# EUROPEAN UNION LAW
# Q&As


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# EU LAW

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# Chapter 1 - EU Law and National Law: Supremacy

**Essay Question 1**

As time has passed Dicey's account of Parliamentary sovereignty has become increasingly difficult to reconcile with constitutional reality in the UK. Critically discuss this statement.

**Answer**

**Introduction**

A.V. Dicey's definition of parliamentary supremacy, which has lost validity as quoted above, will be analysed critically. First this paper will examine the doctrine of parliamentary supremacy as laid down by Dicey. Second this study will examine how European case law has taken precedents over English law and how the United Kingdom courts have dealt with this. Third this study will present arguments advanced by academics. Forth this study will examine the relationship between the Human Rights Act ("HRA") 1998 and Parliament's sovereignty. In particular it will look at the functioning of section 3 and 4 and parliamentary sovereignty. Lastly this paper will conclude its findings.

**Definition of Parliamentary Supremacy**

A.V. Dicey said 127 years ago that the principle of Parliamentary sovereignty was: that Parliament has the right to make or unmake any law. Moreover, no person or body is recognized by the law of England as having a right to override or set aside legislation. Second Parliament cannot bind its successors.[1]

**Membership to the EU**

The doctrine of Parliamentary supremacy holds that the Parliament is the supreme legislature. Nevertheless, the European Court of

[1] Dicey AV, Introduction to the Study of the Law of the Constitution (1885), 10th ed, 1959, London: Macmillan at p. 39

Justice ("ECJ") has asserted the Supremacy of EU law over and above national law. In a famous EU law case the ECJ sated *obita* that the UK had limited its Sovereignty in certain areas, when signing the Treaty which allowed them to enter the EU.[2] The court in *Costa v ENEL*[3] stated that the EC Treaty *"carries with it a clear limitation of sovereign rights".*[4] The crucial issue of whether EU regulations take precedence over UK's was explored by a court in *Internationale Handelgesellschaft v EVCF*.[5] There has been a different conception of the issue between the UK and the EU. The ECJ predicated that *'The Law borne from the treaty cannot have the courts opposing it with rules of national law of any nature whatsoever...'*. In the *Costa* case, the ECJ said that national laws could be pre-empted either prior or subsequent to the enactment of community legislation, which has been enacted in the European Communities Act ("ECA") 1972.

**The ECA 1972**

Section 2(1) of the ECA says that EC treaties and law will have direct applicability in the UK. This gives primacy to the EU law. This has led to confusion in the UK courts as there have been a number of occasions where EU law and Acts of Parliament conflict and individuals who rely on the treaty may debate that the treaty must be given effect under the ECA 1972.

**UK case law**

UK case law is not conclusive with how far Parliamentary Supremacy goes with regard to the EU. Lord Denning in *Macarthy's v. Smith*[6] stated that European law is a method of statutory interpretation or an aid to construction. In this case Cumming Bruce LJ, disagreed with his approach that held if Community law is clear it should bypass national law, more in accordance with direct effect approach in *Van Gen Loss* and

[2] Van Gend En Loos, Case 26/62; Costa v ENEL, Case 6/64; Simmenthal, Case 106/77.
[3] Case 6/64 (15 July 1964)
[4] *Ibid*.
[5] 11/70 [1970] ECR 1125
[6] [1979] 3 All ER 325

*Costa*.[7] However, the House of Lords seems to have clarified the law now in *R v Secretary of State for Transport ex p Factortame*.[8]

**Factortame**

In response to the case Factortame, the UK Parliament enacted the Merchant Shipping Act 1988 which conflicted with EC law which allows the freedom to set up and operate companies everywhere in the European Union. The Spanish companies then argued that EC law is supposed to prevail over and asked for an interim injunction against the 1988 Act. The House of Lords thereupon granted an order restraining the Secretary of State from enforcing the legislation.

**Academic Opinion**

This effects Dicey's definition of Parliamentary Sovereignty, as the courts set the Merchant Shipping Act aside. William Wade's in his article 'Sovereignty – Revolution or Evolution?' regarded this as revolutionary. He claimed a loss of absolute sovereignty, because this has never been seen before in our constitutional arrangement.[9] Another way to see this issue is presented by Craig and De Burca, who argue supremacy remains intact and courts role has changed by letting Parliament set limits to their supremacy, so in that sense that Parliament has restricted itself too by enacting the ECA and courts should respect that.[10] Nevertheless, there is another argument by N. MacCormick who thinks that in today's time Parliamentary Sovereignty cannot exist in such a way presented by Dicey due to interdependence of economies. [11]

Moreover, the doctrine of Implied repeal states that *"where two acts conflict, the more recent prevails"*[12] (which has been the

[7] Ibid per Lord Justice Cumming Bruce
[8] (No.2) [1991] 1 All ER 70, HL
[9] Wade, W, 'Sovereignty – Revolution or Evolution?' (1996) 112 LQR 568
[10] Paul Craig / Graínne de Búrca, EU Law, 3rd ed., 2003, 301-312
11 N. MacCormick, Questioning Sovereignty, (1999), OUP, p.117-121
[12] Elliot M, Parliamentary Sovereignty under pressure, International Journal of Constitutional Law, 2004 at page 550

matter in *Thoburn v Sunderland County Council*[13],) this is supported by Dicey's approach saying that Parliament cannot bind its successors. What can be argued is the s. 2(4) ECA 1972 suspends the doctrine of implied repeal. Laws LJ stated that EU law prevails over an Act of Parliament and as the 1972 Act is a constitutional statute, it can only be repealed with the express intention of Parliament.

