and Forestry* [1973] C.M.L.R., 343, 354.

³⁰ Articles 21(1), 54(2), 57(1) E.E.C. Treaty.

³¹ E.g. art. 13(2) E.E.C. Treaty.

the national conversion or implementation instrument that creates directly applicable law in accordance with the directives and decisions. Directives would not appear to be, at least prima facie, applicable to individuals, and national courts therefore will not be called upon to apply them directly. However, several recent cases decided by the European Court, and in particular the decision in *Van Duyn v. Home Office*³² make it clear that any clear cut distinctions between the direct effect of regulations on the one hand and what can be described as the 'purely Community character' of directives on the other, is unwarranted. There will be situations where national courts will have to give direct effect to directives, although this must always be in a more limited sense than direct effect as applied to a regulation.

In Case 9/70, *Franz Grad v. Finanzamt Traustein*³³ the European Court indicated for the first time that directives might create for individuals, rights which national courts must safeguard without the necessity for any implementing legislation. The EEC Council had issued directives on the harmonization of turnover taxes. The member-states were to issue national laws introducing a system of value added tax before 1 January 1972. As from the date on which a member-state had introduced the required legislation it was no longer allowed to maintain or introduce any levies based on turnover tax. The Federal Republic of Germany had introduced the required legislation in 1968 and in 1969 a further tax for long distance transportation on German roads was introduced. The plaintiff considered this tax contrary to the EEC directive and refused to pay it. The European Court was asked for a preliminary ruling on the question, inter alia, if individuals, before national courts, could invoke the directive of the Council and the decisions by which it was provided that this directive would be applicable to transport. Arguments both for and against direct applicability were put before the Court by the Commission. The Court decided that³⁴

if, in accordance with Article 189, regulations are directly applicable and consequently are, by their very nature, capable of producing direct legal effects, it does not follow that the other acts mentioned in this Article can never have similar effects,

and concluded that the provisions of the decision and of the directive, taken together, produced a direct effect in the relations between the member-states and their citizens and created for the latter the right to invoke them before the courts. It is to be noted that there is nothing in Article 189 or any other Treaty provision which expressly states that a directive may never have a direct effect.

³² [1974] 3 All E.R. 178.

³³ [1971] C.M.L.R. 1.

³⁴ *Ibid.*, 23.

The European Court based its conclusion, inter alia, on Article 177 which does not distinguish between the various categories of Community acts provided for under Article 189 and thereby implies that all these acts can have direct effect. Where it is not indispensable to a Community act that there be a national conversion or implementation provision for the creation of applicable law, (and also in the case of orders to act without any scope for national discretion), it is justifiable, in the opinion of the European Court, to assume that despite the imposition of obligations exclusively on the member-states, there are reflex effects in favour of the citizens of the Community which, just like the corresponding provisions of the Treaty, must be directly observed by the national courts. The mere fact that an obligation is contained in a directive rather than in an Article of the Treaty would not seem to be material. By applying the reasoning in the *Van Gend en Loos* and *Costs* cases and recognizing the legislative nature of directives, it is possible to equate them in their legal effect with regard to direct applicability, with Community regulations without at the same time obliterating the fundamental differentiation of the various measures of secondary Community law as laid down in the Treaty.

Although potentially far reaching the *Franz Grad* case did not unequivocally establish that a directive could be directly applicable. The result in that case of invoking the directive was merely to give effect to a deadline for the application of a substantive obligation found elsewhere. Any doubt however, would seem to have been well settled by the decision of the European Court in *Van Duyn v. Home Office*.³⁵ The plaintiff, Miss Van Duyn, was refused entry into the United Kingdom on the grounds that the Secretary of State considered it undesirable to permit anyone to leave or enter the country on the business, or in the employment of, the Church of Scientology. Miss Van Duyn sought a declaration that she was entitled to enter the country, invoking a directive of the EEC Council which provided, inter alia, that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned'. The United Kingdom government argued that this provision, being contained in a directive, could have no direct effect and could not therefore be invoked by Miss Van Duyn.

