

## Resolving the Inconsistency between National and EU Motor Insurance Law. Was Factortame the Solution nobody Sought?

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# Resolving the Inconsistency between National and EU Motor Insurance Law. Was *Factortame* the Solution nobody Sought?

## Abstract

In this article we argue that the continued uncertainty of UK national motor vehicle insurance law when viewed in respect of its EU parent, the Motor Vehicle Insurance Directive (MVID), has not been satisfactorily addressed using the remedy available through the non-contractual liability of the State. The existing enforcement mechanisms have equally been haphazard in their effectiveness and success in affording rights to third-party victims. Given the link between the MVID and the free movement of persons and goods on which the harmonization of insurance protection was based, we present the first article establishing an argument for the offending aspects of UK national law to be disapplied. Whilst the UK has concluded its agreement to withdraw its membership from the EU and thus to be bound by EU law and the jurisprudence of the Court of Justice, until the transitional period is completed the UK remains aligned to EU law. It is committed to follow superior EU law and the judgments of the Court of Justice. Hence the remedy issued from the *Factortame* line of case authorities may prove to be the most effective way to grant access to rights which continue to be denied to victims in the UK.

KEYWORDS: Breach of EU law; *Factortame*; *Francovich v Italy*; *HS2*; motor vehicles; MVID.

## A. Introduction

As is well understood, the European Union, in its present and previous incarnations, was designed to facilitate a common market between its Member States (similar to a domestic market). One of the essential conditions to bring this to fruition was the establishment of free movement of goods and of persons, and key to this aim was to create a minimum standard of compulsory motor vehicle insurance. Such a system of compulsory insurance cover against civil liability in respect of the use of motor vehicles would protect the interests of victims of accidents and remove disparities of legal protection between the States. Hence, by establishing a system of compulsory motor vehicle insurance between Member States, individuals and other motorists would be free to travel throughout the EU knowing that minimum standards of cover would be in place to compensate the third-party victims of accidents involving motor vehicles. This was achieved, first, through the Motor Vehicle Insurance Directive (MVID) of 1972<sup>1</sup> and then a subsequent series of MVID<sup>2</sup> which expanded the protection of third-party victims and requiring Member States to establish a national compensatory body to provide a remedy to this class of victim in the event that they had no insurer from which to recover damages.<sup>3</sup> In the UK this body, established many years prior to the MVID's creation, is the Motor Insurers' Bureau<sup>4</sup> (MIB) and it is a requirement for every insurer operating in the UK to be a member of the MIB. Indeed, a percentage from

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<sup>1</sup> (The First Directive) Council Directive 72/166/EEC [1972] OJ L103/1.

<sup>2</sup> (The First Directive) Council Directive 72/166/EEC [1972] OJ L103/1; (The) Second Council Directive 84/5/EEC [1984] OJ LL8/17; (The) Third Council Directive 90/232/EEC [1990] OJ L129/33; Directive 2000/26/EC (The Fourth Motor Insurance Directive) [2000] OJ L181/65; (The Fifth Directive) Directive 2005/14/EC [2005] OJ L149/14; and (The Sixth Directive) Directive 2009/103/EC [2009] OJ L263/11.

<sup>3</sup> Established in the Second Council Directive 84/5/EEC [1984] OJ LL8/17.

<sup>4</sup> Of course, similar organisations exist in each Member State.

every motor insurance premium paid in the UK is taken by the MIB to fund this compensatory scheme.

Due to the nature of the requirement to protect victims in the event of no insurer being available to provide damages, the MIB entered into a series of agreements with the Secretary of State (the UK government). These agreements were titled the Uninsured Drivers' Agreement (to be used where the driver had no insurance policy in place at the time of the accident or where the insurer used a provision within an existing contract to avoid its responsibilities) and the Untraced Drivers' Agreement (for events where the vehicle causing the accident could not be traced – for example with so called “hit and run” incidents). The national legislation in place, the Road Traffic Act 1988 (RTA88) along with the extra-statutory Uninsured Drivers' Agreement (UDA) and the Untraced Drivers' Agreement (UtDA) operate to give effect to the MVID and the jurisprudence of the Court of Justice.

Perhaps one of the more controversial aspects of the literature, commentary and judicial examination of national motor vehicle insurance law has been the discussion surrounding the enforcement of the MVID in the UK.<sup>5</sup> It has been a consistent source of uncertainty, however, due to the general disregard of the law nationally, it has also led to successes where third party victims of motor vehicle accidents have obtained judgments against the State under a *Francoovich*<sup>6</sup> action. Indirect effect has also been a doctrine receptive of some courts, although the distinction between a *Marleasing*<sup>7</sup> approach and that required in *Pfeiffer*,<sup>8</sup> which expands the duty of purposive interpretation,<sup>9</sup> seems to have been underutilised nationally.

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<sup>5</sup> As just an example of the critical writing in this area see Nicholas Bevan writing for the NEW LAW JOURNAL which includes: *Motor Insurance Law Change* 166 NLJ 7703, 5 (2016); *Putting Wrongs to Rights (Pt 2)* 166 NLJ 7701, 13 (2016); *Putting Wrongs to Rights (Pt 1)* 166 NLJ 7700, 17 (2016); *Redress Road* 166 NLJ 7700, 5 (2016); *Still Driving Dangerously* 166 NLJ 7693, 18 (2016); *A Call for (More) Reform* 165 NLJ 7661, 9 (2015); *No Through Road* 165 NLJ 7648, 7 (2015); *Delaney Sets a New Insurance Route* 165 NLJ 7644, 4 (2015); *High Impact* 164 NLJ 7628, 5 (2014); *Ignore at Your Peril* 164 NLJ 7628, 7 (2014); *Bad Law* 164 NLJ 7624, 7 (2014); *UK in Breach Over Uninsured Drivers* 164 NLJ 7610, 4 (2014); *Untraced Drivers' Scheme is Car Crash* 164 NLJ 7598, 4 (2014); *On the Right Road (Pt IV)* 163 NLJ 193 (2013); *On the Right Road? (Pt III)* 163 NLJ 160 (2013); *On the Right Road? (Pt II)* 163 NLJ 130 (2013); *On the Right Road?* 163 NLJ 94 (2013); *Asleep at the Wheel?* 163 NLJ 7556, 10 (2013). James Marson and Katy Ferris have published the following *Too Little, Too Late? Brexit Day, Transitional Periods and the Implications of MIB v Lewis* EUROPEAN LAW REVIEW (in press) (2020); *The Compatibility of English Law with the Motor Vehicle Insurance Directives: The Courts Giveth... But will Brexit Taketh Away* 136 LAW QUARTERLY REVIEW. 35-40 (2020); *For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure* 82(6) MODERN LAW REVIEW. 1132-1145 (2019); *Brexit means Brexit: What does it mean for the Protection of Third Party Victims and the Road Traffic Act?* STATUTE LAW REVIEW, 39 (2), 211-27 (2018); *Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex* 38(5) BUSINESS LAW REVIEW, 178-186 (2017); *Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue?* 23 EUROPEAN JOURNAL OF CURRENT LEGAL ISSUES (2) (2017); *The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority* 38(2) STATUTE LAW REVIEW, 133-146 (2017); *Delaney and the Motor Vehicle Insurance Directives: lessons for the teaching of EU law* 50 LAW TEACHER, 1-17 (2017); *Which is the Applicable Law in Recovery of Losses from an Uninsured Driver? Moreno v The Motor Insurers' Bureau [2016]* UKSC 52 22 EUROPEAN JOURNAL OF CURRENT LEGAL ISSUES, (3) (2016); and, with Alex Nicholson, *Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives* THE JOURNAL OF BUSINESS LAW, 1, 51-70 (2017).

<sup>6</sup> Joined Cases C-6/90 and C-9/90 *Francoovich and Bonifaci and others v Italy* [1991] ECR I-5357.

<sup>7</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

<sup>8</sup> *Bernhard Pfeiffer et alia v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835.

<sup>9</sup> “when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must... presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned.”

Most recently, in *MIB v Lewis*,<sup>10</sup> the Court of Appeal confirmed that aspects of the MVID have direct effect and the MIB is an emanation of the State. This ruling has broadened the opportunity for those directly effective aspects of the MVID to be given effect in national courts. Collectively, each of the above mechanisms for the enforcement of EU law or in providing a financial remedy to the victim have been rather limited in practical terms, frequently because of the opaqueness of the remedies and, as Marson and Ferris<sup>11</sup> explain, the teaching of EU law principles often fail to instil in future lawyers and judges the muscle-memory of assessing, comparatively, EU laws and their national transposing measures. Whilst not an enforcement mechanism, as it forms part of a body of rules which enables affected individuals to seek redress from the State for damages or loss caused by its breach of EU law, “state liability” is a mechanism which has been available as a source of redress for third-party victims. The doctrine of state liability, established in *Francovich*,<sup>12</sup> will be remembered as a means for affected individuals to recover damages, yet even with some notable successes in the area of motor vehicle insurance,<sup>13</sup> using it to compel Member States to adhere to their EU legal responsibilities has seen limited success. Indeed, it can also be stated with a degree of certainty that over many years, and until relatively recently by the Court of Appeal<sup>14</sup> and Ward LJ in particular on frequent occasions, that the courts have been reluctant to find the UK in breach of the MVID. This was notably demonstrated in the failed judicial review of the law started by the charity Roadpeace.<sup>15</sup> The cases demonstrate the need for fresh thinking around granting third-party victims of motor vehicle accidents access to their EU rights in light of a recalcitrant UK.

In addressing the instances of the UK breaching its obligations under the MVID, the problems inherent in the available enforcement mechanisms and the limitations in actions under state liability, an argument is presented for the inconsistent national laws in motor vehicle insurance to be disapplied. Thus, *Factortame*<sup>16</sup> as a model for the halting of the application of laws in breach of the MVID may ensure compliance with superior EU law in a way that has been hitherto impossible to achieve. As far as the authors are aware, at present there have been no arguments presented on this basis and in light of the *dicta* in the Supreme Court judgment in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,<sup>17</sup> an argument is presented that national courts not only can, but have a legal duty to strike down aspects of an Act of Parliament that does not comply with EU law.<sup>18</sup> Whilst it is accepted that *Factortame*<sup>19</sup> was based on a Treaty Article and not an EU Directive, the MVID have their origin as giving effect to fundamental principles of the free movement of goods and of

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<sup>10</sup> *MIB v Lewis* [2019] EWCA Civ 909; [2019] 6 WLUK 26.

<sup>11</sup> James Marson & Katy Ferris, *Delaney and the Motor Vehicle Insurance Directives: lessons for the teaching of EU law*, 51 THE LAW TEACHER 411–427 (2016).

<sup>12</sup> Cases C-6/90 and 9/90 *Francovich and Bonifaci v Republic of Italy* [1991] I-5357. It ruled that it is a principle of Community law, inherent in the system of the EC Treaty, “that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.”