It can be argued the 'classical Dician doctrine' is not eroded by Factortame. For example it can be argued Parliament has not lost its Parliamentary Supremacy, it is just not using it, similar to what Craig and DeBurca are asserting. Nevertheless, Laws LJ explained this by saying that Dicey's definition (being 127 years old) is valid but has been modified by case law such as Factortame.

On the other hand, Lord Denning, obviously without knowledge of Factortame, argued in *Bulmer v Bollinger*[14] that *"no longer is European Law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all".* [15] in response to this an exaggerated perception was offered by Seamus Burnes, who said Lord Denning *"might have to revise his image of EU law being like an incoming tide permeating our existing legal order, and more realistically compare it to a tsunami enveloping everything in its path with irresistible force."*.[16]

**Conclusion**

In conclusion, Dicey's definition has been encroached upon because of the case of *Factortame* and the House of Lords was quite prepared to set aside the Merchant Shipping Act 1998. Furthermore, the fact that Parliament cannot bind its successors has also been violated because of section 2(4) ECA 1972 which has the effect of suspending the doctrine of implied repeal.

[13] (2002) Times 22/2/02, DC
[14] [1974] 2 All ER 1226
[15] The Independent, 16th July 1996
[16] Seamus Burns, An incoming tide [2008] 158 NLJ 44

**Essay Question 2**

Explain why the principles of autonomy, supremacy and direct effect are considered to be fundamental requirements for the legal order of the European Union.

**Answer**

The principles of autonomy, supremacy and direct effect are not written in the EU Treaty, yet are considered to be fundamental principles of the European Union. This essay will explore how these doctrines are fundamental and conclude that they are essential to the overall Legal order of the European Union.

The autonomy of community law means that it is quite independent of the legislation passed by the Member States and comes from an external source despite being created by the Member States themselves. This makes community law supranational; it extends equally and uniformly over member states territories, and is applied by their national courts in its original form. This is therefore fundamental to the legal order as having supranational law ensures the conformity of member states.

The uniformity of EU law's interpretation is assured by the obligation to seek preliminary rulings from the community court. This is where the national courts member states raise a question to the ECJ about the interpretation, validity of the Act, Treaty and statutes of bodies established by an act of the council.

The autonomy of the Community law rests both on the concept of unity and on the principle of separation of powers or functions. The constitutional principle of separation means, in the community context, a division of functions between the community institutions and Member States and in the administration of justice, between the community court and national courts.

The practical application of the doctrine of autonomy is seen in areas where the integrity and effectiveness of community law has to be safeguarded. Or where it has to be distinguished from

national laws as for example in the field of competition where the two systems overlap. The ECJ stated that the efficacy of the Treaty would be impaired if the specific tasks entrusted to the Community were not interpreted as totally independent. It follows that the Member States are in no position of taking unilateral measures to carry out the mandatory provisions of community law. The concept of the autonomy of community law was first mentioned by the ECJ in *San Michele v High authority of the ECSC*, which the court stated it is set apart from national law as a separate and independent legal order yet it rules directly over the territories of the member states and reflects a federal legal system.

Supremacy is a fundamental principle of the EU legal order as it reinforces the autonomy of the EU. Furthermore in accordance to Hart's rule of recognition supremacy of EU law has been noted by authors such as Alter, Cruz and Steiner as only being supreme due to the member states acceptance of the EC Treaty.

Supremacy's further importance in the integration of the European community was highlighted by Cruz, which he claimed 'Without supremacy community law ceases to be communataire.

Supremacy can be divided into structural and absolute supremacy. Structural supremacy is its ability to dis-apply national rules on procedures and remedies. Absolute supremacy is its ability to override the most cherished constitutional norm.' This was exemplified in the case of *Van Gend en Loos* where the ECJ stated that 'the community constitutes a new legal order in international law, for whose benefits the member states have limited their sovereign rights, albeit within limited fields.' This was further reiterated in the case of *Costa v ENEL*, here Mr Costa was a shareholder in the Italian electricity industry which had been nationalised by an Italian statute. Mr Costa claimed that the Nationalisation Act contravened European Community Law and it was held impossible for a member state to give priority to a subsequent national law over European Community law. The ECJ further commented on how 'The Treaty carries with it a clear limitation of sovereign rights'.

The question of the supremacy of EU regulations was brought to the ECJ through the case of *Internationale Handelgesellschaft v*

*EVCF* 11/70 in which the national court asked about the interpretation and legality of selected provisions of customs regulations dealing with compulsory deposits lodged in connection with import licences. The ECJ again emphasised that 'The Law borne from the treaty cannot have the courts opposing it with rules of national law of any nature whatsoever...'. This was reaffirmed in *Erich Ciola*. In the case of *Simmenthal* the ECJ identified the importance of Community law protecting individual rights and the consequent setting aside of national laws due to this. It further confirmed and elaborated on the *Costa* case, stating that national laws could be pre-empted either prior or subsequent to the enactment of community legislation.