The European Court held that the directive contained a precise and clear obligation which must have been intended to be of direct effect. It considered that³⁶

it would be incompatible with the binding effect attributed to a directive by Article

³⁵ *Supra*.

³⁶ *Ibid*.

189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. . . .

The Court added that³⁷

legal certainty for the persons concerned requires that they should be able to rely on the obligation even though it has been laid down in a legislative act which has no automatic effect in its entirety.

This decision would seem to confirm the Court's earlier view that the effectiveness of certain directives and decisions addressed to member-states would be very seriously weakened if private parties could not invoke them in municipal courts and is indicative that the Court will continue to interpret the direct effectiveness of directives in the light of the development of the Community legal order as a whole, thus circumventing what were earlier regarded as inherent restrictions springing from the nature of this form of Community legal act.³⁸

Nevertheless because of the very general and the very subjective formulation given by the European Court as to the circumstances in which, and the conditions under which, individuals may derive from a directive the right to invoke one or more of its provisions in a national court against their own government or the government of another member-state, there are those who would still argue that a directive is not directly applicable. The fact that a given provision has been included in a directive rather than in a regulation allows the national authorities to choose the form and method by which the required result will be achieved, incorporating the provisions of the directive in their domestic law so that those provisions are directly applicable. By their very nature directives require national implementation. The decision of the European Court in *Van Duyn* apparently renders nugatory the provision in Article 189 that directives leave to national authorities the choice of form and methods. If a provision is in its very nature complete and legally perfect and is to be treated as such by national courts it is hard to see that there is any choice remaining as to form or method. This argument is answered by the Court by pointing out that there is still a choice as to whether the obligation be effected by legislative or administrative act.

It is further argued that the EEC Treaty has clearly intended that there be a two stage procedure and—unlike the position of regulations—does not seek to create any relationship between the individual and Community law. For the individual it is thus not the directive but only the domestic law that is binding.

Those against the direct applicability of directives would also point to the decisions of the European Court holding that national

³⁷ *Ibid.*

³⁸ Simmonds, "*Van Duyn v. The Home Office: the Direct Effectiveness of Directives*" [1975] I.C.L.Q., 419, 434.

implementation is inconsistent with the very nature of a regulation and that member-states may not, by their own legislation, duplicate or, unless expressly authorised, refine upon directly applicable Community provisions. In *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollman*³⁹ the Court held that the German Government did not even have the power to interpret a Community regulation which had imposed a common customs tariff on certain goods and which was not very clear. The Court then went on to say that⁴⁰

in the absence of provisions to the contrary, the member-states are prohibited from adopting measures for the implementation of the regulation intended to modify its scope or add to its provisions . . . they no longer have the power to make legislative provisions in this field.

Likewise in *Frontini v. Ministero delle Finanze*⁴¹ the Court stated that⁴²

it is in accordance with the logic of the Community system that EEC regulations . . . should not be the subject of state issued provisions which reproduce them, either in full or in an executory manner, and which could differ from them or subject their entry into force to conditions, even less which take their place, derogate from them or abrogate them, even in part.

If a directive is directly applicable, will not the same rule apply, making nonsense of the distinction drawn by Article 189? In practice the member-states have no choice but to assume that the provisions of a directive require national implementation. Inevitably this will lead to the reproduction in national legislation of complete and legally perfect Community rules which are of themselves directly applicable. The very core of the distinction between regulations on the one hand, and directives and decisions on the other, is an involvement of different degrees of Community intervention in the law making of the state.

Apart from these 'academic' considerations, the holding that a directive can be directly applicable has serious practical ramifications. Most significant is the legal insecurity arising out of the almost inevitable conflict of a general Community rule and a detailed municipal rule. Insecurity results not so much where the directive requires only that a particular national legal provision be annulled, as where the directive requires incorporation into municipal law in spite of existing contrary laws. Conflict is inevitable. In *Van Duyn* the Court considered that the useful effect of directives or decisions would be weakened if provisions were not given direct application, but it would seem that rather than promoting integration this will in fact endanger it because integration is only possible on the basis of a secure legal order.

