THE SOVEREIGNTY OF PARLIAMENT AND THE EUROPEAN UNION

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BRIEFING PAPER ON
THE RELATIONSHIP BETWEEN THE UK AND THE EU.

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Introduction

Increasingly the British public is confronted by situations where the so called British way of life appears to be threatened by Britain's membership of the European Community. Many of the outcomes of disputes involving apparent conflicts between Britain and the European Community appear to be unacceptable to the British public fuelling anti-European sentiments in Britain. This is counter productive since the whole purpose of membership of the European Community is to enhance the way of life of all European Citizens including the British. Why does this happen ? Does it have to happen ? What, if anything, has gone wrong ? Can it be put right ?

The need for a device to protect the interests of member states.

As the legal system in the European Community has evolved a constitutional regulatory device essential to protect the interests of member states has either been left out or has not been used effectively by either the European Court of Justice or the British Courts when considering legal issues involving the Community. Whilst the European Community can operate at a superficial level for a considerable length of time without recourse to this constitutional device, its absence or non-use could ultimately result in irreconcilable political problems which could in turn result in the political destruction of the European Community. Creating this device or introducing a mechanism to make the courts take judicial notice of the interests that it is designed to protect requires political will and in particular political recognition of the need to create or enforce it. That apart, it should be a relatively simple affair to introduce a legal measure into the European Treaties to solve the problem and to ensure that justice is not only done but that it is seen to be done. The reasoning behind judicial decisions must be apparent to all. No one should ignore or minimize the importance of introducing such a measure as a matter of urgency.

The proposed solution will not solve all the perceived problems that membership of the Community has visited on Britain, nor should it. Many problems are the result of the British Government's failure to learn quickly enough how to deal effectively with Community law.

The need for openness in EC affairs from both the Government and the EC

Changes in law affect different people in different ways. Those who suffer from changes in the law tend to blame whoever made the change even though the change is generally beneficial in that it has more advantages than disadvantages. For example, higher M.O.T. standards mean that some cars will end up on the scrap heap. Naturally, owners of such cars may well be unhappy at this outcome. However, the safety of everyone including the owner is worth protecting and the harm caused to the interests of the affected owners is far outweighed by the advantages to society as a whole. Sometimes the government provides relief for those that suffer from a change in the law, sometimes it does not. This is true of British and European Community Law. The most important thing here is for government to explain the changes clearly to the public and to highlight the advantages.

There has often been a failure by the British Government to publicize and explain the reason behind, and the impact of, European Law to the public at large, resulting in press reports of suffering by individuals, which consequently provoke unnecessary public outrage. For example, the adverse reaction to Community measures regarding uniform packaging rules and decimalization of weights and measures was the result of poor presentation by the British Government. Uniform rules will eventually result in lower prices since manufacturers will be able to market their goods anywhere in the Community using the same packaging. Better publicity, in advance of the legal changes would have gone a long way towards diffusing the problem.

The failure of the UK to maximize benefits to be derived from Europe.

Another cause of resentment is that often the British Government does not take advantage of opportunities available to the U.K. through the European Community. Such schemes can often offset the adverse affects of changes in the law introduced by the Community.

It is only in recent times that the U.K. has started to take advantage of Regional Aid. The longer we are in the European Community and the greater the expertise developed by the British Government and other agencies in the U.K. the sooner such problems will be solved.

The need the EC to impose an equal playing field.
The British Government often enforces European Law very promptly whereas other member states do not, resulting in unequal treatment for British interests in the interim period until other states enforce the law as well. Regrettably it would appear that these periods can be rather long. Some member states have even introduced measures which make the problem worse and encourage organizations in their states to do the same. The European Commission has the job of tackling such abuses but the procedure is slow and cumbersome and the problem is growing not decreasing. This has been exacerbated by British organizations such as the Equal Opportunities Commission which have legitimately seized upon European Community provisions as a way of advancing their cause. This is highlighted by the cases on female worker's rights. If the British Government does not appreciate the activities of such bodies it can always dissolve them. If it chooses not to do so then the British government cannot complain that the U.K. suffers by being in the vanguard of European reform.