The supremacy of Community law has caused problems for national constitutions as the national perspective of Supremacy appears to be different. This is because of a number of constitutional reasons in a number of member states.

With regards to the UK the traditional view expressed by AV dicey that Parliament was sovereign and could make or unmake any law on any subject whatsoever without legal constraints. Was generally accepted as a reality 100 years ago. However two principles remained a matter of dispute: The fact that Parliament could legislate on any matter and that parliament could not bind its successor.

The United Kingdom being a dualist system allowed EC law to come into force through the European Communities Act 1972. Section 2(1) of this act particularly conveyed how the UK limited its sovereign rights in favour of the EC. However section 2(4) limited the EU's sovereignty over domestic law. This subsection ensured that all domestic enactments had effect only subject to directly applicable rules of community law. Overriding the usual presumption that any later enactment overruled earlier law inconsistent with it, and clearly limited the effect of any primary or secondary legislation' purporting to contradict any provision of the EC Law.

The judge's belief that the Europeans Act would coincide with national law was seen in the early case of *Shield's v Ecoomes* (1979) where Lord Denning stated that 'By the 1972 Act,

parliament enacted that we should abide by the principle as laid down by the European Court.

The case of *Mcarthy v Smith* created a new approach to interpreting European Law. A female employee took over from a male predecessor, whose contractual pay was less than his. There was therefore an issue over whether the act complied with the article. Lord Denning consequently treated the European measure as an aid to construction and therefore treated the question as an aid to statutory interpretation. Justice Cumming-Bruce in his dissenting judgement stated that community obligation if clear should bypass national law, more in accordance with direct effect.

Nevertheless Lord Denning's construction approach was applied in consequent case law such as *Garland v British rail engineering*. However this gave rise to concerns about whether too much emphasis was being placed on the construction approach in England. This was because the European court in *Van Gend en Loos* stated that European obligation should not be conditional upon national law.

The case of *Factortame* however brought about a change to the constructive approach through another challenge to the United Kingdom's sovereignty. This case concerned Spanish nationals who were discriminated against by the Merchant Shipping Act 1988.
The ECJ ordered the national court to suspend the operation of an act of parliament, something that had never been done in the UK and that breached parliamentary sovereignty . This brought about academic debate on the concept of parliamentary sovereignty.

Authors such as Wade stated that the act having to be disapplied meant 'that something drastic had happened to the traditional doctrine of parliamentary sovereignty'. He claimed that this was revolutionary on the grounds that the courts were no longer prepared to uphold absolute parliamentary sovereignty. He further rejected the constructive approach believing that what happened in *Factortame* was an application of a rule of interpretation. This meant that parliament was presumed statutes not to override EU law. This view was also held by Sir John Laws.

Alternatively Craig and De Burca argued that sovereignty remained intact. Although the courts had altered their role. They allowed parliament to set the limits of its sovereignty rather than defining those limits within themselves.

On the other hand Mccormick argued that in the modern world it was no longer realistic to speak in terms of absolute sovereignty due to the inter-dependence of economies.

However many English Lawyers, did not accept the European Court's view. They contended that European law overruled English domestic law only because parliament had chosen to make it so, and that parliament could change its mind at any time. All the rights and obligations created by EU law were incorporated by the ECA into English domestic law, and took precedence even over primary legislation where this was inconsistent.

A balance is thus preserved between the supremacy of EU law in matters of substantive law, and the proper supremacy of the UK parliament in establishing the legal framework within which EU law operates.

There is now an external body competent to make laws affecting the United Kingdom, which are applied by the English courts irrespective of the wishes of Parliament. The UK is not the only country to have struggles with supremacy in their national jurisdiction this is also seen in other European Union member states such as Germany and Poland.

Direct effect is implicit in supremacy. These doctrines have been described as the 'defining characteristics of EC Law'which have made it unique in comparison to international law. Without direct effect and supremacy which ensures uniformity and consequently legal certainty 'the legal system and its application would be imperilled'. Direct effect ultimately gives the individual rights and with this the people of the Member States are brought directly into the European Community in a way which transforms the Community into something much more than simply the sum of its Member State parts.

Having established the supremacy of Community law over national law, the ECJ introduced the concept of direct effect through the case of *Van Gend en Loos*. This was the result of the court's view that a new legal order had been established with the Community, which gave rights to individuals that their national courts had to uphold. This was subject to three requirements being satisfied and meant that an individual could claim a right under the Treaty, administrative act or other act treated as *sui generis* by the Court. This very important development was implied by the ECJ under its powers of interpretation and within its role in explaining what Community law was. Thus, it was possible to identify three issues, which could be referred for a ruling under Art 267 namely, interpretation, validity and direct effect.

Craig & De Burca observed that it could be narrowly defined as its capability to grant entitlements to individuals. Lenaerts highlighted these entitlements derived from a higher 'norm' which would not have been present in the relevant national legal system. Dougan further articulated in the 'primacy model' of the relationship between direct effect and supremacy, that direct effects domain was of granting rights rather than setting aside national law. It additionally had a substitutionary effect. This was endorsed by Lenaert who stated that direct effect 'supplemented the gaps in the national legal order.'