In an attempt to rationalise the decision in *Van Duyn* with the need

³⁹ [1970] C.M.L.R., 141.

⁴⁰ *Ibid.*, 153.

⁴¹ *Supra*.

⁴² *Ibid.*, 387.

for legal security, some writers would draw a distinction between direct applicability and direct effect. In declaring any provision of Community law directly applicable the European Court has been concerned to strengthen the legal protection afforded to private citizens of member-states. In its efforts to ensure the effective protection of individual rights, as deduced from the Community obligations of member-states and of the Community institutions, the European Court has been prepared to interpret the provisions of directives and decisions as having 'vertical' but not a 'horizontal' effect.⁴³ They are not directly applicable in the same sense that a regulation is directly applicable, but nonetheless do have some direct effect and can be invoked by individuals as against their national governments or the governments of other member-states although not however as against other individuals.

Similar issues are raised in respect of an individual's right to invoke a decision of the European Court pursuant to Articles 169 and 170 of the Treaty before a national court. In contrast to a preliminary ruling of the European Court where the Court interprets Community law and which is then applied by the national court, in a proceeding under Article 169 or Article 170 it is the Court itself which applies Community law. The Court looks only to whether there has been a Treaty violation and does not view the Treaty provision in the light of the individual's right to be protected, merely stating how there has been a violation of the obligation without repealing or modifying the national provisions violating the Treaty. Yet both proceedings—Articles 169 and 170 and Article 177—have as their main purpose the same object: to ensure the respect for, and execution of, Community obligations. It can be argued that, in view of this common purpose, such a decision given pursuant to Article 169 is binding on the national legal order.

Clearly it binds the competent national authority—legislative or executive—to comply with the decision by either modifying or repealing the offending national provision. Inevitably there will be a period of delay before the necessary measures are in fact taken, and national courts face a dilemma as to what provisions are to be supplied over that period. Are they to continue to apply the national provisions which violate the Community law, or to give effect to the Community law notwithstanding the national law? The European Court has not so far had to rule on this question but the arguments for and against are similar to those that have been put forward in respect of the direct effect of a directive.

The central argument which would justify giving a similar effect to

⁴³ Simmonds, *loc. cit.*, 434.

such a decision as to a preliminary ruling declaring a Treaty provision directly applicable, involves an extension of the concept of the inherent supremacy of the Community legal order. It is inherent in the nature of a directly applicable provision that it precludes the application of a national provision contrary to it, even though such an incompatibility is found by a national court. It is even more logical, and consistent with the supremacy of Community law over national law, to admit a similar limiting effect to a decision of the European Court declaring a Treaty violation. Qualitatively, it would seem that an Article 169 decision is better equipped to entail some effect in the national legal order than a preliminary decision declaring a Treaty provision to be directly applicable. The violation or otherwise is determined by the Court in contentious proceedings in contrast to a preliminary ruling which is non-contentious and which is given in an abstract manner, its application resting with the national court. In a preliminary ruling it is the national court which states the possible conflict whereas in the procedure under Article 169 the European Court itself determines the conflict.⁴⁴

On the other hand Article 171 commits the defaulting member-state to 'take the measures required for the implementation of the judgment of the Court' and as a matter of interpretation there is a strong argument for saying that this precludes any direct effect. However this must be viewed in the light of the European Court's attitude to the direct applicability of directives and decisions. Both are a species of Community law and no distinction can be drawn simply because one is issued by the Council or the Commission and the other by the Court. Considering the European Court's progressive interpretation of the Treaty and the gradual achievement of the objectives of the Treaty it would be most unlikely for the Court to hold against the direct applicability of its own decision.