Trying too hard to please the EC
Finally the British Government, when implementing Community Law, often imposes measures which are even more strict than those required by Community Law to the disadvantage of British interests. The current problem regarding commercial drivers who wear glasses is an example. Other member states have chosen to retain 'grandfather rights' so that drivers who currently wear glasses will not be disadvantaged by the new law.

Identifying the problem and potential solution
This over zealous attitude of the British Government is partly though not entirely due to the uncertainty created by the absence of the constitutional regulatory device mentioned above. In essence the missing device is ***'some legal provision in the Treaty of Union which would require the courts to take into account all the relevant competing policies involved in disputes'***. This would in turn compel the European Court of Justice to develop guide lines to enable it to balance such competing policies. A basic requirement of the concept of Natural Justice that governs tribunals in the U.K. is that when applying guide lines the court must have to explain how and why it reached its decision, demonstrating that the legal reasoning adopted is both open and apparent. Such explanations would provide invaluable precedents for member states on how to organize their affairs.

Without such a device the Government does not know what matters must be taken into account when considering the scope of the various laws governing Europe. The guide lines would give the British Government the confidence to pass rules which more closely match the requirements of the European Community without damaging British interests.

It will not solve the fact that British officials tend to be over enthusiastic when it comes to making rules and have demonstrably extended this enthusiasm in a European context. That is a purely British phenomena which we have always suffered from and cannot be blamed on the European Community. It is the job of British Politicians to monitor and control such behavior and a clear understanding of the scope of European Law will help them to do this.

The problem that needs to be solved is epitomized by the Spanish Fishermen saga which is currently embarrassing the British Government yet again. The dispute about fishing rights must be distinguished from the constitutional problem that caused it. The problem is not specific to fishing rights and is not a problem peculiar to the British. The problem can affect any member state and arises whenever the courts have to deal with conflicts between the requirements of different European Community policies.

The problem also arises when the court has to deal with conflicts between Community policies and the domestic policies of member states. Conflicts between member states and the Community can obviously result in anti-European sentiments when the decision of the court adversely affects the rights of citizens in a member state. Equally however, the same anti-European sentiments can be roused when a Community policy beneficial to a member state is rejected by the courts in favor of another Community policy which is less favorable. A solution to the problem will therefore improve the public perception of the Community, protect the future cohesion of the European Community and prevent many legal injustices from occurring.

The fishing saga

Fishing rights in the waters bordering Europe have been subject to political squabbles between the various European Governments for centuries. Large modern fishing vessels and factory ships pose the threat of over fishing which could destroy the industry. The Common Fishing Policy is designed to limit the number of fish that can be caught each year to protect the long term future of the industry. Member states are given a quota of that overall permitted catch so that the fishing industry in each member state is protected. The harvesting of natural resources such as fish are legitimately excluded from the normal rules of free and open commercial competition in the interests of the preservation of fish stocks.

Spanish fishermen registered their fishing vessels on the British Register of vessels in order to take advantage of the British fishing quota, a practice now called quota hopping. Clearly, this practice was an unfair tactic and contrary to the spirit of the Common Fishing Policy. The British Government responded by introducing s14 Merchant Shipping Act 1988 which required the owners of British vessels to be British citizens. The Government clearly believed that this course of action was perfectly lawful under European Law since it complied with the objectives of the Common Fishing Policy.

The Spanish fishermen claimed however that the Act contravened Articles 7, 52, 58 and 221 of the Treaty of Rome which gives all citizens of the European Community the right to set up business in and engage in any work in any member states of the European Community without incurring state created economic disadvantages by reason of them being foreigners. The European Court of Justice ruled that the Spanish fishermen suffered an unlawful restriction on their right to work because of the Act of Parliament.

Short fallings of the European Court of Justice.

It is submitted that the Court failed to explain in a satisfactory manner how it reconciled the requirements of freedom of establishment with the requirements of the Common Fishing Policy. The President of the European Court of Justice accepted that Britain needs rules to ensure that there is a genuine link between the vessels that are able to fish against the British quota and the British fishing industry. Making such rules would be legitimate. However, such rules should not derogate from the European Treaty prohibition of discrimination on the grounds of nationality.