The nature of how all legally EC binding acts were capable of direct effect of community law in national courts was further reinforced in the case of *Grad V Finantanzamt Traustein* which concerned the enforceability of a decision which gave a time limit for amending national vat laws, the ECJ stated that it would be 'incompatible with the binding nature of decisions.' if citizens could not enforce them and as it met the *Van Gend en Loos* criteria it was capable of direct effect. The case of *Van Duyn v Home Office* deviated away from community laws enforceability against national courts and set out the conditions needed for any provision of community law to be directly effective. The criteria were that it needed to be clear and precise/unconditional without exceptions and not require any implementation by the Member States.

After the successful application of direct effects to other areas of EC law, the contentious issue of directives was then brought to the

courts attention. This was due to the nature of directives not giving rise to direct effects automatically; as they were orders addressed to the state to implement certain law into their system .The ECJ made a distinction between direct effects concerning directives .Directives could only be enforced against the state or be vertically directly effective. Rather than having horizontal direct effect, which was against private individuals and which was what Treaty articles, regulations and decisions were capable of doing.

A number of case law was used to outline the principle of vertical direct effect. *Defrenne v SABENA (No.2)* stated that the directive must give clearly identifiable rights to individuals. *Pubblico Ministero v. Ratti* added that the time limit for the Member State to enforce the directive must have passed. Lastly *Marshall v Southampton South West Hampshire Area Health Authority* stated that directives were only capable of vertical direct effect, this case involved a women being made to retire contesting that the different retirement ages of men and women was against the equal treatment directive 76/207. In addition to this *Foster* v *British Gas* expanded the definition of the state to being a body subject to its control and which had special authority given to it by the state, evidence of a broad definition of the state was further seen in the *NUT v Governing Body of St Mary's Church of England (aided) Junior School* where educational institutions were seen as part of the state.

Due to this broad characterization of the state the ECJ further imposed a duty of harmonious interpretation which was for international courts to construe national law in light of Article 10. This principle was spawned in the case of *Von Colson and Kamann V Land Nordrhein-Westfalen* and was arguably seen as a way for courts to avoid the use of direct horizontal enforcement.

Many member states failed to recognise indirect effect. For example the French courts in *Minister of the Interior* prevented the claimant from using Directive 64/221. Similarly the English courts in *O'Brien* refused to accept that the Equal Pay Directive 75/117 had direct effects. Furthermore the German tax court in *Re VAT Directives* also refused to implement the sixth VAT directive.

This was because Article 288 TFEU differentiated between regulations being directly effective and directives which were implemented through national legislation. Weiler purported the idea of formalism where the legal language used by the ECJ provided a conceivable concept that member states followed. This was violated without the express mention of the direct effect of directives.

Despite 'pockets of resistance'in member states such as Germany exemplified in *Internationale Handelsgesellschaft,* states have come to accept direct effect and supremacy. Reasons included the empowerment of all courts to exercise the power of judicial review which was prohibited in non -community cases. Moreover direct effect and supremacy suited member states due to common interest that the rules were followed.

This was reinforced by historical institutionalists who believed that states gave power to the ECJ to adhere to the intention of the founders, in turn the ECJ required deference to supremacy. According to Ginsberg the early establishment of direct effect and supremacy saved the Treaty from being undermined by states who would have reinstated their prerogatives.

To conclude autonomy, supremacy and direct effect are fundamental to the legal order of the European Union as they ensure a means of compliance by member states to the workings of the European legal order and further grant rights to individuals, allowing for a social element to the integration of the European Union.

# Chapter 2 - Direct Effect, Indirect Effect and State Liability

**Essay Question 1**

**"***The establishment of direct effect and the supremacy of EU law was a mistake. The various rationales employed by the Court of Justice to justify their development have been seriously flawed. The principles governing the supremacy of EU law are far too strict while the principles governing direct effect are an incoherent mess. Yet these problems can be resolved easily."* Critically discuss this statement with reference to relevant treaty articles, decided cases and academic opinion.

**Answer**

**Introduction**

Part 1 will discuss Supremacy. It will examine the rationale of the doctrine. It will further examine if the doctrine of supremacy is too strict. It will then examine if the doctrine can be reconciled? Part 2 will be an examination of the "direct effect doctrine" which will determine how it has been treated by the Court of Justice of the European Union ("CJEU"). The analysis of the doctrine will be followed by a study of restrictive limitations, the vertical and horizontal direct effect arbitrary distinction ("VDE" and "HDE") and the reasoning behind the Marigold case will also be looked into.

**Part 1- Supremacy**

The supremacy of the European Union ("EU") and its law, which is often referred to as primacy of EU is the principle that EU law in its entirety supersedes the domestic laws of the Member States ("MSs"). Thus EU law prevails over domestic law. This means that the individuals of the member states can rely and cite EU law in their national courts, i.e. EU law has direct effect in national courts.[17]

[17]Burley, Anne-Marie, and Walter Mattli. "Europe before the Court: a

**Doctrine of Supremacy**

The European Economic Treaty did not have any provision on supremacy of EC law. However, a primacy section was included in the Constitutional Treaty, Article 1-6, and consequently a declaration on primacy was included in the Lisbon Treaty (Declaration 17).But prior to the introduction of primacy the ECJ had pronounced its visualization of supremacy in their earlier jurisprudence. In **Van Genden Loos**[18]the ECJ as they were then held:

> *"the Community constitutes a new legal order of International law for the benefit of which the States have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only member states but also their nationals".*[19]

Moreover, in **Costa v ENEL**[20]the ECJ as they were then held:

> *"the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves...Such a measure cannot therefore be inconsistent with that legal system… the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."*[21]

The point to note is that supremacy of the EU law was created by ECJ and is not something which is in Treaties. ECJ talked about "spirit" of Treaty, this was not the drafters' intentions. Commentators argue that EU law should be accorded superiority

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political theory of legal integration." International organization 47.01 (1993): 41-76.