By declaring a considerable number of Treaty provisions to be self-executing, that is, immediately applicable to individuals within the member-states and creating obligations not only for the member-states but also for individuals, the European Court has reinforced, as well as given effect to, the notion of the supremacy of Community law. Extension of this direct applicability to provisions which impose upon member-states a positive duty to act and even to some decisions and directives has increased the areas within which the Community can affect the legal position of private individuals, either by granting rights or by imposing upon them obligations limiting their professional or commercial freedom of action, independently of their national legislature. This extension of the sphere of Community law

⁴⁴ For a full discussion see Bebr, *loc. cit.*, 288-289.

could be brought about by the European Court without any assistance from the national courts because it depends on the interpretation of Community law alone.

However the most progressive case law of the European Court would be of no avail if municipal courts were not prepared to follow it. The real problem, then, of the legal supremacy of Community law lies in the enforcement of this priority. The two orders, of European and of national law are, as the European Court has often pointed out, separate and independent. The Community has no authority to declare provisions of national law null and void. The rule of the supremacy of the Community legal order belongs to the sphere of Community law; to become a part of the national legal order it has to be accepted by that order. It has been said by one writer that the⁴⁵ "rule of supremacy of Community law is a statement on principles governing Community law and a recommendation to the national judge to follow its guidance" and that the enforcement of the supremacy of Community law over national law belongs to the decision of national organs, whether legislative or judicial. In seeking to recognise the supremacy of Community law the national courts encounter difficulties originating in the national legal order in which they operate, and undoubtedly these influence their attitudes to Community law and its relation to national law.

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The European Court confines itself to stating what Community law requires, leaving it to the national court to apply that law and resolve the case before it. It is thus essentially in national courts that Community law must find its concrete application. Unless they are both able and willing to accept its primacy, the Community cannot work harmoniously. Assuming that the pre-eminence of Community law is accepted by the national court, there still remains the question of the relationship between Community and national constitutional law; in particular the procedure by which the respect for the pre-eminence of Community law over national law is assured. Must the supremacy be given effect by the national courts, and what is the legal situation if the traditional constitutional practice governing 'directly applicable' treaties does not ensure such an effect? National practice is based on variations of one of two basic doctrines. The first derives from natural law philosophy and requires national courts to apply a 'self-executing' provision of a treaty as the supreme law of the land.⁴⁶ This effect

⁴⁵ Scheuner, "Fundamental Rights in Community Law and National Law" (1975) 12 C.M.L.R. 171, 176.

⁴⁶ E.g. United States Constitution, Art. IV.

attaches the moment the treaty comes into force and no legislative measure is required.

The second doctrine, sometimes known as the 'dualist' theory, evolved from a theory of strict separation of national and international law. It does not admit of 'direct applicability' and requires in every case a transformation of treaty law into the national legal order. Under this theory, because a treaty provision can become applicable as national law only if transformed by legislative action, a subsequent national law will have to be given predominance by the courts if it is contrary to a treaty provision. This doctrine, together with the doctrine of the sovereignty of Parliament, create the primary difficulties to the acceptance by the United Kingdom courts of the principles of the primacy and direct effect of Community law. The objective of efficacy for Community law requires accommodation and proper application by national courts. A clash of traditional views with the European Court's case law has been bound to occur in view of the novel legal nature of the Community and the simultaneous applicability of two independent legal orders. The EEC Treaty contains no explicit provisions regarding the resolution of such conflicts and national courts are left to apply constitutional provisions governing the relation of municipal to traditional international treaties.

It is generally accepted in the United Kingdom that domestic courts are not bound by the provisions of a treaty except where those provisions have been incorporated by Act of Parliament into the internal domestic law. There was no real problem in providing for the immediate supremacy of existing Community legislation. The doctrine of the legal sovereignty of Parliament carries with it the proposition not only that Parliament has the right to make or unmake any law whatsoever, but that no person or body is recognized as having a right to override or set aside the legislation of Parliament. Parliament could thus give effect to its obligations under the EEC Treaty without any fear that the validity would be doubted by any British judge.