The President concluded that Britain could have achieved its objectives without passing discriminatory legislation. Unfortunately he never told the British Government how to do this. It is submitted that the reason he did not explain how to do this is because he did not know how to do it. By suggesting that it was possible he avoided having to decide how to balance the requirements of conflicting European Policies. After all, there is no mechanism in European Community law to tell him what he should take into account in making such a decision. If there was, the British Government could have used the guide line to help them frame a law that would have worked without breaching European Law. The Governments of all member states need to know what the guide lines are. It is not a peculiarly British problem.

The European Community – a half way house between something and nothing.

Why is there no such rule ? It may be that no one realized that such a rule was needed. If the European Community was a State engaged in all the functions of a State ranging from social legislation, law and order, economic policy and national security then a system to regulate the interaction between the various functions of state would have emerged almost from the outset.

The peculiar nature of the European Community, and the fact that all the member states have worked hard to co-operate together and avoid conflict has enabled the Community to stumble on for a long time without developing such a rule. Much of the dealing between member states and the community has been carried out at a political level. As the scope of European Community activities has grown the political necessity of introducing a measure to protect spheres of influence best carried out by member states from the encroachment of the European Bureaucrats has resulted in the invention of the notion of subsidiarity. This means that the Community is not allowed to do anything outside that authorized by the Treaties that govern the European Community if the task is best carried out by a member state under its own rules.

The Role of the European Court of Justice

If the European Court has difficulty in deciding issues involving conflicts between European Community policies then it is nothing compared to the problem it encounters in deciding between conflicts of policy that arise involving European Community policy and the policies of member states. So far the courts have dealt with this problem by asking a one sided question, namely, are the aims and objectives of the

European Community policy prejudiced by the conflict, however small that prejudice might be. If the answer is yes, which it almost inevitably must be, the dispute is settled in favor of the rules of the European Community. In the absence of any rules requiring the court to take into account and balance other interests this is a perfectly logical thing to do. The only guide lines given to the court are to develop European Law in line with the legal principle of the primacy of European Community law in that no member state is allowed to pass laws that derogate from European Community law and the legal principle of harmonization to try and ensure that the individual laws of member states introduced to further the European Community are compatible with each other.

On one level it is possible therefore to have empathy with the European Court of Justice in the way that it has carried out its judicial functions. However, the Court is not entirely free of criticism. The Court has been rapacious and partisan in the way that it has developed its jurisdiction. As far back as 1964 the court enthusiastically pursued the ideals of primacy and harmonization even before these powers were firmly backed up by subsequent Treaty Provisions. The rules on compensation which are currently being used to award compensation to the Spanish fishermen are not expressly provided for by the various Treaties governing the community and have been given a concretized existence by the European Court of Justice.

When the British Government passed the Merchant Shipping Act in 1988 it could not have known that by 1996 the European Court of Justice would be able to make the British Government pay the Spanish Fishermen compensation if the way in which the statute was passed resulted in a breach of European law. Ironically, the compensation rules were developed by the European Court of Justice first in relation to a case against the Spanish Government and refined in later cases involving amongst others the Italian Government, illustrating again that this is not a specifically British problem.

By the time the court finally ruled on whether or not the Spanish fishermen should receive compensation the outcome of the case was virtually certain, though even then there was a remote possibility that the European Court of Justice might hold that in the circumstances the claims for damages lacked merit and should therefore be refused. The British Government had made a merely technical breach of European Law in that the President of the Court had earlier decided that the purpose of passing the Act was both legitimate and justifiable.

The wrong method had been chosen by the British Government. The fishermen were trying to exploit a loophole in the law to evade the quotas established by Community Law. As such they could not be described as deserving claimants. Many British vessels had to be de-commissioned at this time since they could not get an allocation of the fishing quota. The Spanish Fishermen knew that they could not fish in U.K. waters at that time under English Law and that the British Government was determined to prevent them participating in the British quota. They should have gone elsewhere to fish to avoid financial losses. If they chose not to do so the only conclusion must be that other areas of the seas were also so badly over fished that it was not profitable or viable for them to do so. Either ways their economic loss for being prevented from doing something they were not entitled to do is negligible. The current estimates of claims for £30,000,000 do not appear to be in any way justifiable.

The ability of the court to award compensation is not entirely bad or unjustified. The deliberate breach of European Community law without any justification from other relevant policy considerations is no bad thing. It ensures that member states do not act selfishly in their own best interests to the detriment of other member states. The problem once more centers on what considerations the court should take into account when the objectives of different lawful policies collide. The method of assessing damages is not yet clear either.