<sup>13</sup> *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172 and *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

<sup>14</sup> *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267 and *Sahin v Havard* [2016] EWCA Civ 1202.

<sup>15</sup> *RoadPeace v Secretary of State for Transport and Motor Insurers' Bureau* [2017] EWHC 2725.

<sup>16</sup> *R v Secretary of State for Transport, ex p Factortame* (No 2) [1991] 1 AC 603.

<sup>17</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

<sup>18</sup> Jay J. Arangones, *Regina v. Secretary of State for Transport Ex Parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law* 14(3) FORDHAM INTERNATIONAL LAW JOURNAL 778-818 (1990).

<sup>19</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

people. However, by extension, in *HS2*<sup>20</sup> it was possible to argue (albeit by the judiciary in a hypothetical setting)<sup>21</sup> that EU Directive 2011/92/EU should prevent the application of inconsistent national law relating to decision-making – in this case that concerning the construction of a new highspeed railway. Thus, in relation to the Treaty provisions of free movement of people and goods (*Factortame*)<sup>22</sup> and the adherence of national laws and administrative provisions to comply with an EU Directive (*HS2*)<sup>23</sup> the argument presented here may be more persuasive and result in a paradigm-shift in enforcement of EU motor vehicle insurance law in the UK. At least whilst the UK remains a Member State.<sup>24</sup>

## **B. The Free Movement Principle and Motor Vehicle Insurance...**

The Free movement of EU citizens within the Community can be traced to the establishment of the European Economic Community in 1957,<sup>25</sup> being later developed under the Treaty of Maastricht in 1992. However, EU citizens' right to move and reside in other EU States with, to some extent, no restriction had not been achieved at this stage but required the passing of Directive 2004/38/EC<sup>26</sup> to give effect to this Treaty principle. The ultimate aim of the Treaty, and given effect via the enactment of secondary law, was to establish a Community where EU citizens can live, travel and move freely with as few restrictions as possible. It was borne of anti-discrimination and sought to harmonize rules through the Community to facilitate free movement of persons and goods.

Free movement of EU citizens is a fundamental principle of the Treaty enshrined in Articles 21 and 45 of the Treaty on the Functioning of the European Union (TFEU) as well as Article 3(2) of the Treaty on European Union. Article 45 of the TFEU states clearly that "*Freedom of movement for workers shall be secured within the Community.*" It is a treaty requirement, which has direct effect on national courts of EU Member States without the need for further legislation for implementation. Therefore, and in order for national States to secure freedom of movement as required under the Treaty, States need to ensure that people are fully protected when moving from one State to another. In other words, EU individuals shall not face any obstacles that restrict their rights of movement such as facing different levels of insurance cover and protections that may undermine their rights when they become victims of incidents involving motor vehicles simply because they have crossed borders within the Community. Any such restriction would be interpreted as a breach of the Treaty and requires correction. Furthermore, the EU, in the First MVID,<sup>27</sup> aimed from the outset to "*liberalise the rules regarding the movement of persons and motor vehicles travelling between Member States.*"<sup>28</sup> Therefore, EU Member States such as the UK, which have been in breach of these requirements should correct the wrong and bring its national law into compliance with the

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<sup>20</sup> *Supra* note 17.

<sup>21</sup> *Id.* as explained at paras. 93 and 94.

<sup>22</sup> *Supra* note 12.

<sup>23</sup> *Supra* note 17.

<sup>24</sup> According to the European Union (Withdrawal Agreement) Act 2020, the UK's transitional period and continued relationship with the EU will cease on the 31 December 2020 and the Act will enter into force.

<sup>25</sup> Provisions 1(1), 1(2), 1(5) and 2(1)(4).

<sup>26</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>27</sup> First Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability.

<sup>28</sup> Preamble to the Directive.

MVID. This ensures the requirement of minimum standards of insurance are met for those travelling throughout the EU, and it ensures that cross-border travel is harmonized to the extent that no hinderance to people and vehicles is experienced when moving from one State to another.

### **C. ... And its Significance to the Community**

Free movement of people is one of the four founding principles upon which the EU is based. Article 3 of the Treaty of Lisbon provides that “*The Union’s aim is to promote peace, its values and the well-being of its peoples... and shall promote social justice and protection.*” From this it is derived that free movement is a fundamental principle of the Community that cannot be achieved without social justice and protection. The EU’s values which include “*equality and the rule of law*” cannot be achieved by, for instance, having different treatment for victims of uninsured or untraced drivers in comparison to claims made directly to insurers just because the driver at fault was uninsured or the vehicle unidentified.<sup>29</sup> Furthermore, it breaches citizens’ rights to have their rights protected as it undermines other EU values (the rule of law) when the UK’s motor insurance law<sup>30</sup> breaches the MVID.

One of the drawbacks of the First MVID was the disparity in legal protection afforded third-party victims between Member States, which was deemed a substantial barrier to free movement. This was especially in respect of the scope of insurance cover and the exclusion clauses to the responsibilities of insurers permitted by each State.<sup>31</sup> This undermined the effectiveness of free movement. It entailed a Second Directive<sup>32</sup> to be passed to remedy these drawbacks. The UK, however, was reluctant to remove these existing obstacles that were leading to the disparities in respect of the scope and exclusion clauses permitted within its national law. Whilst the RTA 1930 was the basis on which the First MVID was founded, it was clear that while the EU, since 1983, was attempting to develop the law to avoid the negative consequences experienced by third-party victims of accidents involving motor vehicles, the UK, and its close relationship with the national motor vehicle insurance industry, was reluctant to adopt the changes required of it. For the EU, the consequence of failing to facilitate free movement would be to undermine the aims of the Community which included facilitating tolerance across the Community, to build trust and to deepen integration between the different cultures within the EU. Therefore, and to ensure the protective purposes of the MVID was not undermined by national laws, the law required amendment to facilitate compliance. In the UK, the RTA88, and the MIB Agreements, in many respects do not comply with the aims of the MVID to provide the precise levels of protection and thereby facilitating the free movements of people, goods and (therein vehicles) in the Community.

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<sup>29</sup> Equality and the rule of law cannot be achieved too if citizens of one Community face different legal systems based on where an incident takes place.

<sup>30</sup> Throughout this article the terms “UK national law” or “UK law” will be used. This is for simplicity to draw attention to the difference between this law (namely the laws of England and Wales) and those at the EU level.

<sup>31</sup> Compare, for example the extent to the permissible exclusions of liability, still in existence in s. 148 RTA88, and which have been subject to academic scrutiny and condemnation whilst the Court of Justice, in *Finanger v Norway (National Association for Road Traffic Victims, intervening)* [2006] 3 CMLR 13, stated “The Motor Vehicle Insurance Directives do not grant national authorities a margin of political or economic discretion with regard to the requirement of insurance... The purpose was to pave the way for a Common Market with free movement, and one of the means was to achieve security for the survivors of road traffic accidents... The development from the first to the third Directive shows that a strong degree of protection was intended, so that the various exemption rules that existed in certain countries were forbidden.”

<sup>32</sup> (The) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17.

## D. But Should the UK's Motor Insurance Law Be Disapplied? The Offending Provisions Apt for Disapplication

In both *Delaney v Secretary of State for Transport*<sup>33</sup> and *EUI v Bristol Alliance Partnership*<sup>34</sup> not only were national appeal courts confused as to the requirements of UK national law in relation to their EU parent, but the cases were also notable for the claimant successfully obtaining redress from the State in a *Francovich*<sup>35</sup> action. However, when one considers the scale of the errors present in the rulings by the courts in the UK as to the compatibility of national legislation with the MVID, these add weight to the argument for the necessity of a disapplication of the offending laws. The article continues the discussion by, briefly, identifying the most egregious breaches of EU law and those areas which require disapplying in the RTA88, the UDA 2015 and the UtDA 2017. This is not an exhaustive list, but simply used to represent the most obvious and serious breaches of EU law which affect the rights of third-party victims. Presented here are examples of the misunderstanding of the two sources of law by, frequently, the most senior appeal courts in the UK and are presented to exemplify the misconstruction of legal principles and doctrine, not decisions based on case facts.

### I. The RTA88

Beginning with the RTA88, the present scope of ss. 143, 145, 148, 150, 151(4), 151(5) *in relation to* 151(8), 185, and 192<sup>36</sup> cause problems with a consistent interpretation with the MVID and remain in breach of EU law. Section 143 requires that “a person must not use a motor vehicle on a road [or other public place] unless there is in force... such a policy of insurance... as complies with the requirements of this part of the Act.”<sup>37</sup> This section is in breach of Articles 1 and 3 of the MVID and the rulings of *Vnuk*<sup>38</sup> and subsequent case authorities, and this breach continues in relation to ss. 145 and 185 RTA88 with the definition of “motor vehicle.” In *Vnuk*,<sup>39</sup> the Court of Justice extended the requirement for compulsory motor vehicle insurance to apply to private land. This was in contradiction with the RTA88 which limits compulsory insurance to a “road or other public place.”<sup>40</sup> Despite further rulings confirming this point of law (notably in *Andrade*<sup>41</sup> and *Juliana*),<sup>42</sup> and that *Vnuk*<sup>43</sup> was decided in 2014, the RTA88 still has not been amended nor has definitive guidance, to aid legal certainty,<sup>44</sup> been issued by the UK government. These cases, not only explaining the

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<sup>33</sup> *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

<sup>34</sup> *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

<sup>35</sup> *Supra* note 16.

<sup>36</sup> The definition of road or other public place. This section of the RTA88 breaches Articles 1 and 3 of the 6<sup>th</sup> MVID.

<sup>37</sup> Similar requirements are placed on authorized insurers in s. 145 RTA88.

<sup>38</sup> Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] EUECJ C-162/13. [2016] RTR 10.

<sup>39</sup> *Id.*

<sup>40</sup> Section 145.

<sup>41</sup> Case C- 514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* [2018] 4 WLR 75, [2017] WLR(D) 788, ECLI:EU:C:2017:908, [2017] EUECJ C-514/16, EU:C:2017:908.

<sup>42</sup> Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* [2018] ECLI:EU:C:2018:661.

<sup>43</sup> *Supra* note 38.

<sup>44</sup> Which is a fundamental aspect of EU law. See Case C-308/06 *R (International Association of Independent Tanker Owners (Intertanko)) v Secretary of State for Transport* [2008] 2 Lloyd's Rep 260, para 69 where the Court said: “The general principle of legal certainty, which is a fundamental principle of Community law,

requirement for insurance for vehicles used on private land, also explained the law relating to the concept of the “use of a vehicle.” However, in *Cameron v Liverpool Victoria Insurance*<sup>45</sup> the Supreme Court misinterpreted UK national law and failed to give effect to these rulings.<sup>46</sup> Similarly, in *Pilling v UK Insurance*<sup>47</sup> the Supreme Court also failed to reflect the geographic scope of the MVID and the incompatibility with s.145 RTA88.

