PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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built into theoretical accounts of the role of courts in public law cases. In a 'multi-layered' constitutional structure, such accounts will otherwise be incomplete.

THE RECEPTION OF EC LAW WITHIN THE UNITED KINGDOM

There is still considerable uncertainty—from the perspective of UK law—about why, exactly, courts should accord priority to rules of EC law where these are in conflict with provisions of domestic law, and about the circumstances—if any—in which national legislation which defies the requirements of EC law might nonetheless be given effect by the courts. It can therefore be said that while the *existence* of overriding EC law norms demonstrates that multiple layers are present within the contemporary constitution, it remains to be definitively confirmed *how* those layers inter-relate. Some accounts locate the answer within national law; some do so by reference to the requirements of EC law; and some employ a combination of norms of EC and national law. One's view of the nature and shape of the multi-layered constitution will depend—in the EC law context—upon which account one favours. Indeed, the contemporary constitution might appear to be *more* or *less* multi-layered depending upon the account adopted. For this reason, the divergent accounts will form the main focus of this section of the chapter.[11]

The first group of accounts focuses mainly or entirely upon national law. The three accounts falling within this group differ in terms of whether they regard the force of EC law at national level as being attributable mainly or entirely to the actions of Parliament or to the courts, and as to whether—if the answer lies with the courts—that answer can be categorised as political or legal in nature. The first account maintains that the overriding force given to norms of EC law by national courts is the result of Parliament's intentions as expressed in the European Communities Act 1972, which incorporated EC law at national level. Section 2(4) specifies that 'any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section'. This refers back, crucially, to section 2(1), which allows relevant elements of EC law—including, by implication, EC law supremacy[12] and direct effect[13]—to be 'recognised and available in [national] law, and be enforced, allowed and followed accordingly'. Meanwhile, section 3 directs national courts to take judicial notice of the decisions of the European Court of Justice. In *R. v Secretary of State for Transport, ex p. Factortame(2)*,

[11] Only one of the accounts to be considered—that developed by Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin, [2002] 3 WLR 247—has explicit judicial support, in the form of his Lordship's own judgment in that case. Given the controversial nature of this account (see n 33 below), together with the constitutional magnitude of the debate, it is submitted that this cannot be conclusive of the matter. For a contrasting approach to questions considered in this chapter, see A O'Neill 'Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act' [2002] *PL* 724.

[12] Case 6/64, *Costa v ENEL* [1964] ECR 585.

[13] Case 26/62, *van Gend en Loos v Nederlandse Administratie der Belastigen* [1963] ECR 1; Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337.

Lord Bridge used the 1972 Act in order to justify his conclusion that national statutes which were inconsistent with EC law must be 'disapplied' by the courts.[14] According to Lord Bridge:

> If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty ... it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.[15]

The suggestion that Lord Bridge explained the overriding force of EC law by reference to factors within the national constitutional layer—in particular Parliament's intentions—has been articulated by Sir Neil MacCormick (among others).[16] For the essence of the passage cited above is that Parliament has managed to bind *itself*. Lord Bridge did not go on to say whether this was a situation which was unique to the European Communities Act 1972, or but one example of a broader range of situations in which it might be possible for Parliament to do such a thing. As Paul Craig has suggested, Lord Bridge's judgment is open to a variety of interpretations, each of which has different implications for our analysis of the relationship between Parliament and the courts.[17] A narrower reading would suggest that the 1972 Act had unique effects, based upon the reception into domestic law—via section 2—of the unique EC law principles of supremacy and direct effect. In consequence, courts should read future statutes subject to the 1972 Act, possibly—although this is not settled—unless those statutes made it sufficiently clear that they were departing from the requirements of EC law. A broader reading would suggest that courts may now, as a general matter, depart from pre-existing constitutional norms whenever the intentions of Parliament are clear enough. Normatively, this reading rests on the assumption that the constitutional justifications for the existence of a legally sovereign national Parliament—as that term was traditionally

[14] N 1 above.

[15] N 1 above, 658–9.

[16] According to Sir Neil MacCormick, the House of Lords sought to explain its decision in *Factortame(2)* by reference to norms of domestic law *alone*: *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, OUP, 1999), pp 99–102; see also TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *LQR* 443, 445, 448.

[17] See further PP Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) *YBEL* 221, 251–5.

understood—no longer exist.[18] However, other than the inference that Parliament's intentions must be clear enough, Lord Bridge's judgment *itself* offers us no real guidance as to when courts might use this broader reading to justify departing from pre-existing norms of constitutional law.