Domestic and Community Interests

A difficult issue that needs also to be settled is how to reconcile conflicts between legitimate national interests and Community Law. It would not be acceptable for a member state to attempt to selfishly assert national interests as a reason for avoiding European Community obligations freely undertaken by the member state simply because the member state in common with other member states is inconvenienced by observing the obligation. The ability to do this comes under the purview of the political arena alone and is not a matter for the courts to deal with or sanction. The member states however can make a political decision to permit otherwise unlawful acts.

For example, a government that wishes to subsidize a vulnerable industry in contravention of the European Community rules on fair and open competition has the ability to apply to the European Commission for an exemption from the rules, using the platform of the Council of Ministers to do so. If the representatives of that member state successfully make out a special case for exemption the Council of Ministers can approve the application and the Commission can authorize the subsidy. Spain has recently followed this course of action to provide a subsidy to its national airline. However, what happens if the objective the government seeks to attain is not within the competence of the European Community ? How can the European Court of Justice reconcile measures introduced to achieve an objective not covered by EC policies but which would inadvertently result in a breach of the member state's European Community obligations ?

Subsidiarity

Under the notion of subsidiarity the European Community should not interfere with the execution of non-community policies. Any policy pursued by the government of a member state that does not have implications for European Community law cannot be interfered with by the European Community. However if it does have such implications it would appear at the present time that the court is likely to ignore these other objectives or assert that the government should find another way of dealing with the problem, and insist that the member state complies with its community obligations. However, this may not be a realistic proposition. If the objectives are legitimate and important they cannot be swept under the carpet and ignored. A mechanism is needed to enable the courts to legitimize such actions where the other objectives of the member state are so important that there is a genuine need to over ride the community obligations.

Defense and Employment

Defense policy is such an area and again this issue was central to the Merchant Shipping Act 1988. The Act was passed to deal with a wide range of issues. The principle aim of the Act was to tighten up rules on safety at sea following The Zeebrugge Disaster. Parliament was also concerned to do something about the fact that Britain needs to maintain a fleet of merchant ships and ensure that there are sufficient active qualified seamen to provide support for the armed services in times of need, such as the Falklands Crisis. If British vessels are owned and manned by non-British nationals the owners and crew would be unlikely to risk their vessels and their lives for Britain. The British Shipping Register was intended to preserve a pool of vessels and seamen who could be called on in defense of the realm.

Following the Spanish fishermen's case it would appear that excluding any European Community Citizen from the opportunity of employment would be unlawful. Must the British army be prepared to enlist European Community Citizens ? Would Spanish sailors or soldiers help to protect Gibraltar from the Spanish or the Falklands from the Argentinians ? This is most unlikely. Must the managers of the five nations rugby teams open up selection to all citizens of the union ? Football has already had to come to terms with the ramifications of European Community Law regarding who can play for a club in European Cup competitions.

The suggestion that the army must enlist non British soldiers or that any other than a Welshman could represent Wales at rugby is unsustainable and no doubt the Court would find a reason to step back from reaching such a conclusion. However, in so doing the court would have to at last develop and apply legal rules to reconcile disputes between conflicting policies. The European Court of Justice can develop such rules. This was implicit in the President of the Court's allusion to 'the balance of interests' in the Spanish Fishermen's Case. It is regrettable that the court has not yet chosen to do so.

One solution would be for someone to pursue such a plainly ludicrous course of legal action before the court that it would be forced to expound such rules. In the absence of such a case the court is unlikely to do so. This being so the best way forward is to incorporate such a provision into the Treaty of European Union at the next summit meeting of the representative of the member states of the European Union.

The British courts have been reluctant to enunciate such rules in case a further appeal is lodged to the European Court of Justice. The result is that cases with a very tenuous link to European Community Law have been decided in favor of European Community Law where they might not otherwise have been so decided.

An example of this is the ruling that the two year rule regarding entitlement to employment rights discriminates against women. The rule applied equally to men and women. However, the court held that because more women than men undertake part time work women were discriminated against. The connection is very weak. Whether or not a change in the law was desirable is not the issue. That should have been a political choice for the government. It should not have been forced on the Government by courts who were too afraid to incur the wrath of the European Court of Justice. In normal circumstances the Government can pass legislation to overturn a judicial decision but in this instance the lead set by the British Court would inevitably result in the E.C.J. forcing the British Government to repeal any such amending legislation.