[18](Case 26/62) [1963] CMLR 105

[19]*Weatherill, Stephen (2007). Cases and materials on EU law.Oxford University Press. p. 9*

[20](1964) Case 6/64

[21] Ibid

because it stems from the treaty that has been made by the MSs when they joined the EU and formed a new legal order. Yet, no reference to the constitution of MSs was made. This perhaps should have been done. Functional commentators argue the aims of the Treaty would not be achievable unless EU law was accorded supremacy. The security of uniform application of EU law and it effectiveness is the only way the EU can achieve its purpose. Dougan has argued that the doctrine of primacy produces exclusionary effects within national legal systems, in that it sets aside domestic laws that are inconstant with a *"hierarchically superior norm of Community law".*[22]This is distinguished from the substitution effects where the direct application of Community law is concerned.[23]

**Is the doctrine of supremacy too strict**

An instance of where the doctrine has been seen as too strict is where the French disagree with EU law being supreme over all national law. France believes that "EU law ranks above statute, but below their constitution".[24]Additionally, Germany claims that EU law is not absolutely applicable. In the case of **Internationale Handelsgesellschaft,**[25] the impact of EU law on the German Constitution was considered. The highest German Court ignored the supremacy of EU law on the grounds that it would detrimentally impact the fundamental rights in the German constitution. Of course, the ECJ disagreed. German Courts claim that they will review EU laws for *"compliance with fundamental rights*" until they are satisfied that EU law gives *"equivalent protection".*[26]In **Solange II**[27]**,** following developments in EU

[22]Dougan, Michael. "When worlds collide! Competing visions of the relationship between direct effect and supremacy." Common market law review 44.4 (2007): 931-963.
[23]Ibid
[24] Sweet, Alec Stone. "Constitutionalism, legal pluralism, and international regimes." Indiana Journal of Global Legal Studies 16.2 (2009): 621-645.
[25] 13 Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125
[26]VerfG E271, English translation [1974] 2CMLR 540 - Internationale Handelsgesellscha.fi v.Einfuhr und Vorratsstelle fur Getreide und Futtermittel.
[27]VerfGE 73, 339 2 BvR 197/83 Solange II-decision; Date: 22 October

fundamental rights jurisprudence the German Court now accepts that equivalent protection is provided and that it will no longer review EU laws for *"compliance with fundamental rights".* Frowein argues that the courts did not *"surrender their jurisdiction over fundamental rights",* but simply claimed that they would not exercise that jurisdiction while the ECJ continues the present circumstances.[28]In **Honeywell,**the German courts claimedthat the EU law was being used beyond its competence and hence was *ultra vires.*[29]

In **Gauweiler v Lisbon Treaty**[30]the German court has authority to engage in *ultra vires* review. The Union is not a democracy which means that integration cannot go so far as to affect the ability of the democratic state to put itself together (i.e. "*the state must take a role in criminal law, war and peace, public expenditures and taxation, welfare, and culture and religion"*).[31]The EU cannot take on powers such as military, revenue, key social powers. Moreover, under extraordinary conditions the *"Federal Constitutional Court may declare EU law inapplicable in Germany in violation of Germany's constitutional identity as a democratic federal state"*, this is referred to as the identity lock.

**Can the doctrine be reconciled?**

The UK accepts supremacy not on the basis of authority of EU law, but the intention of Parliament in passing the ECA 1972, which is a *"constitutional statute".* The Conceptual basis for acceptance of supremacy was seen in the case of **Factortame II**. Lord Bridge accepted the principle of supremacy relied upon by the ECJ and connected the acceptance of the principle by the UK to the UK statute 1972 European Communities Act. Moreover in the case of **Thoburn v Sunderland CC***,* acceptance of supremacy by domestic courts was considered. Laws LJ said that *"common*

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[28] J.A. Frowein, 'Solange II, (BVerfGE 73, 339) Constitutional complaint Firma W.' (1988) 25 Common Market Law Review, Issue 1, pp. 201–206

[29]Honeywell decision.(BVerfG, 6 July 2010, 2 BvR 2661/06, NJW 2010, 3422-30).

[30](2 BvE 2/08) 45

[31]Ibid.

*law had modified the traditional concept of parliamentary sovereignty"*, which created exceptions to the *"doctrine of implied repeal"*, also known as *"constitutional statutes"* (of which ECA 1972 was one) which could only be repealed by express wording.[32]

MacCormick argues that there is a constant interaction between the two legal systems- the legal systems of the member states on one hand and the EU law legal system on the other. The national courts have no authority to assume dominance over the international order and in case there is a conflict between the two legal systems, there is always the alternative possibility of recourse to adjudication or international arbitration.[33]

Kirchhof argues that if EU law is made autonomous it will lose its authority and power to develop since the ECJ and domestic courts both have adjudicatory functions and responsibilities of their own, it must be a question of balance and collaboration not subordination, domination or supremacy.[34]

Eeckhout argues that pluralism in this case is based on the highest courts, namely the CJEU on one hand and the national high courts on the other, making contradictory claims about the final authority. The Court of Justice has to identify that its authority is also bound by the questions of EU law. It does not have ultimate authority over national courts' acceptance of EU law. Moreover, the jurisdiction of national courts must also be respected, which means that there must be no unnecessary interference in the questions of national law.