Section 148 includes statutory exclusion clauses in motor insurance policies which, if found, are to be held as void. Section 148(2) allows insurers to escape their responsibilities unless the exclusion falls into one of the “matters”<sup>48</sup> as specified in that section.<sup>49</sup> It had been questioned in *Delaney*<sup>50</sup> whether the list of matters was illustrative or exhaustive. An exclusion of liability for domestic insurers is permissible in the MVID (at Article 13)<sup>51</sup> and this is the only exclusion clause allowed. The UK’s approach, that s. 148(2) is to be interpreted as exhaustive and therefore any exclusion of liability outside of these prohibited “matters” is allowed, continues in its legislative form, but is clearly wrong in terms of EU law. The Court of Justice had previously held that the exclusion clause included under Article 13 of the MVID was exhaustive,<sup>52</sup> but nevertheless, other exclusion clauses should not totally prevent third-party victims of their rights as responsibility to provide a remedy to third-party victims could be shifted to the national compensatory body (as required under Article 10 of the same Directive).<sup>53</sup> In either way third-party victims must not be left uncompensated. Member States may need to regard the exclusion clauses in Article 13 of the MVID as a minimum requirement, and other exclusions may be only considered in respect of first, not third, party victims. The Court of Justice later clarified the issue surrounding the permissibility of other exclusion clauses. No other exclusions can be used against third-party

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requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (see [*Belgium v Commission* (Case C-110/03) [2005] ECR I-2801, para 30, and *IATA and ELFAA* (Case C- 344/04) [2006] ECR I-403, para 68]).

<sup>45</sup> *Cameron v Liverpool Victoria Insurance* [2019] UKSC 6.

<sup>46</sup> For commentary see Nicholas Bevan, *Principle v Process* 15 March NEW LAW JOURNAL 14 (2019).

<sup>47</sup> *R & S Pilling t/a Phoenix Engineering v UK Insurance Ltd* [2019] UKSC 16.

<sup>48</sup> Which include the age or physical/mental condition of persons driving the vehicle; the condition of the vehicle (for example, a car’s illegally worn (bald) tyres); the number of persons that the vehicle carries; the weight/physical characteristics of the goods which the vehicle carries; the time at which/areas within which a vehicle is used; the horsepower/cylinder capacity or value of the vehicle; the carrying on the vehicle of particular apparatus; or the carrying on the vehicle of any particular means of identification other than that required by law.

<sup>49</sup> It is interesting to note that the exclusion clauses in s. 148(2) RTA88 continue, yet the (similarly unlawful) provision in s. 152 RTA88 has recently been removed in The Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019.

<sup>50</sup> *Supra* note 33.

<sup>51</sup> Article 13 identifies permissible exclusions in respect of third-party victims of road traffic accidents. Under this Article, neither statutory exclusions nor contractual clauses can be used by insurers to avoid liabilities for claims made by third-party victims. However, the Directive does allow a single exclusion where the victim knew that the vehicle he or she is travelling in is stolen and they voluntarily allowed themselves to be a passenger - and the insurer can prove that. Hence this requires actual knowledge on the part of the victim and that the insurer or compensatory body – the MIB in the UK – can prove this.

<sup>52</sup> Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829.

<sup>53</sup> Member States are, under Article 10, required to set up a body with a fund that shall be always available for unsatisfied judgments. Its primary task, in other words, is to ensure that victims of uninsured or untraced drivers are compensated to the minimum (required) level of compensation that they might secure had the driver causing the accident been insured and the claim brought against their insurer. However, the chosen body has its liability limited to only those vehicles which fall under Article 3, which means that the compensatory body is not responsible for claims caused by derogated vehicles. Nonetheless, this exception is not to be misinterpreted by Member States to avoid liability towards victims of such vehicles, but the States are required to provide another mechanism of compensation such as local authority insurers, securities or another compensation scheme.



victims.<sup>54</sup> The Court of Justice in a string of authorities (*Bernaldez*,<sup>55</sup> *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,<sup>56</sup> *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,<sup>57</sup> *Farrell v Whitty*,<sup>58</sup> and *Churchill v Wilkinson and Tracey Evans*)<sup>59</sup> identify the exclusions as illustrative and they cannot be viewed as exhaustive (thereby allowing all other exclusions not expressly precluded in this list). In other words, the Court regarded the exclusion clause allowed under Article 13 as illustrative of what *cannot* be used against third-party victims. In this respect, unlike exhaustive exclusions, illustrative clauses can be used as guidance by Member States to operate in line with the protective purpose of the MVID by, for instance, using *Pfeiffer*<sup>60</sup> to impose similar prohibited exclusions when it comes to third-party victims' rights, and to ensure consistency across the Community. Failure to prohibit the use of a wider range of exclusion clauses may lead to a limiting of third-party victims' rights to access compensation which might lead to different levels of cover depending on where the accident takes place. Such disparities oppose the uniformity of protection across the Community that the MVID aim to achieve. Therefore, third-party victims' rights must be ensured access to fair compensation, either by insurers or the Compensatory Body, regardless.<sup>61</sup> Returning to UK national law, the law is not certain in this respect as to limit insurers' rights of applying exclusion clauses other than the that stated in Article 13 of the MVID. The law does permit a greater range of exclusion clauses through which an insurer is still capable of undermining third-party victims' rights enshrined by the MVID.

Section 150 RTA88 relates to insurance policies being issued on the basis of use of the vehicle for "social and domestic" use only. This provision breaches Articles 3 and 12(1) MVID and has required the judiciary in the UK to be creative in finding mechanisms and factual constructions to provide protection for third-party victims.<sup>62</sup>

Section 151(4) relates to an exclusion of an insurer's responsibility on the basis of the knowledge (which in the UK context may involve constructive knowledge) of the theft or the unlawful taking of a vehicle where the third-party (passenger) is injured. Such an exclusion breaches the permissible exclusion identified in Article 13(1) of the MVID. Section 151(5) RTA88 places a burden on to insurers to fulfil the cover provided in the policy of insurance, regardless of the breach of the policyholder, but, in conjunction with s. 151(8), allows the insurer to recover any funds paid to the third-party victim from the policyholder. It is possible that the third-party victim may also be the policyholder (as per *Churchill Insurance v*

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<sup>54</sup> Article 3 is perhaps the most important with regards to the obligation imposed on Member States to ensure third-party victims of road traffic accidents are protected. Under this Article, Member States must ensure that civil liability, in regard of the use of a vehicle on their territory, is covered by a minimum of third-party cover to ensure victims suffering loss or injury in the use of vehicles have their fair compensation met. According to Article 3, insurers are liable and shall compensate third-party victims of road traffic accidents for any personal injuries arising out of the use of a vehicle, regardless of the degree of relation between passengers and the policyholder.

<sup>55</sup> *Supra* note 52.

<sup>56</sup> Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

<sup>57</sup> Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtio Pohjola and Jarmo Ruokoranta* [2005] ECR I-5745.

<sup>58</sup> Case C-356/05 *Elaine Farrell v Alan Whitty* [2007] ECR I-3067.

<sup>59</sup> Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

<sup>60</sup> *Supra* note 8.

<sup>61</sup> Subjected to the only permitted exclusion clause in Article 13 of the MVID.

<sup>62</sup> E.g. *Seddon v Binions* [1978] RTR 163 and *Keeley v Pashen* [2004] EWCA Civ 1491.

*Wilkinson and Tracey Evans*)<sup>63</sup> and it is this application of the two aspects of the RTA88 which breach Article 13 MVID.

In *Delaney v Pickett*,<sup>64</sup> the insurer was successful in obtaining a declaration from the courts under s. 152(2) RTA88 due to the insured driver having failed to disclose relevant and material facts which would otherwise have affected the insurer's decision to provide cover. This has recently been repealed through reg. 6 of the Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019. However, the *Delaney*<sup>65</sup> decision was issued in 2011, the Regulations revoking the offending provision of the RTA88 were effective from 1 November 2019, and significantly, the Court of Justice had ruled that such exclusions were contrary to the MVID in *Bernaldez*<sup>66</sup> from 1996! Indeed, even though a consistent ruling was issued by the Court of Justice in *Fidelidade-Compania de Seguros SA v Caisse Suisse de Compensation*,<sup>67</sup> the UK's breach of the MVID and inconsistency with the jurisprudence of the Court of Justice was rejected by Ouseley J in the *RoadPeace v Secretary of State for Transport and Motor Insurers' Bureau*<sup>68</sup> judicial review hearing. As recently as 2019 in *Colley v Shuker*<sup>69</sup> the s. 152 RTA88 exclusion was still being applied and used by insurers to escape their responsibilities.

Finally, at s. 192, the definition of "road" continues despite the implications of *Vnuk*<sup>70</sup> and the possible misreading as to their rights and obligations this creates for users (and arguably) insurers.

## II. The MIB Agreements: The UDA and the UtDA

It is true that there is another route for compensation for third-party victims to follow (where insurers succeed in avoiding liability) in the event that the insurer chooses to exercise an exclusion clause. This is where the national compensatory body (the MIB) would be involved through one of the Agreements (UDA or UtDA) – either dealing with the third-party victim's claim directly or where the insurer would manage the claim through the UDA / UtDA itself. The question, though, is whether the scheme managed by the MIB offers comparable compensation and access to protection as a claim directly against the insurer on the terms found in the policy of insurance. The UK's compensation scheme, which is supposedly designed to protect third-party victims of uninsured drivers / untraced vehicles, cannot be deemed to be fully implementing the MVID and it would be a potential aspect for future disputes as the current compensation scheme is neither equivalent nor effective in this respect to that required in the MVID. The failure is due to technical knock-out clauses, conflicting provisions and unfair procedural rules that innocent victims face when they are required to pursue their claims through the MIB Agreements which result in claims being concluded with less or no compensation awarded to victims at all. When scrutinized, it becomes readily obvious that the MIB's Agreements, when compared with the minimum standards required under Community law, offer a level of protection to third-party victims that is neither equivalent to that under the Community law nor under similar claims made directly against

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<sup>63</sup> *Supra* note 59.

<sup>64</sup> *Supra* note 33.

<sup>65</sup> *Id.*

<sup>66</sup> *Supra* note 52.

<sup>67</sup> Case 287/16 *Fidelidade Companhia de Seguros SA v Caisse Suisse De Compensation* [2017] EUECJ.

<sup>68</sup> *Supra* note 15.

<sup>69</sup> *Colley v Shuker* [2019] EWHC 781 (QB).

