

CHAPTER 1

Setting the Context for European Public Law

This book, which in part examines the Europeanization of our domestic law, comes at a crucial stage in the future of European integration. The financial crisis has led to a treaty (European Stability Mechanism (ESM)) between states who are members of the Eurozone¹ and a treaty originally between 25 EU states (Stability, Coordination and Governance in the Economic and Monetary Union) which will lead to greater integration of fiscal and economic management between the signatories of the treaty. The latter will provide tight controls over taxation and spending and penalties for those who overspend (Chapter 13). This will inevitably lead to pressures to federalise political and fiscal control over the economies of those states. In May 2013, the French President and German Chancellor agreed an outline for the future of the Eurozone members which envisaged a permanent president of the Eurogroup of Finance Ministers and regular summits. They also suggested that the European Parliament establish Eurozone only structures to give democratic legitimacy to the bloc. There will be central regulation of banks within the Eurozone by the European Central Bank although the May 2013 proposals seemed to steer more towards national responsibilities for bank bail-outs. It is inevitable that the Union will proceed at a different pace and in a different direction by those within the Eurozone and those without. The call for greater integration and redistribution of resources *within* the Union is unlikely to be acceptable to any future UK government.²

The UK is not a party to these treaties. The Advocate General Kokott in the *Pringle Opinion* argued that solidarity under the Preamble to the treaties, Article 3(3) TEU and Article 122(1) TFEU was a basic ‘fundamental principle’ of the treaties to argue against

1. The Court of Justice has ruled that the treaties of the European Union and the Functioning of the EU (TEU and TFEU) did not present a legal barrier to the signing of the treaty: Case C-370/12 *T Pringle v. Government of Ireland* [2012] EUECJ.

2. M. Poiares Maduro ‘The Euro Crisis and Institutional Reform in EU’ http://www.fd.lisboa.ucp.pt/resources/documents/CONFERENCIAS/2013/The_Euro_Crisis_and_Institutional_Reform_in_the_EU_MPMaduro24julho2013.pdf.

an interpretation of Article 125 TFEU that would have ruled ESM ultra vires.³ David Cameron has used the crisis to attempt to forge a new relationship with the Union through which the Prime Minister hoped to be able to renegotiate the terms of UK membership over 40 years after the UK joined the common market. The Foreign Affairs Committee of the House of Commons expressed his ‘veto’ as a possibly ‘defining moment’ in the UK’s EU policy and place in the EU. The opportunity for renegotiation Cameron believes will arise on a new EU treaty required by the Eurozone and stability treaties. The UK government is undertaking a ‘balance of competences’ review’ announced in July 2012 to assess what the EU does and how it affects the UK. The review will cover 32 subject areas and the first batch of reports appeared in July 2013.⁴

Having renegotiated successfully to an acceptable position that will place the UK possibly on a trading partner basis with the EU but without the costs, loss of sovereignty and attendant regulation, a referendum will then be put to the UK citizens on terms as yet unspecified. It will include a referendum on ‘in’ or ‘out’ of the Union or ‘in’ on the new terms by 2017. A Conservative Private Member’s Bill after the Queen’s Speech opening Parliament in May 2013 forced the hand of the Prime Minister on a firm promise of an ‘in/out’ referendum. Euroscepticism has become something of a *zeitgeist* and has been fanned by much of the popular press within the UK and has prompted nationalistic and populist political parties exerting ever increasing pressure on the Conservative Party.⁵ Very often this has been based on gross distortion and misrepresentation – a factor commented upon by Leveson LJ in his inquiry and report on government and media relations in the UK.⁶ The future has to be determined. My own guess is that the UK will remain in the Union as a member and will continue its uneasy relationship with the other partners. Whether it will remain an influential partner remains to be seen. The select committee conducted its inquiry into *The future of the European Union: UK government policy* on the basis that the UK would remain within the Union. ‘The Government should frame its approach and language in pan-EU rather than UK-only terms, and should remain constructive, positive and engaged’ the Committee advised.⁷ Much of what this book contains results from the influence of our 40 years within the EU and over 60 years within the European Convention on Human Rights (ECHR). Come what may that influence will remain. I personally hope the UK through its legal systems continues to influence European Public Law just as the UK will continue to be influenced by European laws.

3. Pringle above *Opinion* of Advocate General paragraphs 142–144.

4. <https://www.gov.uk/review-of-the-balance-of-competences>. This link sets out the timetable for evidence gathering and reporting concluding in the summer 2014.

5. The UK Independence Party has become a significant electoral force breaking the mould of three party domination in England. Its support is in England. UKIP speaks for those who feel alienated by forces of globalization, Europeanization and financial collapse.

6. *An Inquiry into the Culture, Practices and Ethics of the Press* House of Commons Paper HC 780 I-IV (2012–13), Executive Summary HC 779 (2012–13) at Vol. II pp. 687–688 <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp> See J. Spencer (2012) *Cambridge Yearbook of European Legal Studies* 363.