The second account—developed by Sir William Wade—categorises the recognition that EC law has overriding force as the political response of national courts to the reality of EU membership. Wade describes the decision in *Factortame(2)* as 'a revolutionary change',[19] which he explains—at least, at an analytical level—solely in terms of the behaviour of national courts.[20] He suggests that the rule whereby courts give effect to the most recently enacted statute of the Westminster Parliament regardless of the wording of any earlier statute concerning the same subject matter—part of the long-standing 'rule of recognition' in English law—has always been in the keeping of the courts. It is 'a rule of unique character, since only the judges can change it. It is for the judges, and not for Parliament, to say what is an effective Act of Parliament'.[21] If judges recognise that there should be a change, this is a technical 'revolution': something which happens 'when the judges, faced with a novel situation, elect to depart from the familiar rules for the sake of political necessity .... the rule of recognition is itself a political fact which the judges themselves are able to change when they are confronted with a new situation that so demands'.[22] This, according to Wade, is exactly what happened in *Factortame(2)*. Indeed, Wade suggests, Lord Bridge took it for granted that Parliament was able to bind its successors:[23] a possibility which, on his analysis, was presumably always inherent given the nature of the rule of recognition.[24]

The third account—articulated by Laws LJ in *Thoburn v Sunderland C.C.*—also explains the decision in *Factortame(2)* by reference to the role of national courts, but does so in legal rather than political terms. In his judgment in *Thoburn*, Laws LJ accepted a conclusion which was implicit in *Factortame(2)*: namely that the European Communities Act 1972 is not open to implied repeal.[25] *Factortame(2)* was, Laws LJ suggested, concerned with the primacy of substantive provisions of EC law. In *Thoburn*, by contrast, the court was concerned to identify 'the legal *foundation* within which those substantive provisions enjoy their primacy, and by which the relation between the law and institutions of the EU law and the British State ultimately rests'.[26] Laws LJ suggested that this foundation was domestic constitutional law, specifically the common law. For:

[18] Craig, n 17 above, pp 251–4.

[19] Wade & Forsyth, *Administrative Law* (8th edn, Oxford, OUP, 2000), p 28.

[20] Wade seems to rest his analysis on the consequences of Lord Bridge's reasoning in *Factortame(2)*—the possibility of 'disapplication' of a post-1972 statute—rather than on its content. For this reason, it is appropriate to analyse it separately from Lord Bridge's own explanation.

[21] Sir William Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 *LQR* 568, 574.

[22] N 21 above, 574.

[23] N 21 above, 573.

[24] See Wade's 'The Basis of Legal Sovereignty' [1955] *CLJ* 172, esp pp 187–192.

[25] N 11 above, paras [61], [68] and [69].

[26] N 11 above, para [66].

> The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal .... There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say—have said—that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision. The courts have in effect so held in the field of European law itself, in the *Factortame* case.[27]

Laws LJ argued that this turned on the common law's recognition of a hierarchy of statutes. 'Ordinary' statutes were open to implied as well as express repeal; 'constitutional' statutes, including the 1972 Act, were only open to express repeal. Laws LJ suggested that a 'constitutional' statute was one which '(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.[28] Due to the legal development represented by this recognition, the 1972 Act was a 'constitutional' statute, immune from implied repeal,[29] and EC law could be recognised as having overriding force for this reason.

The significance—for our purposes—of these three accounts is that they explain the decision in *Factortame(2)* by reference primarily to the powers of institutions at *national* level. Those 'multi-layered' aspects of the contemporary constitution which can be associated with British membership of the EU are seen as resulting—constitutionally-speaking—from the actions of the Westminster Parliament and/or the national courts. For Wade, the decisive event appears to have been the response of the national judiciary to a significant political development, namely accession to the EU. Obviously, the fact of accession depended—historically speaking—on the actions of the executive and Parliament, but for Wade, the key constitutional moment came in the House of Lords' decision in *Factortame(2)*. This reflects Wade's long-standing view that Parliamentary Sovereignty can only be shed if the *courts* recognise, as a political matter, that this is the case. This might be triggered either by the overthrow of the governing institutions of a state, or by a more technical change such as the passage of a statute which triggers a unique judicial response.[30] The 'revolution' in the EC context is of the second variety, but—according to Wade—might encourage 'revolutionary' judicial behaviour in other contexts. It is, he suggests, now 'guesswork' to predict whether other limitations on sovereignty might be possible, and that sovereignty is—as a result of *Factortame(2)*—'now a freely adjustable commodity whenever

[27] N 11 above, para [60]. More broadly, Laws LJ talked, in the same paragraph, of it being the responsibility of the courts to develop (as a legal matter) the 'scope and nature' of Parliamentary Sovereignty—echoing his extra-judicial view in 'Law and Democracy', [1995] *PL* 72 at 85–8.