<sup>70</sup> *Supra* note 38.

insured drivers. The MIB may argue that its Agreements comply with the MVID and the current differences are not so significant as to hold it (the MIB) to be in breach of the Directive. However, no matter how small the (perceived) violation of the protection, the result is that the effects of the MVID are undermined by the Agreements. In *Bernaldez*<sup>71</sup> the Court of Justice stated that insurers can neither rely on contractual terms nor on national law in order to avoid a claim raised by third-party victims. *Bernaldez*<sup>72</sup> requires Member States to ensure the effectiveness of the MVID to protect third-party victims of motor accidents. Therefore, the UK is obliged to take into account the EU principles of equivalence and effectiveness<sup>73</sup> when dealing with claims made against uninsured drivers and in respect of untraced vehicles. Procedural rules imposed under the UDA 2015 as well as the UtDA 2017 must not deprive innocent third-party victims of road traffic accidents of their rights but to ensure the right amount of compensation is awarded.<sup>74</sup> In other words, to ensure effectiveness and equivalence in this respect, such claims shall follow the same procedural rules and get the same award as had it been dealt and awarded by insurers, which is not the case, at least for now, under the current MIB compensation scheme.

At cl 5 of the UDA 2015, the MIB is not liable for any claim “arising out of the use of a vehicle which is not required to be covered by a contract of insurance<sup>75</sup> unless the use is in fact covered by a contract of insurance.” Bodies do exist which would generally be able to meet claims in the event of them possessing no insurance cover for accidents involving their vehicles - the National Health Service and the police are perhaps the most obvious examples. The MVID, at Article 5, makes no such exception and the result is that a victim of an unauthorised driver (such as, for example, a “joy rider” who steals such a vehicle and causes an accident in the course of this venture) would be unable to recover damages from the MIB, which as a body exists to be the insurer of last resort. Clause 6 enables the MIB to avoid liability and/or deduct from payments any amount that a claimant would have been able to secure from another source (admittedly subject to certain exclusions). This might include from bodies such as the Criminal Injuries Compensation Authority but would also include those from an employer’s non-insured refundable advance. This deduction of compensation even extends to situations where the claimant failed to use, or to claim within the required time limits, from a personal insurance scheme. Whilst Article 10 MVID does allow for Member States to make deductions from a victim’s compensation payments, this was included to prevent the double payment of compensation (thus where Article 10 specifically refers to “social security bodies required to compensate the victim in respect of the same accident”). It does not exist to permit subrogation against victims of motor vehicle accidents. Clause 8 is applicable to situations where the victim allowed themselves to be a passenger in a vehicle to which *either before the start of the claimant’s journey or after its start, they knew or had reason to believe* that (a) the vehicle had been stolen or unlawfully taken; or (b) the vehicle was being used without there being in force a contract of insurance complying with the RTA88. MVID Article 10(2) permits the exclusion of liability from the MIB in relation to persons who the Member State (or in this instance the MIB) *can prove* / knew the vehicle in which they were travelling was uninsured. In *White v White*,<sup>76</sup> the House of Lords at para. 34 of the judgment, extended the concept of knowledge to “turning a blind eye” as to

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<sup>71</sup> *Supra* note 52.

<sup>72</sup> *Id.*

<sup>73</sup> Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECLI:EU:C:1999:14 at para. 32.

<sup>74</sup> Both Agreements govern uninsured driver and untraced vehicle accident claims.

<sup>75</sup> per RTA88 s. 144.

<sup>76</sup> *White v White* [2001] UKHL 9.

whether insurance was held or not. However, there is no such inclusion of constructive knowledge in the MVID. It is clear that actual knowledge is required for the application of the MVID, and nothing less than this will offer the victim the same level of protection.

The UtDA 2017 is the most recently altered of the MIB's Agreements (it was effective for accidents occurring on and after 1 March 2017) yet it continues to breach aspects of the MVID. Some of the provisions included are merely archaic,<sup>77</sup> yet they are fundamentally disadvantageous to potential claimants to the MIB. Beginning at s.1(5), the UtDA defines an "authorised person" as "a person acting on the claimant's behalf who is recognised in law as having authority so to act but *this does not include a solicitor or other legal representative* of the claimant, unless appointed as the claimant's Guardian or Deputy or a person authorised under an Intervention Order pursuant to section 53 of the Adults Incapacity (Scotland) Act 2000" (authors' emphasis). This definition is important in respect of cl. 10(1) which requires that the claimant, albeit with the assistance of an authorised person, comply with the requirements of the clause. Failure to comply enables the MIB to reject the claim. The clause specifically removes the right for a claimant to be assisted in their action with the MIB with qualified legal representatives. Given the plethora of irrelevant materials to which the MIB might require the claimant to provide access, and perhaps a solicitor would be aware of the potential problems and harm this might cause the claimant better than a non-legally qualified lay person, the specific removal of lawyers from this aspect of the claim is as surprising as it is worrisome. Completing the claim and early correspondence with the MIB is often the first, crucial stage, in a claim and to not enable a victim to have assistance from a solicitor is quite unusual.

The UtDA include various procedural aspects which contradict or undermine the effectiveness of the MVID. With regards to damage sustained to property, the UtDA stipulates that an award is conditional on a claimant suffering personal injury from the same accident. The injury must however be "*significant*" in order for the MIB to proceed the claim for property damage and this means the value of any claims must exceed £400. Such requirements reflect a general lack of good faith and whilst the MIB may argue for the need to take these measures to prevent fraud, they nevertheless should not operate at the expense of innocent victims of untraced drivers. There should, rather, be a balanced assessment given it is the duty of the MIB to have the right measures to control for such issues, not the victims. Therefore, the MIB should not be in a position to exploit such incidents to undermine third-party victims' rights of untraced drivers and thereby the MVID.

Under cl 8(1) of the UtDA 2017, the MIB has the right to deny any liability in respect of death, bodily injury or property damage arising out of the use of a vehicle where a claimant voluntarily let themselves to be a passenger in a vehicle and they "*knew or ought to have known*" that the concerned vehicle; a) was stolen or unlawfully taken, or b) uninsured according to the national requirement (Pt VI of the RTA 1988). This wording, already identified in the line of judicial reasoning outlined above, continues to use the constructive knowledge definition which is beyond that allowed in the MVID and thereby negatively

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<sup>77</sup> For example, at cl. 24, the MIB requires notice of documents and claims to be served to it via fax or recorded delivery (which, incidentally, has been abolished as a form of communication in the UK). The MIB does reserve the right to accept communications in another form, but this either has to be the choice of the MIB to accept this form of communication or it has to be conclusively proved that the MIB did in fact receive the notice. In 2017, with the range of electronic communications systems quite readily used by businesses and legal professionals and professional bodies, to insist on the use of such old-fashioned mechanisms remains surprising. It might be surmised that this has been stipulated in the "new" Agreement to make communication of notice more difficult and hence to reduce the number of claims to the MIB.

affects the efficacy and protective purpose of the Directive. Indeed, it is in a practical sense difficult to ascertain how a passenger would know, and this being proved, that a vehicle was uninsured. If the MIB can prove that the claimant knew or had reason to believe in any of such matters then the MIB would be deemed to discharge its duty in respect of knowledge. The knowledge requirements under this Agreement seems to be sufficiently wide to make it easy for the MIB to shift the burden of proof to the victim, which can be deemed to breach the clear and simple requirement applied under the MVID (see *Phillips v Rafiq*).<sup>78</sup>

There are certain requirements that any law is expected to respect (and beyond the formalities of its construction and adherence to constitutional requirements it should, as a minimum, provide a level of legal certainty) otherwise its legitimacy may be called into question. One of the fundamental requirements of the UK's constitution and the rationale advanced for contravening aspects of the RTA88 and the UDA and UtDA to be disapplied stems from the European Communities Act 1972 and associated case law which provides a means for the courts to adopt this course of action if they so choose. It is argued here that the UK's motor insurance laws breach fundamental principles of EU law. The national laws (the RTA88 and the MIB Agreements) may be argued to breach aspects of the EU's free movement principles when failing to provide the necessary protection for EU citizens (here it would be third-party victims of motor vehicle accidents). The national law further breaches fundamental principles to ensure legal certainty as it contradicts its EU parent law (although these would not find the remedy in national law being disapplied). Community citizens, under this current regime, cannot accurately nor adequately predict their legal position and therefore their rights in advance when they decide to travel to, work or even live in the UK. The UK's withdrawal from the EU (otherwise referred to as "Brexit") becomes another source of uncertainty as to whether the UK will leave the Single Market and Customs Union which will, if the UK chooses to leave without agreements, end the UK's duty to fulfill the free movement principles. Furthermore, although not specifically pertinent to the arguments advanced here, national law possibly breaches Article 8 of the European Convention on Human Rights as it impinges on citizens' right to access to justice. Finally, currently national law does not comply with the effectiveness and equivalence principles required under EU law.<sup>79</sup> The earlier mentioned principles, as they pertain to breaches of EU fundamental principles, are discussed to explain and offer a legal basis for the advancement of disapplying inconsistent national laws which breach superior EU laws.

The arguments presented above have been used to not only identify some of the inconsistent judicial practices in the (mis)application of UK national laws in respect of EU law, but also to highlight some of the procedural and administrative functions which operate to transgress EU law in the UK. Case law is now presented to argue how it is constitutionally possible for national legislation and administrative agreements to be disapplied for breaching EU Treaty Articles and Directive provisions.

### **E. Disapplying the RTA88, UDA and UtDA: The Constitutional Argument**

It will likely be questioned in the first instance why, in 2020, is an argument being presented to use a case established in 1991 to give effect to superior EU law in the courts of a Member State. Surely the brightest legal minds will have considered, and by implication rejected, such an argument. We write this because naturally this is the "elephant in the room" and without

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<sup>78</sup> *Phillips v Rafiq* [2007] EWCA Civ 74.

<sup>79</sup> James Marson and Katy Ferris, *Motor vehicle insurance law: ignoring the lessons from King Rex* 38(5) BUSINESS LAW REVIEW, 178-186 (2017).

addressing it from the outset, it will play on the minds of the reader and possibly distract from the opinions presented. *Factortame*<sup>80</sup> began the constitutional revolution in the UK whereby an Act which had been established that transgressed EU law should not be enforced. The case law then progressed through *Thoburn*<sup>81</sup> which discussed the different types of Acts and their constitutional hierarchy. Finally, *HS2*<sup>82</sup> has enabled the Supreme Court to reflect on the potential for the disapplication of an Act due to incompatibility with a Directive. Hence, given the problems inherent with the statutory (RTA88) and extra-statutory provisions (the UDA and UtDA) when considered in light of the MVID and free movement principles, and that in *MIB v Lewis*<sup>83</sup> the UK appeal courts seem to accept the transgression of EU law (in some respects) and the status of the MIB and the direct effect of Articles 3 and 10 of the MVID, it seems an apt time to discuss the potential for the offending national laws to be disapplied as contravening the effectiveness of EU law.