## Part 2 - Direct Effect

In order to make EU law effectual and reliable it must be given precedence over the laws of the member states. The case of **Van**

[32] (2002) EWHC 195 (Admin)
[33] Hix, Simon, and Bjorn Hoyland, "*The political system of the European Union*", Palgrave Macmillan, 2011.
[34] Schilling, Theodor. "Autonomy of the Community Legal Order: An Analysis of Possible Foundations, The." *Harv. Int'l. LJ* 37 (1996): 389.

**Genden Loos**[35] laid down the "doctrine of supremacy". In this case, a customs duty imposed under a Dutch law was challenged on the grounds that it did not comply with the EC treaty Article 12. The ECJ (as they were previously known) held that the EU law superseded the Dutch law and the Dutch had limited their sovereign powers. Therefore, the "doctrine of direct effect" is an EU provision that can be invoked by any individual of any member state which will have a binding effect. Most of the EU treaties[36], regulations[37] and decisions can be relied upon.

However, the EU directives are not applicable directly. [38] Since, a directive does not immediately become 'law', it highlights the objectives which the member states need to accomplish, which can be done in any way the member states deem fit. These directives may be applicable to some or all member states. [39]

The aforementioned case of **Van Gend** laid out few conditions that have to be met before an EU law can have "direct effect".[40] The **Reyners** test[41] states that the provisions of the law in question must be clear, precise and absolute. For directives, the doctrine is based on the principle of estoppel: they are capable of "direct effect" to increase their efficacy and make certain that Member States do not take advantage of their own inactions[42]. However, "direct effect" is only possible after the "deadline for implementation of the directive expires."[43]

The CJEU has placed another restriction on the "direct effect" of directives: the directives can only have VDE.[44] Invoking Article

[35] Van Gend en Loos v NederlandseAdministratie der Belastingen [1963] ECR 1 (26/62)
[36]Defrenne v Sabena (No.2) [1976] 2 CMLR 98, ECJ
[37]Taittinger v Allbev [1994] 4 All ER 75, CA
[38]Craig, P. and De Búrca, G., The evolution of EU law. (Oxford: Oxford University Press, 1999) p.279
[39]*Article 288* TFEU
[40] Van Gend en Loos v NederlandseAdministratie der Belastingen [1963] ECR 1 (26/62)
[41]Reyners v. Belgium [1974] ECR 631 (2/74)
[42]Becker v. FinanzamtMünster-Innenstadt [1982] ECR 53 (8/81)
[43]PubblicoMinistero v Ratti [1980] 1 CMLR 96, ECJ
[44] Marshall v. Southampton Area Health Authority (152/84 ) [1986] ECR

288 paragraph 3 of the Treaty on the Functioning of the European Union ("TFEU"), the CJEU stated that the directives were incapable of HDE. Unlike a regulation which becomes a part of the national law instantaneously, a directive requires a nationally implemented legislation to become operational. The reasoning behind distinguishing between HDE and VDE is that Article 288 does not make directives binding on private individuals. In another case of **Dori**[45], it was held that the regulation imposes obligations of individuals which a directive does not do.

This arbitrary difference has led to many problems, for instance the cases of Duke[46] and Marshall.[47] Both the cases dealt with a dispute over retirement age but the outcomes were different as one was considered to be a function of the state and VDE was made applicable, where the other was not. Clearly there are two rules, one for the emulation of the state and the other for non- state bodies, with community rules being ignored. Moreover, political agendas have limited the scope of directives which makes bad law. Therefore, the CJEU has diluted the "direct effect doctrine" through the use of "arbitrary distinctions" and "faulty reasoning."[48]

The CJEU has supported this claim that as stated in **Marshall**[49] and **Dori**[50], a directive cannot be relied upon by private individuals in national courts. In these cases, the CJEU utilized a treaty provision which would be directly effective[51], or ignored the possibility of HDE by claiming that the action was not covered by the directive [52][53], hence clearly discounting the "direct effect doctrine". The Court has extended the doctrine of VDE for

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[45] Faccini Dori v Recreb [1995] All ER (EC)
[46]Duke v GDC Reliance Ltd. [1988] ICR 447
[47] Marshall v. Southampton Area Health Authority (152/84 ) [1986] ECR 723
[48]Ibid
[49] Marshall v. Southampton Area Health Authority (152/84 ) [1986] ECR 723
[50] Faccini Dori v Recreb [1995] All ER (EC)
[51] J Steiner, L Woods and C Twigg-Flesner, EU Law, 9th ed. (Oxford, Oxford University Press, 2006) p. 97.
[52]Worringham v Lloyds Bank Ltd. (69/80) [1981] ECJ
[53] Burton v British Railways Board (19/81) [1982] ECJ

directives in cases like Unilever[54] and CIA Security[55], using terms such as "exclusionary effect". These aforesaid cases point out that these directives can be enforced between individuals horizontally.