[28] N 11 above, para [62]. Laws LJ suggested *obiter* that examples of such statutes, apart from the 1972 Act, included the Magna Carta, the Bill of Rights 1689, the Acts of Union 1707, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998.

[29] N 11 above, para [63]. The contrast between 'legal' and 'political' developments and responses developed in this and preceding paragraphs is, of course, open to attack from a realist standpoint.

[30] N 24 above, esp at 187–92.

Parliament chooses to accept some limitation.'[31] According to Lord Bridge's own reasoning in *Factortame(2)*, by contrast, the House of Lords was merely *responding* in legal terms to a decisive event which had already occurred, namely Parliament's decision to pass the 1972 Act. Lord Bridge was thus keen to stress that the House of Lords was carrying out Parliament's will, unusual though the practical consequences may have been in relation to the traditional operation of Parliamentary Sovereignty. Craig shares Lord Bridge's view that the House of Lords was responding to Parliament's legislative initiative,[32] but appears to favour what was described above as a broader reading of Lord Bridge's judgment. In consequence, he seems to be in implicit agreement with Wade that courts may be able to recognise the existence of *other* constraints on Parliamentary Sovereignty, especially in the area of fundamental rights. For Craig, however, the reason for this lies *not* in the assertion that there has been a 'revolution', but rather—as noted above—in the fact that the underpinning constitutional justification for the continued existence of a legally sovereign Parliament may no longer exist. Craig's analysis thus focuses on the consistency of the contemporary constitutional architecture—at national level and viewed in the round—rather than on the specific assertion that *courts* may now be free to recognise further constraints on the Westminster Parliament.

Laws LJ's analysis in *Thoburn* has attracted critical comment,[33] and it can certainly be said—quite apart from the lack of authority cited in the judgment—that the reasoning may not be entirely consistent with Sir John's own previously stated extra-judicial views.[34] Nonetheless, it provides an important comparison with Wade's and Lord Bridge's accounts, given that it might well be felt to fall somewhere between the two. A key similarity with Lord Bridge's account is that both explain the overriding force of EC law as the result of a *legal* development at national level. Nonetheless, the two differ in that Laws LJ related his account to the role of the courts, whilst Lord Bridge placed decisive weight on the legal consequences of Parliament's actions in 1972. A second similarity is that under either approach, relevant provisions of the 1972 Act would still seem to be open to express repeal. Laws LJ stated in *Thoburn* that if a provision of EC law 'was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA [1972] were sufficient to incorporate the measure and give it overriding effect in domestic law'.[35] In other words, the status of EC law, resting—as it did for Laws LJ—on domestic common law, was not absolute, leading him to conclude that his

[31] N 21 above, 575 & 573. At 575, Wade suggests that it might be possible for courts to decide that Parliament can voluntarily limit its sovereignty at any time; or that accession to the EC was a unique legal event; or, as a middle course, that certain legal provisions—for example, those relating to fundamental rights—are capable of entrenchment, while others are not.

[32] N 17 above, pp 252–3.

[33] See, eg, G Marshall, 'Metric Martyrs and martyrdom by Henry VIII clause' (2002) 118 *LQR* 493.

[34] In 'Law and Democracy', n 27 above, 84–9, Sir John argues that the common law now recognises various examples of 'higher-order law'. *However*, he goes on to state that while section 2(4) of the European Communities Act 1972 is not open to implied repeal, this is because power has been devolved by Parliament to the EU, *not* because of 'higher-order law' analysis.