The policy areas occupied by the Community are rather limited at present. One might have expected the Treaty provisions governing these areas to make provision for such over lapping interests. A provision in the Common Fishing Policy stating that national quotas are reserved for that country's nationals would have prevented the Spanish Fishermen's dispute from arising. The European Community can pass such a law. A member state government cannot.

Negotiating and Renegotiating European Union Policies.

It would appear that the British Government now intends to renegotiate the terms of the Common Fishing Policy to solve the problem. Such renegotiation will not have retrospective effect and whilst there is a place for political solutions they are not an ideal way of solving problems that should not arise and which the judicial system should be able to solve in an acceptable manner. The opportunities for renegotiation are few and far between. A major issue may or may not be renegotiated successfully and even then at a political price in exchange for something else as compromises are inevitable. Minor injustices will never get to the negotiating table. If the legislators have so far been able to pass water tight legislation that does not involve conflicts of interest between policies how much more difficult will it be in the future when the European Community undertakes ever wider spheres of influence and adopts more policies ?

The Social Policy cuts across the conflicts of both national and community policies. Britain has opted out of the Social Chapter and so social policy is the sole preserve of the British Government. However, for the rest of the member states of the European Community it is simply one more policy area governed by the European Community. The objectives of the Social Chapter are diametrically opposed to those of the Treaty of Union in respect of competition. The concept of a minimum wage forms a protective barrier from the demands of competition and the market place which traditionally keeps wage rates down. If a minimum wage is introduced in all member states except the United Kingdom it would be possible to argue that British workers would have an unfair competitive advantage over their continental counterparts. The specter of one area of European Community Law being used to achieve the objectives of another policy area which Britain has opted out of could arise. Would the courts be able to enforce Social Chapter rights on Britain through the back door by invoking a breach of the competition rules ?

Germany has four million unemployed workers and the figure is rising. Sending all the foreign workers home would help in that German citizens could take the jobs left open by departing foreigners. Germany is not allowed to discriminate against foreign workers under community rules. Many are British construction workers who work for much less than German nationals whose unions have negotiated very high rates of pay for them and substantial benefits packages. Germany proposes to introduce a minimum wage in the construction industry based on the going rate for German nationals. Since this accords with the objectives of the Social Chapter it appears to be a legitimate thing to do. However, since German industry is unlikely to employ foreigners at the same rate and only did so whilst they could pay lower competitive rates many British construction workers are likely to loose their jobs. If this strategy is challenged in the courts by redundant British workers in Germany how will the E.C.J. decide between the conflicting requirements of the Social Chapter and the competition rules ? The strategy could also be deemed to breach the rules on freedom of establishment since it will place British construction workers in Germany at a disadvantage which they did not suffer previously. I suspect that the court will find that the strategy is legitimate and does not offend European Community Law but whether or not the reason for this will be explained in a convincing manner is doubtful.

Euro-philes versus euro-phobics.
It is important to establish that this problem is not related to anti-European values. The problem will continue to exist even if the European Union becomes a Federal State. A Federal State needs exactly the same clear rules for the apportionment of power between the Federal Government and its constituent states, so that each member state knows what it is allowed to do on its own and when it must abide by Federal Legislation. Federalists should not be allowed to marginalize the issue as a preoccupation of anti-federalist bodies. Even if a common currency comes into being it could still be a long time before a fully fledged European State emerges. During the convergence process conflicts between policies are likely to intensify. A legal mechanism to deal with such conflicts is essential.

The Union cannot afford to wait until a Federal State is created to invent such a mechanism. However, is the E.C.J. capable of operating such a mechanism ? The problem is that the court is not value free. The court has developed a dynamic role in the promotion of the European Community. This was essential at the outset to ensure that member states did not protect their own national interests to the detriment of the Community as a whole. This is particularly obvious from a British perspective since decisions of the court have leant towards Community Law adopting the notions of primacy of European law and harmonization.