If one begins by examining the constitution upon which the UK is based, one of the first theorists that springs to mind is Dicey who, as famously instructed to all first-year English law students, concluded that the sovereignty of Parliament is supreme – limitless – and therefore it may make and unmake any laws which it chooses. Significantly, “no person or body is recognized by the law... as having the right to override or set aside the legislation of Parliament.”<sup>84</sup> Thus, the legal power vested in the country is qualified by a political reality and this, for Dicey, is the only hierarchy in place. There is, of course, a hierarchy in existence within the sources of law which will be seen between Acts of Parliament, the common law, conventions and customs. This is natural. However, the issue is that for Dicey that the Acts themselves are of the same legal power and significance. He did not seek to establish a hierarchy amongst them. Given the flatness of the structure proposed, the legal status of each Act of Parliament is the same.

This view of the legal landscape in which primary legislation exists fails to take into account the development of the legal system of the UK, and of what at least became known as constitutional statutes – those which were so fundamental that they could not be, implicitly at least, reversed (through implied repeal). Thus, whilst they became entrenched in the UK’s legal system there remained the possibility of an explicit repeal by a future Parliament if indeed the political will allowed. The Constitutional Reform Act 2005, the Human Rights Act 1998 and, especially for the purposes of this article, the European Communities Act (ECA) 1972 are each examples of Acts of Parliament which had the status granted to them of moving beyond “ordinary” Acts and becoming “constitutional.”

We can therefore move forwards on the basis that whilst the UK Parliament and its law-making remains supreme, the content of the laws it produces are subject to a hierarchy in which some Acts have greater powers and significance than others. To begin, it is important to recognize the fundamental impact that the case *Factortame*<sup>85</sup> had on the UK legal system, the rights of individuals within the Member States of the EU, and the obligations facing Member States and the supremacy of EU law over inconsistent national law.

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<sup>80</sup> *Supra* note 12.

<sup>81</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 [2002] 3 WLR 247.

<sup>82</sup> *Supra* note 17.

<sup>83</sup> *Supra* note 10.

<sup>84</sup> Albert Venn Dicey & E.C.S. Wade, *Introduction to the Study of the Law of the Constitution* (1965).

<sup>85</sup> *Supra* note 12.

## *I. Supremacy of EU Law: A National Courts' Duty?*

National courts of EU Member States have a duty to ensure that the principles of Community law are protected, and they voluntarily undertook this duty. Lord Denning's statement in *Macarthys v Smith*<sup>86</sup> reflects how in the UK this was achieved through Parliament surrendering its sovereignty to the EU through s 2 ECA 1972. However, the surrendering was a voluntary act of Parliament and one which it could override if it should so choose. He stated:

If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.<sup>87</sup>

Consequently, unless explicitly provided for in the text or preamble of an Act, Parliament's intention when it legislates is to follow and, if applicable, to give effect to EU law. As demonstrated in *Unibet (London) Ltd v Justitiekanslern*,<sup>88</sup> for instance, many authorities were provided where EU Member States are obliged to give effect to the Community law and to ensure that rights conferred on EU individuals by these laws are protected. Therefore, and to do so, national courts must work in conformity with EU law and take into account the purpose of EU legislation to ensure compatibility and a consistency in approach. Further, in *R v Transport Secretary Ex p Factortame Ltd (No.2)*<sup>89</sup> Lord Bridge stated that the ECA 1972 is clear that EU Member States shall give priority to Community law where there are conflicts with national laws. National courts cannot compromise on individuals' rights, or permit any breaches to EU principles. Moreover, Lord Harwich held that Community rights conferred on EU citizens were to be protected by national courts and could be, in these circumstances, directly enforced. In this respect, the courts in Member States are not allowed to undermine Community law by, for instance, preventing its effectiveness. To give effect to this principle, national courts were able to set aside any rules that undermine the effectiveness of EU law and were to enforce Community law.<sup>90</sup> However, in regard of an award for damage to victims of a State's failure to implement EU law as required (*Francovich*),<sup>91</sup> *Evans v Secretary of State for the Environment, Transport and the Regions*<sup>92</sup> clarified that such award is only granted conditional on the satisfaction of three conditions (i) the law in breach shall grant individual direct right in regard of the disputed area; (ii) the breach shall be sufficiently serious; and (iii) the loss to the victim was the direct consequence of the breach by the State (the loss was due to direct failure of implementing EU law).

## *II. The Tri-Partite Test – The Limiting Factor*

It was in *Delaney v Pickett*<sup>93</sup> where the Court of Appeal referred to the judgment of Jay J at first instance where he held that the MVID satisfied the tests and allowed the claimant to recover damages from the UK. Typically, it is the second test which limits the success of

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<sup>86</sup> *Macarthys Ltd. v Smith* [1979] 3 All ER 325.

<sup>87</sup> *Id.* at [329].

<sup>88</sup> *Unibet (London) Ltd v Justitiekanslern* [2007] CMLR 30.

<sup>89</sup> *Supra* note 16 at 659B.

<sup>90</sup> Article 5 of the Treaty of Rome.

<sup>91</sup> *Supra* note 19.

<sup>92</sup> *Evans v Secretary of State for the Environment, Transport and the Regions* [2004] RTR 32.

<sup>93</sup> *Supra* note 33.

recovering compensation. It is trite comment and the arguments are well rehearsed elsewhere but essentially Member States were to be protected where they had breached EU law, and this had caused the claimant quantifiable loss, but this had been the result of an innocent mistake or administrative error on the part of the State. It would be unfair to hold a State liable for each loss sustained by claimants in such circumstances, particularly when the Court of Justice was placed as a court of reference to determine any error and offer more clear and purposive instruction as to the point of law or the interpretation that should have been used by the court. The result was the “sufficiently serious” element of the test which negated the efficacy of the remedy of state liability. Of course, in relation to the MVID, the breaches of EU laws and principles in national law have often been so flagrant and clear that they pass the threshold for establishing the State’s liability. Nevertheless, and as mentioned earlier, even though *Francovich*<sup>94</sup> offers some method of remedying the financial losses suffered by the claimant, it does not correct the wrong (the breach) by bringing the national law in breach into line with its EU parent. Consequently, the victims who choose not to seek this route of remedy would suffer the negative consequences of being left uncompensated, which opposes the protective purpose of the MVID to facilitate free movement of people and goods throughout the Community (see Article 4 MVID which prohibits Member States to carry out insurance border checks on vehicles based in other Member States as such checks could amount to a hinderance of the principle of free movement).

### *III. Key Cases and the Development of the UK Constitution*

It is unlikely to be controversial to comment that one of the most remarkable movements in the history of the EU was the Court of Justice ruling in *Von Colson and Kamann v Land Nordrhein-Westfalen*.<sup>95</sup> Here the court empowered national courts to interpret its laws rationally in accordance with the wording and the aims of EU law. The EU had created, it will be remembered, a “new legal order” in which EU law was superior to national law which was a principle establishing the indirect effect of EU law.<sup>96</sup> In *Marleasing*,<sup>97</sup> the Court of Justice instructed the courts of Member States that they should, *as far as is possible*, interpret national law to give effect to the content and spirit of the EU parent. This philosophy was furthered in 2004 with the Court’s ruling in *Bernhard Pfeiffer et alia v Deutsches Rotes Kreuz, Kreisverband Walshut eV*.<sup>98</sup> Here those same national courts, it was emphasized by the Court of Justice, should play a greater role in protecting individuals’ rights conferred on them by EU laws when interpreting national law. Concurrently, national courts were charged with not preventing any provision from undermining the purpose of the MVID.<sup>99</sup> These cases established that, even prior to the UK joining the EU, EU law was accepted (and had to be accepted by new entrant States) as superior to national law. Without such a ceding of sovereignty the legal system of the EU and the development from an economic community to a union of States would not be achievable. The States, in ensuring EU law was superior to national law would have their rights to establish new laws in contradiction of EU law curtailed. When interpreting and applying existing laws, which either were created to transpose the effects of secondary sources of EU law (Directives) or could be interpreted as

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<sup>94</sup> *Supra* note 19.

<sup>95</sup> Case 14/83 *Von Colson & Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>96</sup> See as well, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

<sup>97</sup> *Id.*

<sup>98</sup> *Supra* note 8.

<sup>99</sup> See for instance, Case C-129/94 *Ruiz Bernáldez* [1996] ECLI:EU:C:1996:143 and *Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland* [2007] ECR I-3067.



being affected by an EU law, the courts in those jurisdictions had a positive duty to give effect to the EU law (direct parent law or not). Even with the duty of purposive statutory interpretation applying to national / EU law, numerous examples have been presented in this article where national courts have adopted a holistic approach and concluded that, on the whole, national law conforms with the requirements of the MVID (see *Roadpeace*).<sup>100</sup> Therefore, the value of the *Marleasing*<sup>101</sup> / *Pfeiffer*<sup>102</sup> line of reasoning in establishing a consistent interpretation of national law in light of the MVID has been haphazard and has not produced any semblance of legal certainty for any of the parties to motor vehicle insurance law. While much of this article uses cases where the national court has failed to interpret national law consistently with the MVID, positive examples do exist (for example *Churchill v Wilkinson*).<sup>103</sup>

Most recently in *MIB v Lewis*<sup>104</sup> the Court of Appeal held the MIB to be an emanation of the State (reversing years of inconsistent national rulings – indeed by the same judge who had previously ruled that the MIB did not possess this status). It also confirmed the direct effect of both Articles 3 and 10 MVID. This will provide a greater range of rights to be exercised in UK national courts – basing arguments directly on Articles 3 and 10 MVID and thus superseding the offending aspects of the RTA88, the UDA and the UtDA. However, and to place the significance of this judgment in context, the direct effect of the Articles will not, in the absence of knowledgeable lawyers and a receptive judiciary, result in significant change in the application of the law. For legal certainty, the case law may be amended through subsequent judgments but the provisions within the legislation and extra-statutory Agreements will not be changed (which compromises legal certainty). However, the status of the MIB, as a body of the State, will perhaps ease the argument that the Agreements it produces with the Secretary of State are susceptible to disapplication in a similar way to Acts of Parliament and functioning administrative agreements.

Ultimately, the UK judiciary too often seem unwilling to consider EU law when establishing a ruling, or cases heard at the same time but in different courts in the UK have opposite views on how to give effect to EU law,<sup>105</sup> which leads to an inconsistent interpretation between the two laws. This in turn undermines the protective purpose of the MVID.

#### *IV. Factortame, Thoburn and HS2: A Triumvirate of Constitutional Development*

If an argument is to be made that it is perhaps necessary, and possible – both legally and politically – to disapply the RTA88, UDA and UtDA in areas where they breach the MVID, it is right to begin with the case which established the change in the UK's constitution. The UK does not possess a constitutional court, its constitution is uncodified and subject to change, and the separation of powers does not grant a right for any court to strike down legislation. These facts are an established feature in UK constitutional law.

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<sup>100</sup> *Supra* note 15.