[35] N 11 above, para [69].

approach gave 'full weight' to the 'supremacy of *substantive* Community law' as well as to the supremacy of the United Kingdom Parliament, vouchsafed by the common law: reflecting the general responsibility of the courts to strike such a balance.[36]

Despite Lord Bridge's rather different reasoning in *Factortame(2)*, it seems plausible to suggest that he might reach a similar conclusion concerning a post-1972 statute which was explicitly incompatible with EC law, given that his judgment rested on the proposition that Parliament's specific intention in passing the 1972 Act must be deemed to take priority over Parliament's intentions as stipulated in other statutes—a proposition which might allow for a statute which was expressed with sufficient specificity to displace the 1972 Act.[37] In this respect, both Lord Bridge's and Laws LJ's accounts stand in stark contrast to Wade's. For given that, according to Wade, there has already been a 'revolution', with the House of Lords allying itself to the *political* reality of Britain's membership of the EU, it is uncertain what would be sufficient—empirically-speaking—to trigger a judicial 'counter-revolution'. Would an express repeal of the European Communities Act 1972 be enough, for example? Indeed, would anything be sufficient, given that—according to Wade—we now live in a constitutional world that is so unpredictable that we are effectively left to guess what new limitations on Parliamentary Sovereignty the courts may impose? The inability of Wade's account to provide any normative basis for assessing such points is perhaps its crucial weakness as a legal theory: the blunt assertion that courts are making essentially 'political' decisions when fundamental constitutional questions arise leaves us—as a matter of logic—with nothing to fall back on, at least in terms of orthodox legal analysis, when assessing what courts *ought* to do.

A further question concerns the potential for practical overlap between Lord Bridge's and Laws LJ's explanations. It is clear that, unlike Wade, both are content to tie their accounts to the law itself—not unsurprisingly, since both accounts form part of judgments delivered in actual cases. As some of the comments made by both judges might imply, however, it may sometimes be difficult *in practice* to delineate an exact distinction between the respective roles of the courts and Parliament—even though each account appears to presuppose that such a distinction can be drawn. This difficulty might, in fact, echo broader constitutional arguments concerning the relationship between Parliament and the courts. Perhaps the most prominent is Sir Stephen Sedley's extra-judicial assertion that the emergence of a powerful regime of judicial review in the late twentieth century might mean that:

> we have today ... a new and still emerging constitutional paradigm, no longer of Dicey's supreme parliament to which the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable—politically to Parliament, legally to the courts.[38]

[36] N 11 above, para [70].

[37] It seems likely that this would require express repeal, but this is not absolutely certain.

[38] Human Rights: a Twenty-First Century Agenda' [1995] *PL* 386, 389. Sedley J (as he then was)

Perhaps less radically, it can be asserted that any legislation passed by Parliament in a common law system depends, by definition, upon the judiciary for its practical interpretation and application. In consequence, whilst it may be necessary for the sake of constitutional clarity to distinguish between the role of Parliament and that of the courts when explaining the overriding effect of EC law—not least, given the consequences which the theory adopted may have for the circumstances (if any) in which Parliament might be free to ignore the requirements of EC law—it may well be that the recognition of such effect operates, in practice, as a co-operative venture.

From the standpoint of the accounts considered so far—two of which, it should perhaps be reiterated, have been advanced by national judges as part of their judgments in cases—it seems clear that the priority to be accorded to EC law depends upon one's interpretation of domestic constitutional considerations. However, two further explanations of the overriding role of EC law have a rather different focus. The first is effectively the antithesis of the arguments so far considered, given that it seeks to tie the overriding effect of EC law overwhelmingly to the requirements of EC law *itself*.[39] This approach starts by stressing the unique nature of EC law. When explaining its recognition of direct effect in *van Gend en Loos*, the European Court of Justice stated that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields ...'.[40] The Court reiterated and expanded upon this argument in *Costa v ENEL* when proclaiming the principle of EC law supremacy: 'By contrast with ordinary international treaties', the Court asserted, 'the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'.[41]

In consequence, while the European Communities Act 1972 acted as the mechanism by which EC law norms were brought into the UK, historically-speaking, the unique nature of those norms—as demonstrated in *van Gend* and *Costa*—was such that EC law was permanently entrenched in domestic law, rather than merely incorporated. It follows from this argument that severe constraints were thereby placed on the freedom of action of the Westminster Parliament. The 1972 Act could not be impliedly repealed—for the principles of EC law would disallow this—and, while the Act was in theory open to express repeal should Britain wish to leave the EC, practical obstacles might still be placed in the path of this course of action given that any withdrawal would need, logically, to be conducted in accordance with the rules of EC law. Since the EC Treaty contains no explicit provision allowing for unilateral withdrawal by a member state, an inter-governmental

suggested in *R v Parliamentary Commissioner for Standards, ex p. Fayed* [1997] COD 376 that Parliamentary privilege rested on 'a mutuality of respect between two constitutional sovereignties'—a point approved by Lord Woolf MR when the case reached the Court of Appeal: [1998] 1 WLR 669, 670.