The European Court of Justice, social values and democracy.
In a more subtle way the decisions of the court also reflect the social ideology of leading members of the Union such as France, Germany and in later times Spain, which is one reason why Germany may not be found to be breaching Community Law by introducing a minimum wage for construction workers. This social leaning may tip the balance in favor of Germany if a claim for anti-competitive / establishment practices is mounted, though no doubt this influence will not be directly averred to in the court's judgments. The rules of natural justice would however require any such influence to be clearly identified.

If the court cannot be rendered value free it may be necessary to introduce a final court of appeal that is totally objective and free from such values. It would be regrettable if this should be needed but possibly the International Court of Justice could be invoked as a final or supreme court. I would hope that this would not be necessary. Whilst the European Court of Justice could develop a more balanced view and gradually discard the values that have recently colored its judgments I believe that explicit requirements in the Treaty of Union would compel the court to adopt a completely objective role in dispute settlement. The evolution of the concept of Public Law in the Community, epitomized by the Francovitch Case, illustrates that the court is dynamic but a gently shove from the legislature should help to ensure a rapid resolution of this problem.

It is submitted that the following measures should be introduced as a matter of urgency into the Treaty of European Union, namely that **"The applicability of European Community Law is governed by the principles of primacy, harmonization and subsidiarity. The court must provide applicants with a complete explanation of the reason for its decisions and the factors taken into account when reaching that decision"**.

Arguably, such a measure is unnecessary. The E.C.J. has respected the principle of subsidiarity. Passages of the judgments of the court address all three criteria. Nonetheless it appears that the court has always come down unerringly on the side of primacy. Concerns that the E.C.J. fails to effectively balance all the criteria before it have been expressed by the Prime Minister following the 48 hour working week rule by the European Court of Justice, by the British Government in the White Paper on the policies the government will pursue at the forthcoming I.G.C. and by Alain Juppe the French Prime Minister, who asserts that the 'creeping increase in the court's power must be avoided'.

There is clearly not unanimous support for the way the court is operating at present. If the court already operates in the correct manner then the proposed amendment would change nothing and no harm would be done. If it does not then it would be a valuable contribution to justice in the Community. Even if such a provision is enshrined in the Treaty it may be of no effect since clever legal reasoning could enable the court to marginalize its effects. This may be so but the Community should not shirk from doing something constitutionally worthwhile simply because putting it into practice may be difficult and may not always work.

The Rule of Law and abuse of policy power.

The White Paper on the I.G.C. highlights several concerns. The government is unhappy about the retrospective effect of E.C.J. rulings. This dissatisfaction is justified on one level and not on another.

Decisions of English Courts often have apparent retrospective effect in that they clarify the scope of a statutory provision. In that those affected may not have realized the effect of a statute there is a degree of unfairness in that the parties affected may find themselves subject to liabilities they did not originally realize they were subject to, or alternately are entitled to rights which were not originally obvious. That Community Law has the same affect is therefore quite acceptable.

However, the creeping increase in power of the E.C.J. illustrated by the fact that the Court has created rights of compensation for individuals in relation to Community Law is a quite different matter. If the duty to pay compensation is retrospective it offends against a central premise of the Rule of Law that no one, including a State with international legal personality, should be liable to a penalty where at the time that the offending action was carried out, there was no penalty available at law. Treating the imposition of a penalty on one party as the loss of a right to compensation for another obfuscates the issue. If this is so, then such compensation would be payable as from the time that the court creates such a remedy in respect of all future government action but not for actions carried out before the court decision was reached.

The British Government claims that the use of Health and Safety Legislation to enforce a 48 hour maximum working sidesteps the British opt out to the Social Chapter. It is not easy to draw a clear demarcation line between the scope of Health and Safety provisions and Social Chapter provisions. Overlap is inevitable. Health and Safety Regulations are binding. The U.K. cannot evade such rules. If the regulations specify how many hours a person can safely work without endangering health then the mere fact that it has implications for workers rights cannot detract from the validity of the regulations. However, a Health and Safety Regulation should not have exceptions to it based on a balance of workers' social rights. The 48 hour rule however does have such exceptions and therefore belongs under the umbrella of the Social Chapter. The Regulations apply unless an agreement is reached between employer and employee permitting overtime. This provides the Trade Unions with considerable bargaining power to trade off rights for increased wages. Employers in non-unionized industries will have little difficulty in evading the rules. If however, working more than 48 hours a week seriously damages health there should be no exceptions. Thus the maximum legally permitted driving hours for lorry drivers is perfectly justifiable on the basis of health and safety. Driver fatigue is dangerous both to the driver and other road users.