<sup>101</sup> *Supra* note 96.

<sup>102</sup> *Supra* note 8.

<sup>103</sup> *Churchill v Wilkinson* [2012] EWCA Civ 1166, [2012] All ER (D) 47.

<sup>104</sup> *Supra* note 10.

<sup>105</sup> For an MVID compliant interpretation of the RTA88 and UDA see *Allen v Mohammed and Allianz Insurance* (2016), Lawtel, LTL 25/10/2016; and for an inconsistent interpretation of EU law, based on a 'holistic' comparison between the EU laws and the suite of national legislative and administrative provisions see *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202. Again, here the lower court gives effect to the MVID and the appeal court views national law as compliant in its current state.

#### IV.1. *Factortame*

The problem in this case began when Spanish owned vessels started overfishing in UK territorial waters. Under the Treaty of Rome, the free movement principles enabled EU citizens to enter another Member State with the intention of working. The Spanish fishermen were such individuals. They had started by fishing and selling their catch in their home country, but soon discovered that other fish which did not sell particularly well in Spain did have a market in the UK. This led to the influx of new entrants to the fishing market in the UK and local fishermen were concerned about their livelihoods. It has to be remembered that these fishermen were fishing around the ports in the South of the country and these were traditionally Conservative-voting constituencies. With a threat that these areas would change their political votes, especially having seen what the Conservative governments had done to the coal and steel industries in the North of the country, the Government was faced with a problem. Should it follow EU law and continue to allow the Spanish fishermen (and citizens from other Member States) access to the waters and the fish, or should it establish legislation to curtail the influx? The result was the Government ceding to the pressure by the national fishing lobby and enacting the Merchant Shipping Act 1988 (MSA88). The MSA88 imposed conditions on those who wished to fish in British waters. Either the fishermen had to be domiciled in the UK or the vessel itself had to be registered in the UK. This would effectively limit access to fishermen from other Member States who would be unlikely to wish to satisfy either criterion. Of course, the Act contradicts one of the most important principles of the Community (free movement). The argument presented in court<sup>106</sup> was for the EU Treaty offending MSA88 to be disapplied so as not to breach this fundamental Treaty right. It was appealed to the House of Lords who believed that applying the requested intervention might subvert the concept of Parliamentary sovereignty as the MSA88 was approved by Parliament<sup>107</sup> and the judiciary had no constitutional power to refuse to give effect to an Act of Parliament. Consequently, the Lords referred the case to the Court of Justice which declared that the MSA88 breached EU law and as the law of EU is supreme,<sup>108</sup> interim relief was necessary and the UK chose to disapply the Act accordingly.<sup>109</sup>

Prior to *Factortame*,<sup>110</sup> it was understood that national courts have no power to strike down any legislation passed by the Parliament. The role of the courts is to interpret the law, not to make it.<sup>111</sup> However, and although the Court of Justice empowers national courts of EU Member States to read and interpret legislation in a way that gives effect to EU law through consistent interpretation and methods of reasoning to ensure consistency in the Community, such empowerment is still limited in the UK and any interpretation must not go against the spirit of the UK legislation, in spite of the fact that *Factortame*<sup>112</sup> is a British case. Nonetheless, this may raise another question of the constitutional position of the courts as its

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<sup>106</sup> The case was brought by Spanish company *Factortame Ltd.* and almost 100 other Spanish fishing companies. They claimed compensation for losses while their ships were unavailable for use over three-year period (1988-1991).

<sup>107</sup> The case sparked a debate on whether the constitutional principle of parliamentary sovereignty is being eroded. However, Lord Woolf, Master of the Rolls, sitting with Lord Justice Schiemann and Lord Justice Robert Walker, ruled that 97 owners and managers of vessels were entitled "in principle" to recover damages.

<sup>108</sup> Section 2(1) and s 2(4) of the European Communities Act 1972.

<sup>109</sup> Three years later the Court of Justice overturned the UK's legislation. It also ruled member states must pay compensation where a breach of European law was deemed "sufficiently serious."

<sup>110</sup> *Supra* note 12.

<sup>111</sup> The House of Lords refused to rule on this matter as it may subvert the concept of Parliamentary sovereignty and referred the case to the Court of Justice.

<sup>112</sup> *Supra* note 19.

interpretation of EU law may lead it to either overrule Parliament or to disregard EU law in a case of irreconcilable differences between the two. The ruling in *Factortame*<sup>113</sup> provoked outrage as to how it undermines Parliamentary sovereignty.<sup>114</sup> The government however, was not ignorant<sup>115</sup> of the fact (as is also the case in matters related to third-party victims of road traffic accidents) that any legislation that undermines any principle of EU law such as free movement is a clear breach of EU law, which the UK is legally bound by, and negative consequences may follow as a result of passing the MSA88. However, the government's challenge to the Court of Appeal was dismissed, and the House of Lords stated that the disapplication was due to a breach of one of the most important principles of Community law, and therefore justified in the circumstances.

The MSA88 holds a unique place in the history of the UK constitution being the only Act which the courts would not apply. It was for Parliament to determine whether the MSA88 as it was written should be applied. If it was the intention of Parliament to breach a fundamental principle of EU law, it was able to do so. Adopting Denning's position in *Macarthys v Smith*,<sup>116</sup> the national courts would follow Parliament's instruction to adhere to the national law even where it was in conflict with a superior EU law. The EU law in question was only superior in the instance of the MSA88 because Parliament had instructed the judiciary of this point in the ECA 1972 s 2,<sup>117</sup> and Parliament was equally empowered to revoke this instruction in relation to the MSA88 or generally to all laws if it chose.<sup>118</sup> The Lords had decided that such a fundamental breach could not have been the intention of Parliament and they held accordingly.

#### IV.2. *Thoburn*

It will be noted that one of the most significant features of the *Factortame (No. 2)*<sup>119</sup> case is that despite the importance that it has for the UK and its relationship with the EU, there is a general lack of detail and discussion on the constitutional theory and practicalities of, on the one hand, the principle of parliamentary sovereignty, and on the other the supremacy of EU law. It was not until 2002 in the *Thoburn*<sup>120</sup> case where the reasoning of the court shed light on this particular issue. The case was widely known and considered at the turn of the new millennium. Council Directive 80/181/EEC had established the requirement for goods widely sold (exceptions were incorporated in the Directive but do not require consideration for the purposes of this article) to have the legal units of weight represented according to metric measurements. The Directive further allowed for supplementary indications of measurements – essentially allowing Member States such as the UK to continue using the Imperial measurement system until the end of 2009. The incorporation of the Directive in to national, amending legislation (the Weights and Measures Act 1985), led to four appellants, known

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<sup>113</sup> *Supra* note 19.

<sup>114</sup> Adam Wagner, *Does Parliamentary Sovereignty Still Reign Supreme?*, THE GUARDIAN, January 27, (2011), <https://www.theguardian.com/law/2011/jan/27/supreme-court-parliamentary-sovereignty> (last visited Nov 11, 2019).

<sup>115</sup> The law lords held that the government had deliberately decided to run the risk of introducing the legislation, knowing that it could be unlawful. Justice required that the wrong should be made good.

<sup>116</sup> *Supra* note 86 at [329].

<sup>117</sup> The ECA provides, by section 2(4), that European Union Law is to prevail over inconsistent Acts of Parliament "passed or to be passed."

<sup>118</sup> At least this was the thinking at the time until the Miller and Cherry cases clarified the mechanism need to repeal the ECA 1972.

<sup>119</sup> *Supra* note 16.

<sup>120</sup> *Supra* note 81.

widely at the time as the “metric martyrs,” who had been convicted of offences relating to the use of Imperial measurements. It was in the use of the “Henry VIII” powers by the Secretary of State to amend the 1985 Act which was the focus of the appeal. The main argument was that the amendment to the 1985 Act had impliedly repealed s 2(2) of the ECA 1972 on the basis that the ECA 1972 established a general provision regarding amending legislation and the more recent 1985 Act was a specific provision. Laws LJ was not convinced with the legal basis of the argument but, to provide certainty regarding the issue in case he was incorrect in his analysis, Laws LJ continued by examining the nature of the ECA 1972 and whether and how implied appeal through inconsistent provisions in later statutes might affect its standing. Previous authorities were discussed and the fundamental principles which are very well known and need not be replicated here were considered. The result was that Parliament and the legislature cannot bind future parliaments – the doctrine of implied repeal continued as a fundamental matter of British national constitutional law.

However, Laws LJ went further. He remarked that implied repeal is actually context sensitive and, as legislation could be “ordinary” or of a “constitutional” nature, implied repeal operates as it is known to do so in relation to ordinary legislation. With regards to constitutional statutes,<sup>121</sup> these had to be treated differently. Therefore, at para. 63, Laws LJ considered:

Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.

The ECA 1972 is a constitutional statute, but the overriding nature of the UK’s Parliament, it being sovereign, must surely work to resist any limitations on its own power. Perhaps Wade is correct and sovereignty is now a “freely adjustable commodity.”<sup>122</sup> The answer seems to be found in the text of the ECA 1972 itself and the powers it provides the judiciary in matters of resolving conflicts between national and EU laws. In terms of implied repeal, the ECA 1972 is impenetrable to implicit repeal or contradiction, albeit still subject to the express repeal of a sovereign Parliament. Thus *Thoburn*<sup>123</sup> establishes a continuation of the theory of parliamentary sovereignty. Therefore, in relation to any difference in approach by the judiciary in its interpretation of the RTA88, UDA, and UtDA, the ECA 1972 is immune from any sense of implied repeal. It takes precedence over the statute and extra-statutory provisions and the clear instruction in ECA 1972 s 2 that “All rights, powers, liabilities, obligations and restrictions... created or arising by or under the Treaties, and all such remedies and procedures... provided for by or under the Treaties, are without further enactment to be given legal effect or used in the United Kingdom” instructs the judiciary as to this supremacy.

#### *IV.3. R (HS2 Action Alliance Ltd) v Secretary of State for Transport*

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<sup>121</sup> The Magna Carta; The Bill of Rights 1689; the European Communities Act 1972; the Human Rights Act 1998; the Scotland Act 1998 and so on would likely be considered “constitutional” in nature.

<sup>122</sup> Henry W.R Wade, *Sovereignty – Revolution or Evolution?*, 112 Law Quarterly Review 568 (1996) at 573.

<sup>123</sup> *Supra* note 81.