[39] This argument would effectively be a more radical version of that put forward by the respondents—and rejected by Laws LJ—in *Thoburn v Sunderland City Council*, n 11 above, paras [53–7].

[40] N 13 above, 12.

[41] N 12 above, 593–4.

conference would probably need to be convened to renegotiate the Treaty to allow for any withdrawal—a possibility which could not be guaranteed, politically-speaking. From this standpoint, any Parliamentary attempt unilaterally to withdraw from the EC without renegotiation of the Treaty might therefore be subject to legal challenge based upon the dictates of the Treaty itself.

Straightforward though this approach is—not least because of its apparent consistency with the jurisprudence of the Court of Justice—it is open to criticism because it considers only half the picture, constitutionally-speaking. For, as Sir Neil MacCormick has argued, if the reception of EC law into the domestic legal systems of Member States is initially mediated via the rules of national constitutional law—in the UK, by the passage of the European Communities Act 1972—it is unclear why those rules should not *continue* to have a decisive effect until the Member State has clearly left the EU.[42] This criticism forms part of MacCormick's broader theory, which constitutes the second explanation referred to above. MacCormick suggests that the reception of EC law into domestic law involves an 'interlocking of legal systems, with mutual recognition of each other's validity, but with different grounds for that recognition'.[43] For the European Court of Justice, the overriding quality of EC law at national level derives—as the theory considered above suggests—from the nature of Community law itself, as the Court's decisions in *Van Gend en Loos* and *Costa* demonstrate. In MacCormick's words, EC law is—for the Court—'a distinct legal system of a new type ... that enjoys "primacy" or "supremacy" over the laws of the Member States'.[44] From this standpoint, the 'ultimate power of interpretation' of the powers 'transferred' to the EU by the Member States, and of the nature of the Member States' obligations, lies with the Court.[45] For national courts, *by contrast*, 'the ultimate validating ground' for the superior force of EC law 'is found in domestic constitutional law'.[46] MacCormick suggests that this standpoint is clearly evident in *Factortame(2)*, in Lord Bridge's assertion that the *Westminster Parliament* must have intended EC law to have overriding force at domestic level, given that it was *aware* of the nature of EC law when it passed the European Communities Act 1972.[47] MacCormick argues that

> [f]rom the Lords' point of view ... the reason for the binding character of Community law is the provision of domestic constitutional law that made valid the acceptance of Community membership and Community law through accession to the relevant treaties.[48]

[42] MacCormick, n 16 above, p 116 ff; see also Sir John Laws' analogous basis for refuting this argument in *Thoburn*: n 11 above, paras [58–9].

[43] MacCormick, n 16 above, p 102.

[44] MacCormick, n 16 above, p 94.

[45] *Ibid.*

[46] MacCormick, n 16 above, p 101. Conceptually, this is an aspect of the 'competence-competence' problem found in many Member States: see MacCormick's comparative analysis, n 16 above, pp 99–102.

[47] MacCormick, n 16 above, pp 94 and 100. Contrast this, however, with the 1971 Command Paper *The United Kingdom and the European Communities*, Cmnd 4715, paras 29 & 31.

[48] MacCormick, n 16 above, p 101.

A key difference between this argument and the other theories analysed so far is that MacCormick seeks to explain the relationship between EC law and national law in a way which is coherent in terms of the basic constitutional norms of *each*. MacCormick categorises his argument as 'pluralistic': he believes that EC law and national law are analytically distinct and partially independent legal orders, but that they overlap and interact in practice.[49] Analytically, the relationship between the two cannot be categorised as hierarchical. On the one hand, alterations in the constitutional powers of the EU institutions depend upon treaty-making *between* the Member States at international level. Furthermore, any amendment to the EC treaties will only take effect if it is passed into the national law of each Member State using the procedure *internal* to the Member State in question, in the same way that each Member State must amend its existing constitutional rules on joining the EU so as to allow EC law—including the principles of direct effect and EC law supremacy—to operate at national level.[50] On the other hand, considered in its *own* right, the EC's legal order is:

> neither conditional upon the validity of any particular state's constitution, nor upon the sum of the conditions that the states might impose, for that would be no Community at all. It would amount to no more than a bundle of overlapping laws to the extent that each state chose to acknowledge 'Community' laws and obligations.[51]