The E.C.J. could and should have placed this under the category of the Social Chapter and ruled that the new regulations do not apply to the U.K. This is the opinion of the British Government. This conclusion is endorsed by Labour Party support for the court's decision and by Trade Unions who have applauded the E.C.J. for finding a way around the Tory inspired veto of the Social Chapter. The end justifies the means. However this is a dangerous road to follow. One day the Commission may seek to carry out legislation they do not support and force it through on the back of directly applicable legislation and evade a socially inspired opt out from Community Law. The British have the right not to submit to regulations that have not been constitutionally agreed to by the British Government. The same is true of the other member states. The British Government would like to see new regulations introduced to control the husbandry of British reared veal on the Continent and to ensure that Continental slaughter houses operate humane regime. If the Council of Ministers accept British proposals and incorporate them under the Common Agriculture Policy all well and good. If not, Britain cannot and should not force its wishes on the other members of the Community against their will.

Arguably freedom of establishment was at the root of the Spanish Fishermen dispute. The court's decision was justified because some of the Spanish trawler owners were long time residents of the U.K. However, the Government has announced that Britain will seek to renegotiate the terms of the European Fishing Policy to enable Britain to maintain the link between British vessels and the British quota. The Government clearly does not accept the court's view that licensing systems can maintain that link, presumably since limiting licenses to British fishermen could still be unlawful. The response of Emma Bonino, the Commissioner from Italy responsible for Fishing is that Britain should stop trying to reserve its fishing quota for British Fishermen and open up the industry to all community fishermen, thereby acknowledging that for her the central issue is the avoidance of the quota system.

The White Paper proposes a fast track review of E.C.J. decisions by the Council of Ministers. This is not the ideal way to deal with the problem. Prevention is preferable to providing a cure. What would be the status of the Court's decisions pending such a review ? If the court's decisions are placed in limbo until a decision is reached prolonged periods of legal uncertainty could ensue. The advantage could be that the decisions of the court would not represent binding law. As such confirmation of the court's decision would effectively amount to the Council of Ministers itself making law. The Council of Minister's decision would be subject to National veto. Alternatively, if the court's decision is treated as binding law, pending review, a change in the existing law would equally be subject to veto and therefore the challenge to the ruling by any member state could be defeated by a veto from a single State. Whichever way, the result would be to create a Supreme European Court staffed by politicians. If such an appeal mechanism is necessary and desirable it would be better to use an independent body such as the I.C.J.

Regrettably the E.C.J. has made itself a self appointed champion of European Unionism. It was necessary for the court to establish the principle of primacy. It now needs to exercise self restraint and distinguish between primacy and incrementalisation of Unionism. The court may not always get the balance correct. The peculiar nature of the Community and its institutions is extra-ordinary. The court has no models to follow. The Confederacy it presides over is conceptually flawed in many ways. Perhaps Federal State would be constitutionally tidier but until the politicians decide to create a Federal State the E.C.J. should respect the status quo. Protecting the British opt out of the Social Chapter presents the court with a difficult task but the court has no right to circumvent it simply because the members of the court do not agree with it.

The Court is essentially a Public International Court. In common with all other Public International Courts it must develop a jurisprudence which accommodates the compromises made by the various contracting parties to treaties. Public international jurisprudence gives courts room to manoeuvre and exercise discretion. The result is a less predictable body of law since courts must take a wide number of politically driven factors into account when reaching decisions. Establishing and maintaining an air of impartiality is the difficult but essential prerequisite of a Public International Court of Law. The trade off for legal uncertainty is that the court's judgments are accepted. International conflict is avoided, leading to international harmony rather than division and conflict.

Conclusion

It would be wrong for Britain to seek to take the benefits of membership of the Community without the burdens. It is equally wrong for the E.C.J. and the Commission to sidestep carefully negotiated constitutional limits to Community Law by the use of clever legal arguments. The general public cares little for legal niceties and sees the political realities behind the legal facade. Their patience may one day be exhausted. If their political power is mobilized all the good work that the E.C.J. and the Commission has done could be undone. A modicum of self restraint is surely not too much to ask for to avoid a tragic end to such a noble venture.