The case involved the application of Directive 2011/92/EU and its imposition of decision-making in relation to, for the purposes of the case, the construction of the proposed high-speed rail network known as HS2. The Supreme Court was tasked with deciding if the UK's approach to the process adopted in *HS2*<sup>124</sup> was in compliance with the requirements laid down in the Directive. The mechanism used to give effect to the transposition of the Directive was a "hybrid Bill" – one which begins life as a public bill, but which adds an additional select committee stage following the second reading in each House.<sup>125</sup> It is at this stage where objections from those directly affected by the bill can be raised and where issues may be heard. It was this mechanism which was scrutinized by the Court with the issue of the potential concern that this form of scrutiny may encroach into the relationship between Parliament and the courts (per Lord Reed). It transpires that Lord Reed did not consider there to be any constitutional problem with the manner in which the Directive had to be implemented in national law, but what was interesting was the obiter provided where he hypothesized what would have been the result *had* there been such a problem from the Directive.

Lord Reed surmised that had the Directive called upon the UK to adopt a system of close judicial scrutiny of a bill on its passage through Parliament, the aligning of EU law with national law would not have been as straightforward as the application of the doctrine of the supremacy of EU law. The doctrine derives from the ECA 1972 and matters regarding conflicts between constitutional principles must be resolved by national courts according to principles of national constitutional law. Further, *Factortame (No. 2)*<sup>126</sup> was of no use in these circumstances as the matter there was the breach of EU law following the enactment of an Act of Parliament, not the process of the making of national law and its compatibility with superior EU law. The conclusion to be drawn is that in *HS2*,<sup>127</sup> Lord Reed is explaining how the application of EU law in the creation and interpretation of national law is not merely subject to the existence of the ECA 1972, but rather includes many other dimensions to national constitutional law which may have an impact.

#### *V. Disapplication beyond the MSA88?*

The three cases mentioned come together to form the basis for a legal argument that the directly effective elements of the MVID, where they are breached by the RTA88, the UDA and the UtDA may lead to the disapplication of those offending aspects of national law. In *Factortame (No. 2)*,<sup>128</sup> the decision of the Lords to direct the disapplication of sections of the MSA88 was due to the ECA 1972 providing for EU law to take precedence over national law and the MSA88 Act not derogating from the constitutional powers of the ECA 1972. Had Parliament intended the MSA88 to take effect over the provisions contained in the ECA 1972 it could and would have explicitly done so. *Thoburn*<sup>129</sup> continues this approach of parliamentary sovereignty and pragmatic primacy of EU law by demonstrating Parliament's continued power to derogate from EU law, albeit when it expressly identifies its intention to do so. The problem with this approach, whilst theoretically sound, is that it begins to unravel

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<sup>124</sup> *Supra* note 17.

<sup>125</sup> The Speaker in the House defined a hybrid bill as "a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class" (Hansard (HC Debates), 10 December 1962, col 45).

<sup>126</sup> *Supra* note 16.

<sup>127</sup> *Supra* note 17.

<sup>128</sup> *Supra* note 16.

<sup>129</sup> *Supra* note 81.

when considered in reality. As has been demonstrated throughout the Brexit negotiations and internal wrangling in Parliament, it is not simply the case that the government can choose to remove or suspend parts of the ECA 1972 when it seems politically expedient to do so. This would require an Act of Parliament specifying the clear intention for the particular Act in question to be read as intending to circumvent or directly transgress aspects of the ECA 1972. In its absence, there would also be the political fall-out from the EU itself, a breach by the UK of its EU obligations and a denial of the legitimacy of the action by the Court of Justice. As a consequence, while the position in *Thoburn*<sup>130</sup> is academically correct in as far as the UK's ability to derogate from its EU obligations and the primacy of EU law is concerned, practically, however, this is little more than a theoretical construct. There also remains the very real issue of what type of statute will be necessary to override an existing constitutional statute. This calls into question issues of hierarchy between such laws and, as provided by Laws LJ at para. 63, a "specific" form of derogation will be required to achieve an "inference of an actual determination to effect the result contended for was irresistible." This will allow for protection against accidental or incidental derogation, but the interpretation of such will fall to each court to determine. What it does not achieve though, is reconciling the stark difference between traditional legal theory (*Thoburn*<sup>131</sup> reinforces the principle of sovereignty of Parliament and its legitimacy that specific legislation can derogate from otherwise entrenched legislation with the status of being "constitutional" in nature) and political reality. The UK voluntarily acceded to be a Member State of the EU and to accept with this status the primacy of EU over national law in areas where the EU has competence. It is naïve to infer that Parliament may simply express a willingness to override the EU Treaty and for this position to be accepted by the courts. Although, of course, this is what the *Thoburn*<sup>132</sup> judgment appeared to suggest. However, towards the conclusion of his judgment, Laws LJ offers an interesting insight into a modernizing of that constitutional view:

[Parliament] Being sovereign, it cannot abandon its sovereignty... This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the UK's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.<sup>133</sup>

Here Laws LJ notes that Parliament's legislative authority derives from its common law roots and it is in the common law where it may be subject to modification. Therefore, as the common law is the source of Parliamentary sovereignty, it may also be used to alter what is known of as sovereignty. This, for Laws LJ at para. 60 of his judgment, has been ably demonstrated in respect of the creation of exceptions to the doctrine of implied repeal. It also permits, if such an argument is advanced to a natural conclusion, for the common law to decide, if it wishes, to create constitutional legislation which, through interpretation, are so important that it would be inappropriate for a Parliament to nullify – implicitly or explicitly. The common law will thereby be the arbiter of what might be recognized as constitutional legislation or conversely of a lesser hierarchical standing. Hence the *Thoburn*<sup>134</sup> ruling is at times confused as to which authority (parliamentary or common law) determines the

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at para. 59.

<sup>134</sup> *Id.*

entrenchment of legislation. Ultimately, *Thoburn*<sup>135</sup> reflects a new view of the constitution. Here Parliament's sovereignty is not so much a "political fact" in the Wade sense of its understanding,<sup>136</sup> rather it is a legal phenomenon subject to the common law it need not invoke unconstitutional behavior on the part of the courts to produce a *Factortame (No. 2)*<sup>137</sup> and *Thoburn*<sup>138</sup> result. These cases are the very result of the courts "discharging their constitutional role."<sup>139</sup>

This brings us to the most recent case of *HS2*.<sup>140</sup> If we accept the proposition of Lord Reed in his *dictum*, the stark and binary distinction between ordinary legislation and constitutional legislation is too simplistic in approach. *Thoburn*<sup>141</sup> established the distinction and hierarchy between ordinary and constitutional legislation, but left open the debate of whether all constitutional legislation is of the same status. Could there be nuances and hierarchies present in constitutional laws? This is the place where Lords Neuberger and Mance offered their reasoning on the matter by reference to:

Article 9 of the Bill of Rights, one of the pillars of constitutional settlement which established the rule of law in England in the 17th century, precludes the impeaching or questioning in any court of debates or proceedings in Parliament. Article 9 was described by Lord Browne-Wilkinson in the House of Lords in *Pepper v Hart* [1993] AC 593, 638, as "a provision of the highest constitutional importance" which "should not be narrowly construed".

Thus some constitutional principles may be more "constitutional" than others and could an EU Directive be constructed which would require national courts to set aside the principle due to the superiority of EU law? For Lords Neuberger and Mance the answer was that it probably would not. They seemed to misrepresent the House of Lords' instruction relating to the treatment of national law which contradicts EU law via the ECA 1972 (that such legislation was to be held as "invalid" when really what the Lords held was that such laws could be dissapplied by the courts). However, they proceeded by explaining how the ECA 1972 could not be interpreted as meaning that all legislation, especially those dealing with, for example, the rule of law, which were in conflict with EU law could be abrogated.

The analysis of the above cases is used to demonstrate that the basic notion of the supremacy of EU law over inconsistent national law derives its status from the ECA 1972. This was established, if were needed, in *Factortame (No. 2)*<sup>142</sup> and through *Thoburn*,<sup>143</sup> the court further offered direction that the ECA 1972 was a constitutional statute and thus immune from implied repeal. For future legislation to override the principles of the ECA 1972 would have required specific and explicit repeal of those principles. More recently in *HS2*<sup>144</sup> the Supreme Court explained how constitutional laws – be they legislative or established through the common law – are not equal and a hierarchy exists. Thereby explaining a further nuance

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<sup>135</sup> *Id.*

<sup>136</sup> Henry William Rawson Wade, *The Basis of Legal Sovereignty* 13 CLJ 172 (1955).

<sup>137</sup> *Supra* note 16.

<sup>138</sup> *Supra* note 81.

<sup>139</sup> Mark Elliott, *Embracing 'Constitutional' Legislation: Towards Fundamental Law?* Paper No. 48/2014 August, University of Cambridge Legal Studies Research Paper Series at p. 18 (2014).

<sup>140</sup> *Supra* note 17.

<sup>141</sup> *Supra* note 81.

<sup>142</sup> *Supra* note 16.

<sup>143</sup> *Supra* note 81.

<sup>144</sup> *Supra* note 16.

to laws which may be repealed and through which measures will be required. The ECA 1972 was deemed to have the status of being fundamentally constitutional in nature and therefore Parliament did not intend for future legislation to abrogate the principles within it lightly. If we return to *Thoburn*<sup>145</sup> it is readily evident that the RTA88 would be defined as ordinary legislation and would not require discussion of the hierarchy between constitutional laws. Essentially, the ECA 1972 trumps the RTA88, and using this analysis even more so in relation to administrative provisions contained within the UDA and UtDA (established as they were between a body designated as an emanation of the State and the Secretary of State), and it would follow that it is available to national courts to disapply those national provisions which contradict directly effective elements of an EU directive (superior EU laws). Certainly, the contradicting aspects of the RTA88, UDA and UtDA could not be read as overriding the judiciaries' obligation flowing from ECA 1972 s 2 "to be given legal effect or used in the United Kingdom."

Of course, the entire purpose of the discussion provided by Lords Neuberger and Mance is to further explain the very blunt constitutional tool which is Parliament's sovereignty that enables it to abrogate and derogate from EU law in as far as it chooses, albeit with the proviso that it makes such an intention sufficiently transparent and obvious. The judgment of the Lords tempers this approach through categorization of the ECA 1972 as being but one constitutional law which is potentially limited through the application of other constitutional laws – be they legislative or established through the common law. The status of the ECA 1972 does not credit it with a power to prevail over all other inconsistent Acts of Parliament, but it does offer the starting point for arguments regarding the hierarchy and status of laws and whether implicit or explicit derogation is necessary to determine the primacy of EU law. This rejects the previously held view that the constitutional landscape as provided for by Dicey is flat and introduces a more uneven constitutional order which will require calibration through judicial pronouncement.