The CJEU tried to expand the "direct effect doctrine" to overcome the absence of HDE, this extended their inconsistent principles further. Therefore, in the case of Foster[56] the Court examined the same issue as in the Marshall case[57]. In Foster the definition of "state organ" was stretched out to include a "nationalised utilities company", which was another "arbitrary distinction".

The ECJ held in the case of **Van Colsson**[58] that in order to meet the treaty requirements, the aim of the directives must be kept in mind by the domestic courts while interpreting domestic law. This obligation is called the "indirect effect".

In the case of **Marleasing**[59] which dealt with private individuals, the Court claimed that the domestic courts must keep the wording and aim of the directives in mind while interpreting the directives, thus confirming that directives have an impact even on cases involving private individuals.[60] In its quest to bar HDE and expand VDE for directives, the CJEU has made the difference almost invisible.[61] Hence, this has led to more confusion.

The ECJ in the case of **CIA Security**[62] which involved private individuals gave direct effect to a directive which had not been implemented, pointing to the possibility of "horizontal direct

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[54] Unilever Italia SpA, v Central Food Spa (443/98) [2000] ECR
[55]CIA Security International SA v. Signalson SA and SecuritelSprl (194/94) [1996] ECR
[56] Foster and Others v British Gas Plc. (188/89 )[1990] ECR I-3313
[57] Marshall v. Southampton Area Health Authority (152/84 ) [1986] ECR 723
[58]Van Colson and Kamann v Land Nordrhein-Westfalen (14/83) [1984] ECR 1891.
[59]Marleasing SA v Law ComercialInternacionale de Alimentacion SA (106/89) [1990] ECR I-4135
[60] Craig and de Burca, ibid., p 289.
[61] Craig and de Burca, ibid., p. 300.
[62]CIA Security International SA v. Signalson SA and SecuritelSprl (194/94) [1996] ECR

effect" in case of directives as well. [63] When this discrepancy was pointed out by Advocate- General Jacobs[64], the ECJ held that the emphasis was on the objectives of the directive which does not create any rights or obligations on an individual but involves the failure of a state to apply it. This decision is clearly arbitrary.

The CJEU in another case of **Mangold**, extended the HDE doctrine to a directive involving equal protection and making the domestic courts responsible for ensuring the effects of such rights, even though the deadline for implementing the directive had not passed yet. [65] After the Lisbon Treaty (2009) which gave more rights to the CJEU, the Court further emphasised the decision in Mangold[66] by reinforcing the principle in **Kücükdeveci.**[67] It was claimed that the directive clearly "gave expression" to the principles of EU law. Therefore, it was within the domestic courts' jurisdiction to provide legal protection under EU law to the private individuals seeking relief. This time marked the use of both HDE and VDE for directives. [68]. But this raises a lot of questions [69]due to its inconsistency with Dori[70]. With such clear discrepancies between similar cases, the inconsistent and arbitrary principles employed by CJEU need an explanation.

The unnecessary use of restrictions on direct effect of directives and arbitrary distinction between HDE and VDE[71] has seriously diluted the doctrine. Although the doctrine has been extended horizontally by cases such as **Mangold**[72], the CJEU has

[63] Barnard, ibid., p. 132.
[64]CIA Security International SA v. Signalson SA and SecuritelSprl (194/94) [1996] ECR
[65] Werner Mangold v Rudiger Helm, (144/04 )[2005] para. 75-77. ECJ
[66] Werner Mangold v Rudiger Helm, (144/04 )[2005] para. 75-77. ECJ
[67]SedaKücükdeveci v Swedex GmbH and Co, KG (555/07) [2010] ECJ
[68]M de Mol, "Case Note 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law' ", ECLR 6 (2010) pp 293-308;
[69] Ann Wiesbrock, "Case Note Case C-555/07, Kücükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010", German Law Journal 5, Vol 11, pp. 539-550.
[70] Faccini Dori v Recreb [1995] All ER (EC)
[71] Faccini Dori v Recreb [1995] All ER (EC)
[72] Werner Mangold v Rudiger Helm, (144/04 )[2005] para. 75-77. ECJ

continually discounted the doctrine which has led to a lot of disparity between similar cases. Even though the extension of VDE and HDE are steps in the right direction, it shows that the CJEU has always engaged avoidable limits and then tried to spread out the workings of the doctrine.

**Problem Question 1**

Assume the EU law has passed the following two laws, a directive and a regulation, in the area of employment law.

Directive 2009/1 passed in July 2008. Article 2 of this Directive states: 'An employee shall be entitled to five days holiday leave on attainment of long service employment. Long service is employment with the same employer for 20 years'.

Regulation 3/2012 Article 4 states 'An employer may deduct proportionate expenses, not exceeding half of one month's salary, from an employee's salary, where the latter has caused loss to the employer intentionally or through carelessness or recklessness'.

The directive states that Member States have three years to transpose it onto national law. The regulation itself does not state when it is in force. There is no UK providing rights matching those in the directive or the regulation.

Ahmed and Bola both work as Administrators. Both started working with their respective employers in 1982 and have stayed employed with their employers all this time. Both have had their requests for long service leave refused by their respective line managers. Ahmed works for Redchester County Court. Bola works for Macphere LLP a firm of solicitors.