The direct effect of Community law and its primacy was enacted in the European Communities Act 1972, and more specifically, sections 2 and 3. Section 2 creates the concept of an 'enforceable Community right' giving direct legal effect not only to all rights, powers, liabilities and obligations created by the Treaty but also to those created or arising under the Treaty. Thus the courts are to give effect to Community law according to its own nature and without the need for any further legislative operation. Section 3(1) incorporates the procedures under Article 177 of the EEC Treaty and requires judges to treat any question as to the meaning or effect of any Community instrument as a question of law which, if not referred to the European Court, is to be determined in accordance with the principles laid down by, and any

relevant decisions of the European Court. This establishes Community law as a legal system which the courts must apply immediately and without the necessity of transformation. The words 'as law' rather than 'as part of the law of the United Kingdom' are consistent with the independent nature of the Community legal order. Community law is to be regarded as law to be applied in the United Kingdom and not simply as delegated United Kingdom law. In the situation where Community law and previously enacted United Kingdom law conflict, the Community provisions will take precedence. This is clear even on the principle of Parliamentary sovereignty because the European Communities Act 1972, giving effect to Community law, supercedes the earlier Acts to the extent that it is inconsistent with them.

Difficulties arise in respect of future Community legislation and of future United Kingdom legislation inconsistent with the relevant Treaty or Community law. The doctrine of sovereignty of Parliament as propounded by Dicey at the end of the nineteenth century recognises that Parliament has the power (at least in theory) to legislate without restriction and that no Parliament is capable of binding its successors. Thus in strict theory, because the supremacy of Community law in the United Kingdom depends entirely on an Act of the United Kingdom Parliament, an Act of a subsequent Parliament inconsistent with the European Communities Act 1972 or any Community law which had been similarly incorporated, would prevail. Clearly this is not in harmony with statements made by the European Court as to the supremacy of Community law, and in particular what was said in *Costa v. E.N.E.L.* that⁴⁷

the reception, within the laws of each member-state, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility for the member-state to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity . . . without undermining the legal basis of the Community. A subsequent unilateral law, incompatible with the concept of the Community cannot prevail.

More recently in *Case 106/77 Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA (No. 2)*⁴⁸ the Court repeated that⁴⁹

any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member-states. . . . Accordingly any provision of a national legal system and any legislative, administrative, or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law, the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules having full force and effect, are incompatible with those requirements which are the very essence of Community law.

⁴⁷ *Supra*, 455.

⁴⁸ [1978] 3 C.M.L.R. 263.

⁴⁹ *Ibid.*, 283.

Dicey's theory of the absolute supremacy of Parliament in the legislative field has been encroached upon by convention. The best illustration of this is to be found in section 4 of the Statute of Westminster 1931, whereby Parliament bound itself, in practice if not in theory, not to legislate for Commonwealth countries except with their consent. According to Dicey, the Statute of Westminster could not bind succeeding Parliaments, but all subsequent Parliaments have nevertheless accepted the fact that they could not revoke the Statute of Westminster. But this is only by convention and does not have the force of law so that in theory at least, it could be terminated by legislation which permits of no other interpretation than that it is intended to overthrow the convention.

Dicey noted that while Parliament could not bind its successors it could abdicate 'sovereignty' altogether. This abdication could be effected either without a transfer of sovereignty to another body or with transfer. Where the abdication of legislative authority is only partial, the difficulty is that Parliament, as usually constituted, remains in existence and could pass repealing legislation. A Parliament could wish to transfer part of its sovereignty in one of two respects: it could transfer its authority over part of its territory⁵⁰ or it could transfer to another body the power to legislate with respect to certain matters.⁵¹ To say that Parliament can irrevocably transfer its sovereignty over a portion of territory is logically inconsistent with Dicey's concept of a continuing substantive and procedural supremacy of Parliament. Having once admitted that there is one area in which Parliament can bind itself and its successors there is then no valid reason for denying that another form of limitation could equally be effective. Section 4 of the Statute of Westminster is generally recognised as being not so much an abdication of power to legislate as a redefinition of the legislature which can enact a statute extending to a Dominion. The necessity to reconcile the rule of Parliament sovereignty with the political reality has prompted a reformulation of the rule, whereby Parliament can change its procedures and the manner and form in which it legislates, but cannot impose limits on the contents of legislation.⁵²