This characterisation of the relationship between the EC and national systems has a crucial practical consequence. For, as MacCormick points out, if each system ultimately has its own internal constitutional point of reference, the highest national court and the Court of Justice need not produce identical answers to the question whether an individual Member State might unilaterally secede from the EU. MacCormick believes that Lord Bridge's judgment in *Factortame(2)* can best be explained in these terms. The implication of Lord Bridge's reasoning is, MacCormick suggests, that 'the supremacy of Community law and with it the interpretative competence' of the Court of Justice will be upheld by domestic courts *so long as* the Westminster Parliament is content for Britain to remain within the EC.[52] If Westminster changed its mind and chose to withdraw Britain unilaterally from the EU, this would 'be valid in the perspective of UK law, whatever the Community organs might ... think, say, or do'.[53]

MacCormick's is the one theory—of those we have explored—that might be described as truly 'multi-layered' in nature. For MacCormick recognises that there may be overlapping, and possibly divergent, centres of constitutional gravity for courts in cases which involve EC law points.[54] It follows from this, although

[49] MacCormick, n 16 above, p 119; for different versions of pluralism, see pp 117–21.

[50] MacCormick, n 16 above, pp 117–9.

[51] MacCormick, n 16 above, p 118.

[52] MacCormick, n 16 above, p 100.

[53] *Ibid*; see also the rather more vague formulation, below, p 94.

[54] For a subtly different but analogous account of *Factortame(2)*, see TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *LQR* 443, 445–6. In relation to the EC level, see KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, OUP, 2001), pp 52–63.

MacCormick does not develop the point at length, that a pluralist account would enable us to explain the effect of the European Communities Act 1972 and the *Factortame* litigation in a way which avoids talk of 'constitutional statutes' or 'revolutionary' switches in judicial allegiance. A key aspect of pluralist accounts is the recognition that the Court of Justice and national courts can operate with divergent points of constitutional reference. A pluralist could therefore maintain that while the outcome in *Factortame(2)* was, from the standpoint of the Court of Justice, a logical consequence of the application of the fundamental EC law principles of supremacy and direct effect (interpreted, by the Court, as deriving from the treaties), from the standpoint of the House of Lords it was—by contrast—a logical consequence of the drafting of the 1972 Act. Since domestic courts cannot recognise international treaties without an appropriate incorporating measure (on a standard dualist analysis)[55] sections 2 and 3 of the 1972 Act serve—for domestic courts—as the bridge across which the relevant EC law principles must cross in order to be enforceable and overriding at national level. The apparent immunity of the 1972 Act from implied repeal is therefore explained by the fact that sections 2 and 3 are drafted in such a way as to allow EC law to pass into national law with binding status in national courts, given that EC law—by its own lights—must take priority over national law. However, a unilateral British withdrawal from the EU would, as MacCormick claims, be upheld by domestic courts if it involved the express repeal of sections 2 and 3: for this would remove the means of access into domestic law of direct effect and supremacy, as well as of the judgments of the Court of Justice.[56] The Court could pronounce all it liked on the legitimacy of UK withdrawal *viewed from the standpoint of EC law*, but with sections 2 and 3 removed from the picture this need have no influence on domestic courts. It would be at this point, rather than at the stage at which Wade views it as necessary, that it would become appropriate to talk of the resolution of the dispute as turning on political factors.

MacCormick's argument is supported, at a general level, by Gordon Anthony's analysis of the reception of EC law and Convention rights into national law. Anthony argues that the 'dynamics of legal integration'—whether this involves the reception of EC law or Convention rights within domestic law—'are finally mediated by internal institutional considerations',[57] even though 'judicial recourse to those considerations is often prompted by the "external" dynamic of European law'.[58] A court's view concerning the proper ambit of its power as an institution of the *national* constitutional order will, in other words, have crucial implications for

[55] See, eg, *Maclaine Watson v Department of Trade and Industry* [1990] 2 AC 418, 476–7 (Lord Templeman).

[56] In principle, the question whether an act of express repeal would be required (implied repeal being insufficient) should turn on judicial interpretation. However, the matter appears to have been settled by the result in *Factortame(2)*. A post-1972 statute (the Merchant Shipping Act 1988) which appeared, without expressly saying so, to disregard the priority given to rules of EC law by sections 2 and 3 of the 1972 Act was effectively set aside by reference to those rules and the earlier Act.

[57] N 8 above, p 180. See also below, pp 12–15.

[58] N 8 above, p 47.