Bola's employer has informed her that it will deduct from her wages a sum of money to pay towards damage caused by her to a work photocopier. She has admitted that she damaged it when she kicked it in frustration when paper became stuck.
In relation to this scenario explain for each party, Ahmed then Bola, whether any of these EU rights or obligations could be enforced in the UK:

Under the Van Gend en Loos principle
And, if you conclude that the above principle does not apply in a particular case, explain and advise if (ii) any other relevant EU law could lead to a remedy in the UK courts

**Answer**

**Introduction**

This answer will discuss the above scenario in relation to law of Direct Effect in the European Union ("EU").

1. Nature of the right
2. First this paper will advise Bola;
3. Second this paper will advise Ahmed

**Nature of the right**

In order to analyse and apply the assumed directive and regulation to the advisable parties it is important to understand the applicability of EU law in the UK. The treaties of EU Law do not explicitly mention EU law applicability in Member States. Article 288 of TFEU states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." However there is a difference in applying directives in comparison to regulations. EU law is enforceable in Member States through the principle of 'direct effect'. The case of ***Van Gend Loos*** 26/62 set the foundation for EU law enforceability in member states. The European Communities Act 1972 accepts EU law enforceability in the UK. Below is an in-depth analysis of advice to Ahmed and Bola individually in relation to their rights and obligations under the Van Gend Loos principles.

**Bola**

Directive 2009/1 passed in July 2008. Article 2 of this Directive states: 'An employee shall be entitled to five days holiday leave on attainment of long service employment. Long service is employment with the same employer for 20 years'. Bola started working in 1982 and had his requests for long service leave refused. Bola works for Macphere LLP a firm of solicitors. As far as the directive is concerned, Bola's case is different as the organisation she works for is a private company. As directives have vertical direct effect, it is important to satisfy the last requirement of the three conditions under ***Marshall v Southampton & SW Hampshire AHA***). Macphere LLP is a

private solicitor's organisation. As directives are only articulated for the State, they cannot be enforced against non-state parties. The facts do not state any national law interpreted under this directive, hence solution for indirect effect not possible in this case to help Bola (***Wagner Mirret***). However State liability argument can be used in this case, where Bola can sue the State (UK) for failing to administer the directive into national law (***Factortame and Brasserie du Pecheur***).

Bola has the right to challenge the Regulation 3/2012 despite general application to all member states with direct effect. However if Bola challenges the enforceability of the Regulation under ***Van Gend en Loos*** principles, it is important to satisfy whether the regulation is unconditional, clear and precise. From the wording of the regulation, the terms 'half of one month's salary, from an employee's salary, where the latter has caused loss to the employer intentionally or through carelessness or recklessness,' does not seem sufficiently precise and clear as described in (***Defrenne v. Societe Anonyme Belge de Navigation Aerienne***) It is not clear what elements may qualify as carelessness or recklessness or how to interpret intention of the employee. However the prima facie facts do not state whether the Regulation came into force and therefore one cannot challenge EU legislation if the law has not come into force. Therefore there is no clearance of whether the Regulation took effect as EU law, and therefore cannot proceed with further action.

**Ahmed**

Directive 2009/1 passed in July 2008. Article 2 of this Directive states: 'An employee shall be entitled to five days holiday leave on attainment of long service employment. Long service is employment with the same employer for 20 years'. Bola started working in 1982 and had his requests for long service leave refused. Ahmed works for Redchester County Court. In order to exercise his rights and obligations under EU law, it is important to examine which elements of assumed EU law apply to his scenario. From the facts it is quite clear that the directive 2009/1 on employee leave applies to Ahmed's case. As he has been refused leave by his employer Redchester County court. Directives applicability in member states is determinable under Article 288

which leaves applicability to national member states.

*"A directive shall be binding…upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."*

As directives are left to national member states to entrench and implement as national law, three conditions must be satisfied for it to be applicable in the UK. According to ***Pubblico Ministero v Ratti*** the deadline date for the implementation of the directive must have passed. Secondly, the conditions of ***Van Gend Loos*** case must apply in that the directive should be unconditional, clear and precise. Thirdly, the directive is only relied upon if it is applicable to state or emanation of member state (***Marshall v Southampton & SW Hampshire AHA***). Directives are given vertical direct effect, in which they are directly applicable to member state not to individuals. In Ahmed's case, the three conditions are satisfied whereby the date of the assumed directive is 2009/1 has passed, from the wording of the directive; it appears to be unconditional, precise and clear (***Van Duyn case***). Lastly, because directives have vertical direct effect, Redchester County Court, being a public organisation could be referred to as "emanation of a state" as per ***Foster v British Gas*** where it was declared that a state body can be classified as an organisation with state control, offering public service and containing special powers. Under this, Redchester County Court appears to fulfil those requirements and therefore Ahmed can claim his rights and responsibilities under the directive taking action against UK.

## Endnote

The whole book is available for purchase on our website. We hope you found the example to be interesting and that it was of use to you in some way. Private Law Tutor Publishing's mission is to provide legal education tools that are simple to use and comprehensive for students of all levels, with no consideration for financial gain. We utilise the proceeds from book sales to fund the development of new materials. This publication is authored and published by a group of barristers who are also law tutors, and it is available for purchase online. They have banded together to provide assistance to law students all across the globe.