This still leaves the question whether Parliament can, or has, effectively ensured the primacy of future Community law. Recognising the likelihood of a conflict arising from the simultaneous application of two independent legal orders, the United Kingdom Parliament sought

⁵⁰ E.g. Statute of Westminster 1931.

⁵¹ Arguably s.2(1) and (4) of the European Communities Act 1972 does this.

⁵² Winterton, "Parliamentary Supremacy Re-examined" (1976) 92 L.Q.R., 591, 615-617; S. A. de Smith, "The Constitution and The Common Market: A Tentative Appraisal" (1971) 34 M.L.R., 597, 612-613.

to establish the priorities in the European Communities Act 1972. Section 2(4) provides that directly applicable Community provisions are to prevail over both existing and future Acts of Parliament in so far as those provisions may be inconsistent with such enactments. It also makes provision for the repeal or amendment of past or future Acts of Parliament by means of delegated legislation under section 2(2). However, this section itself is still subject to the rule of Parliamentary sovereignty.

Two possible sources of serious conflict exist: where the European Communities Act 1972 is followed by another Act of Parliament and that later Act is then followed by a Community provision having direct effect which is inconsistent with it, and the converse situation of Community law having direct effect and a subsequent, conflicting Act of Parliament. In the former situation the strict Diceyan argument is that the second Act must be deemed to repeal the power of the enabling Act—the European Communities Act 1972—to authorize the inconsistent Community provision, so that the later Act prevails over the Community law. Can this ever be reconciled with the court's obligation to hold that Community law overrides conflicting domestic legislation?⁵³ There is little point in a limitation on legislative content or power unless a national court can hold a municipal law to be either invalid or *quoad hoc* inapplicable. Adopting the reformulation of the rule of Parliamentary supremacy, section 2(1) can be seen as creating a new legislature 'comprising the three elements of the British Parliament, which have, by section 2(1), given their permanent consent to EEC regulations and the legislative organs of the Community'.⁵⁴ By itself this does not amount to a complete transfer of legislative power as it leaves the United Kingdom Parliament as an alternative legislature. In the event of a conflict between a later statute and subsequent EEC regulations the normal rule that the later enactment repeals the earlier applies, giving effect to the Community provision.

In the second situation, that of directly applicable Community law and a subsequent and conflicting Act of Parliament, the European Court, whose interpretation of the Treaty binds national courts,⁵⁵ has held that in such a case the subsequent law would have to be considered null and void by the national courts. To ensure that this obligation is given effect to it is not only necessary to regard section 2(1) as having created a new legislature but also to interpret section 2(4) as making that new legislature the only legislature in the subject areas governed by Community law. The combination of both subsec-

⁵³ *Costa v. E.N.E.L.*, supra; *Amministrazione delle Finanze Dello Strato v. Simmenthal SpA (No.2)*, supra.

⁵⁴ Winterton, *loc. cit.*, 614-615.

⁵⁵ Section 3(1) European Communities Act 1972.

tions effects a complete transfer of sovereignty over matters regulated by the EEC to the new legislature. In the event of a conflict between a Community regulation and a subsequent statute, the courts would have to rule that Parliament as usually constituted did not, under the present law, have power to enact the measure, so that the purported statute was not, in fact, an Act of Parliament.⁵⁶

Not all commentators and judges would accept such a wide interpretation of section 2. Some would see section 2(1) as a delegation of legislative power to the Community's legislative organs.⁵⁷ Thus secondary Community law would derive its force from an Act of Parliament and could at any time be repealed by a subsequent Act. Further, if Community regulations are dependent for their validity on national legislation then the danger of national differences creeping in cannot be avoided. Nor does this interpretation recognise that the legal acts of the Community can be defined, examined as to their validity, and interpreted only in terms of Community law itself.