#### **F. The Goal of Remediating UK Motor Vehicle Insurance Law: Interim Relief or Permanent Disapplication?**

There is no such power that can prevent the UK's national courts from granting interim relief or to permanently disapply the national motor insurance law otherwise such power would harm the effectiveness of EU law (see *Schorsch Meier GmbH v Hennin*).<sup>146</sup> The MSA88 was believed to be in breach of a fundamental EU principle (free movement principle) where individuals and businesses used to rely on to have the right to access to the UK fishing quota as free movement shall not be restricted. Aspects of the motor insurance laws are in breach of the same EU fundamental principle (free movement). The applicants in *Factortame*,<sup>147</sup> after an unsuccessful claim,<sup>148</sup> sought judicial review in the UK and to remove restriction on their rights of fishing in the UK water.<sup>149</sup> The judicial review, however, failed to achieve anything of substance. As the judicial order to restrain the government from the threat that the Act undermines EU law and to make restitution to the claimants was refused, the case was referred to the Court of Justice through the House of Lords.<sup>150</sup> Thereafter, the Court of Justice

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<sup>145</sup> *Supra* note 81.

<sup>146</sup> *Schorsch Meier GmbH v Hennin* [1975] QB 416.

<sup>147</sup> *Supra* note 12.

<sup>148</sup> The claim before the UK national law before referral to the European Court.

<sup>149</sup> Article 43 of the ECA 1972.

<sup>150</sup> The House of Lords was obliged, under Article 234 (ex 177) now Article 267 TFEU to refer the case to the Court of Justice.



held that national laws of EU Member States should have no effect whatsoever beside EU law (national laws cannot prevent national courts from granting interim relief where EU law is involved in a dispute).<sup>151</sup> The Court of Justice held that the provisions of the MSA88 contravene EU law and therefore to be disapplied by UK national courts.<sup>152</sup> In the light of the Court of Justice judgment, the House of Lords granted an injunction in favor of the claimant (*Factortame*).<sup>153</sup> The motor insurance law has been challenged and many claims have proven unsuccessful. Some were referred to the Court of Justice and some compensation was granted. However, it failed to remove the illegality of exclusion clauses and procedural rules. A judicial review failed too to bring the law into line with EU law.<sup>154</sup> Therefore, referral to the Court of Justice, if national courts failed to fulfil its duty and disapply the law, may need to be considered.

The MSA88 was disapplied by the UK national courts and the victims of the 1988 Act were duly compensated. Therefore, the authors argue that the directly effective aspects of the MVID (Arts. 3 and 10) require the offending aspects of the RTA88, UDA and UtDA shall be disapplied and third-party victims of road traffic accidents who suffered losses or injuries in the past and failed to secure fair compensation due to breaches of EU law shall be compensated accordingly. For instance, in *Factortame III*<sup>155</sup> the Court of Justice held that the European Commission can take actions against any EU Member States that could be liable for damages where it fails to comply with EU law. As explained earlier, the motor insurance law breaches more than one fundamental EU principle. Each of which is sufficient to have the law disapplied (the provisions and clauses in breach).

The power to disapply the RTA88 due to its infringement of the free movement of goods and of persons is compelling when compared with the infringement occurring in *Factortame*.<sup>156</sup> It will be remembered in *Factortame*<sup>157</sup> that the affected Spanish fishermen were not prevented, entirely, from access to British waters to undertake their professional activities, rather the MSA88 applied conditions to be satisfied in order for such access to be effective. Hence, had the fishermen domiciled themselves in the UK or had registered their vessels in the UK, access would have been granted. Compare this with the current state of the RTA88. In its current reading and application, the Act does not prevent the free movement of people and goods from the EU to the UK. The RTA88 makes the provision for the protection of third-party victims of motor vehicle accidents less beneficial than citizens would experience if the EU law was correctly applied. However, on closer inspection, it may even be more compelling to disapply the offending provisions within the RTA88 when compared with the MSA88 as in *Factortame*,<sup>158</sup> had the Spanish fishermen complied with the criteria identified in that Act, access, and therefore the movement of goods and persons, could have been achieved. In respect of the RTA88, and to give just one example of s. 145 and the geographic scope of compulsory motor vehicle insurance (per *Vnuk*),<sup>159</sup> it is actually not possible for an affected citizen to protect themselves against the actions of a negligent uninsured motorist for an accident occurring on private land. There are no comparable criteria within the RTA88

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<sup>151</sup> *Supra* note 12.

<sup>152</sup> *Supra* note 16.

<sup>153</sup> The decision was made on 11 October 1990.

<sup>154</sup> *Supra* note 15.

<sup>155</sup> *Brasserie du Pêcheur v Germany and R (Factortame) v SS for Transport (No 3)* (1996) C-46/93 and C-48/93.

<sup>156</sup> *Supra* note 12.

<sup>157</sup> *Supra* note 12.

<sup>158</sup> *Supra* note 12.

<sup>159</sup> *Supra* note 38.

which, upon satisfaction, grant protection to the citizen. Citizens in the EU have the right to expect EU law to be applied in each Member State, and the MVID and the Court of Justice have clarified the issue regarding the geographic scope of compulsory motor vehicle insurance. That the RTA88 has not been amended since the ruling in 2014, the judiciary seem unwilling, even in recent cases, to understand or appreciate the significance and nuance within the reasoning of *Vnuk*,<sup>160</sup> *Andrade*<sup>161</sup> and *Juliana*,<sup>162</sup> and subsequently citizens may lack confidence in whether the law will be applied correctly and whether they will have access to the protection afforded at the EU level, this may have tangible effect on free movement. Personal insurance cover will protect the individual against associated medical costs, but they are unlikely to cover the suite of losses that would have been available against an insured and identified driver, and which should have been available through the MIB as insurer of last resort in the event of no such cover being available. Yet the national law fails in this duty, the courts have frequently not applied EU law in any semblance of consistency with the provisions in the MVID, and the consequence is the exposure of risk to the individual third-party victim. Such a victim lacks the ability, that was even available to the Spanish fishermen, to facilitate free movement on terms comparable with citizens in other Member States.

*HS2* has extended the principle of disapplying an Act of Parliament in *Factortame*<sup>163</sup> based on a Treaty Article and extended its reach to the disapplication on the basis of an EU Directive. Hence, even if the view is that motor vehicle insurance law is not a direct aspect of the free movement principles of the EU (which, in any respect, we believe they are) and a Treaty Article, the MVID, as a Directive, is not in any meaningful way (hierarchical as opposed to its content) to the EIA Directive. They both impose obligations on Member State to achieve the aims within and indeed, given that aspects of the MVID have been held to have direct effect, it could be even argued that it has a greater argument for requiring offending national law to be disapplying than the EIA.<sup>164</sup>

In *HS2*,<sup>165</sup> at para. 191, Lord Neuberger and Lord Mance refer to the source of the EIA for the subsequent adoption of the UK legislation. As the MVID began its life in 1972, albeit inspired by the UK RTA 1930, it has through iterations in [1983, 1990, 2000, 2005 and 2009] initially been the precursor for aspects of the RTA88, and much more comprehensively the UDA [1988, 1999 and 2015] and UtDA [1996, 2003 and 2017]. Thus, those provisions therein must be viewed “as subject to a pre-condition that the legislative process must have enabled the objectives pursued by the Directive to be achieved.”<sup>166</sup> Further, at para. 206, Lord Neuberger and Lord Mance confirm

Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law.

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<sup>160</sup> *Id.*

<sup>161</sup> *Supra* note 41.

<sup>162</sup> *Supra* note 42.

<sup>163</sup> *Supra* note 16.

<sup>164</sup> Directive 85/337/EEC, the Environmental Impact Assessment Directive.

<sup>165</sup> *Supra* note 17.

<sup>166</sup> *Supra* note 17, para. 191.

## G. Concluding Remarks

Compulsory motor insurance law is of great importance for the functioning of the Community and consequently on individuals' movement (as drivers, passengers and victims). The protection within the Community must not be affected by or based on, for instance, where an accident takes place as far as it happened on Community land. In other words, victims shall not be disadvantaged as to their claim, depending upon in which State the accident occurred, rather they should be treated equally in terms of the levels of compensation provided as well as to the procedural rules applicable in national courts.<sup>167</sup> Directives were chosen as the legislative method to achieve such goals and they create the legal framework to guarantee that compensation is always available for victims of motor vehicle accidents by facilitating a claim directly against the responsible driver, their insurer (if applicable) or where impossible, from the relevant compensatory body. The MVID ensures that Member States have very little margin of discretion when it comes to derogating from these responsibilities, for example through the operation of contractual exclusion clauses. Nevertheless, and as far as the UK is concerned, the government and the judiciary (interpreted broadly) seem to reject the notion that the MVID can have a broad interpretation so as would mean that the UK failed to fulfil its duty to implement the MVIDs effectively. However, some of the blame for this state of affairs may be levelled at the EU itself as the Commission has failed to take any action in this respect to challenge UK national law (see for instance, Lord Clyde's argument in *Clarke v Kato*).<sup>168</sup> Yet, given the political dimension to the decisions of the Commission to seek infringement claims against Member States<sup>169</sup> and its complete discretion in this function,<sup>170</sup> it is possible to excuse its lack of action in this regard.

The article has identified those aspects of UK motor vehicle insurance law which contravene the MVID and undermine the free movement principles of the EU. Also, through *Factortame (No. 2)*,<sup>171</sup> it is constitutionally permissible for the courts to disapply an Act of Parliament that breaches a fundamental aspect of EU law. *Thoburn*<sup>172</sup> provides that "ordinary" Acts of Parliament cannot implicitly repeal a "constitutional" Act, and thus the ECA 1972 could not be deemed to have been altered by the later RTA88. In *HS2*,<sup>173</sup> the dicta of the Supreme Court identify that a hierarchy exists between national constitutional Acts (which is not as relevant for the argument we present here but is an interesting area for development – perhaps in a post-Brexit UK with future trade deals and the basis on which they are concluded), but also that an EU Directive has the power, at least in theory, to require the changing (and possibly disapplication) of a national UK Act of Parliament.

UK national law has led to a lesser level of protection for the victims of motor vehicle accidents than is required under EU law. It has and continues to create uncertainty for all parties as to their legal rights and obligations. Given the problems with meaningful action by the State to rectify the law (see for example *Vnuk*<sup>174</sup> and the continued lack of instruction in

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<sup>167</sup> *Supra* note 52, at para. 13.

<sup>168</sup> *Clarke v Kato* [1998] 233 N.R. 381 (HL).

<sup>169</sup> See for instance Tanja A. Börzel, *Non-compliance in the European Union: Pathology or Statistical Artefact?*, 8(5) JOURNAL OF EUROPEAN PUBLIC POLICY, 803-824, (2001).

<sup>170</sup> For commentary see H.A.H. Audretsch, (ed.) *Supervision in European Community Law*, New York: Elsevier (1986).

<sup>171</sup> *Supra* note 16.

<sup>172</sup> *Supra* note 81.

<sup>173</sup> *Supra* note 17.

<sup>174</sup> *Supra* note 38.

the statutory and extra-statutory laws relating to the compulsory motor vehicle insurance on private land), the most compelling way to provide this certainty and to ensure the fulfilment of the UK's obligations under EU law is for those offending aspects of the RTA88, the UDA and the UtDA to be disapplied.