There is no specific direction given in the European Communities Act 1972 as to the primacy of the Community legal order. Section 3 requires British judges to determine any questions as to the meaning or effect of any Community instrument in accordance with the principles laid down by the European Court, but no where does the European Communities Act 1972 expressly state that supremacy or priority is to be given to Community law. Section 2(1) is intended, *inter alia*, to give the force of law in the United Kingdom to future directly applicable Community law without the necessity for local legislation. The effects of this together with section 3(1), which incorporates the principles and decisions of the European Court, can be seen to require the courts to inquire into the validity of any subsequent statutes dealing with Community matters.

The doctrine of sovereignty of Parliament, in so far as it permits of no person or body to pass on the validity of a statute, has no place in Community law, for that would deprive the European Court of its rights under the Treaty to establish a uniform interpretation of the Treaty provisions and their subordinate instruments. Thus by incorporating Community procedures regarding the validity of Community statutes, British judges have, indirectly, been given a limited power of judicial review, and the supremacy of Community law is effectively entrenched. It is ensured not by the European Communities Act 1972 itself, but by the incorporation of the Community legal order, which contains the element of supremacy. While there is no reason why Parliament cannot enact legislation which is in conflict with its Com-

⁵⁶ Winterton, *loc. cit.*, 614-615.

⁵⁷ Martin, "The Accession of the United Kingdom to the European Communities: Jurisdictional Problems", (1968-1969) 6 C.M.L.R. 7, 17.

munity obligations, the effectiveness of such legislation is denied by controlling the way in which the courts must both construe and give effect to it. The United Kingdom is obliged to honour the Community Treaty and Community law, and any unfettered exercise of Parliamentary sovereignty in contravention of the European Court's pronouncements as to the supremacy of Community law would be a breach of international law.

The British courts have somewhat hesitantly acknowledged the binding force of Community law. In the often quoted words of Lord Denning *M. R. the EEC Treaty is*⁵⁸ "equal in force to any statute" and in any transaction which contains a European element, British courts⁵⁹ "must now look to the Treaty for the Treaty is part of our law." To what extent, however, this is a recognition of the supremacy of the Community legal order it is not at all clear. Lord Denning's statement does not of itself fully acknowledge the independent nature of the Community legal order—he states first that the Community law is merely 'a part' of domestic law, and secondly that the supremacy of Community law follows from the European Communities Act 1972 not from the Community legal order itself. The difficulties arising from this view have already been adverted to.

Some judges have found it difficult to accept that there can be a higher form of law than an Act of Parliament, and no where is this more clearly illustrated than in the judgment of the House of Lords in *British Railways Board v. Pickin*⁶⁰ where it was said⁶¹:

the idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with knowledge of the history and law of our country. In earlier times many lawyers seemed to have believed that an Act could be disregarded in so far as it was contrary to the law of God or of nature or of natural justice but since the supremacy of Parliament was finally demonstrated by the Revolution of 1608 any such idea has been obsolete.

Inevitably there is to be found in many cases a rather restrictive attitude towards the Community legal order. Equally, and in many of the more recent cases, other judges have seen section 2(1) of the European Communities Act 1972 as an enabling section, although none would seem to go so far as to consider that it confers any additional jurisdiction on United Kingdom courts and tribunals. It is submitted, nonetheless that this must be the logical and inevitable progression, to the extent, and for the reasons, already outlined.

⁵⁸ *Gaz S.A. v. Falks Veritas Ltd.* [1974] 3 W.L.R. 235, 242.

⁵⁹ *Idem.*

⁶⁰ [1974] A.C. 765.

⁶¹ *Ibid.*, 782.