7. See HC 87 I and II *First Report* (2013–14) p. 4; see *Government Response* Cm 8693 (2013–14).

The Eurosceptic developments come at a time when there are major reforms being introduced into legal aid in England and Wales and a growing resort to contractualization by the state of legal services and administration. On 1 April 2013 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will come into force, taking whole swathes of civil law out of scope for legal aid. People with legal problems in areas that are out of scope will only be able to get legal aid if they qualify for ‘exceptional funding’. Such funding will be available where it is necessary to avoid a breach of a litigant’s rights under the ECHR or under EU law. Guidance from the Lord Chancellor on exceptional funding is available:⁸

It will be necessary to make legal services available to an individual where the withholding of such services would clearly amount to a breach of Article 6 of the ECHR (‘right to a fair trial’), Article 2 of the ECHR (‘right to life’) or any other provision of the Convention giving rise to an obligation to provide such services. There will be a breach of the enforceable EU rights of the individual to the provision of legal services where the withholding of such services would be clearly contrary to the rights reaffirmed by Article 47 of the Charter of Fundamental Rights, or to the rights to legal services that are conferred on individuals by EU instruments.⁹

Even economic austerity has to make concession to the European influence in domestic law.

§1.01 INTRODUCTORY THOUGHTS ON WHAT IS EUROPEAN PUBLIC LAW

This is a book about European public law. It must be immediately emphasised that it is not a comparative treatise of the public law systems of each European state. My linguistic limitations,¹⁰ my ignorance and the demands of publishers would prevent such a task. It is more accurate to suggest that this work is a study of the impact of European legal thought and practice, and on ‘being in Europe’, on British, and more specifically English public law, its thought and practice. ‘Public law’ itself is an expression that remains contested among English lawyers who either deny there is any system comparable with continental traditions or believe that there is little that needs to be treated as distinctly ‘public’ in our law. Or the concept does not address private power in a global network.¹¹ I do examine, for comparative purposes, the constitutional and administrative systems of France, Germany and the European Union (EU) albeit too briefly.

8. See section 10(3)(a) and: <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chan-cellors-guide-exceptional-funding-non-inquests.pdf>. See HL 100 (2013-14, JCHR) and the impact of legal aid cuts on access to justice.

9. Legal Aid, Sentencing and Punishment of Offenders Act 2012 Explanatory Notes paragraph 107.

10. David Edwards has stated that linguistic barriers in the ECJ have prevented the development of an ‘oral tradition’ similar to some legal systems in Member States in B. Marquesinis ed., *The British Contribution to the Europe of the Twenty-first Century* (2002) Ch. 3. See also Marquesinis ed., *Gradual Convergence Foreign Ideas, Foreign Influence and English Law on the Eve of the Twenty-first Century* (1994).

11. C. Mac Amhlaigh, C. Michelon and N. Walker eds, *After Public Law* (2013); P. Dobner and M. Loughlin eds, *The Twilight of Constitutionalism?* (2010).

European public law is concerned with the development of the public law of European states and their influence upon, and their influence in turn by, the developing law of the European Union, formerly the European Community, and before that the European Economic Community. The subject is not restricted to the public law of Member States but potentially covers the public law of all European states and those further afield who have been influenced by European legal systems usually through forms of imperialism or colonization.¹² It is also concerned with the influence of the ECHR upon the substantive and procedural law of nations that are members of the Council of Europe and the influence of the Convention and judgments of the European Court of Human Rights (CHR) on the decisions of the European Court of Justice (ECJ). Judgments of the ECJ have been influenced by doctrines of fundamental human rights contained in the Convention and in the constitutions of Member States. Indeed, the principles of the ECHR and those protecting fundamental rights in national constitutions constitute a part of the body of general principles of the Union's law which informs the Court's development (Article 6(3) TEU). Since the coming into direct effect of the EU Charter of Fundamental Rights the interpretation of human rights protection will often involve subtle interpretations of national, ECHR and EU law where a matter involving EU law is in question.¹³ The duty upon the Union to accede to the ECHR under Article 6(2) TEU seems set to re-invigorate that confluence although some see a recipe for confusion (Chapters 2 and 9).

There will be no suggestion that legal systems borrow lock, stock and barrel from other systems or that an amorphous homogenised entity is going to do for the legal traditions in Europe what McDonald's has arguably done to its culinary traditions. Flowers that blossom in one soil, wane and wither in another. It was very popular to argue for convergence in laws of the Union, very often advocated by those who had a strong Union agenda in order to assist the process of greater European integration.¹⁴ Union law was after all to be primarily enforced through the courts of Member States. Remedies in domestic courts for breaches of Union law operate in accordance with national procedural and remedial rules but subject to two constraints. They must be no less favourable when applied to Union claims than when applied to similar claims in domestic law and national rules must not make it virtually impossible or excessively

12. See R. Daniels, M. Trebilcock and L. Carson 'The Legacy of Empire ...' 59 *American Jo of Comparative Law* 111 (2011).

13. See e.g., Case C-617/10 *Fransson* 26 February 2013. 'Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by EU law, implements the latter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.' [Press Release]. See Chapter 9, note 72 for the German Constitutional Court's reaction to *Fransson*. What does the judgment in Case C-279/09 *DEB Deutsche Energiehandels-und BeratungsGmbH* reveal about the overlapping of multiple legal systems under the European Union framework and the relationship between EU law and the ECHR in relation to legal aid? Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0279:EN:HTML>.

14. J. Schwarze *European Administrative Law* revised 1st ed. (2006).

difficult to exercise Union rights.¹⁵ These are the doctrines of equivalence and effectiveness.¹⁶ Commercial and legal integration require a legally stable framework in which to operate and vicissitudes brought about by too great a legal disparity would upset or prevent that stability. The doctrines seek to ensure a broad consistency in application. They cannot, and do not, guarantee uniformity.

Comparative lawyers wrote of how ‘legal transplantation’ provides the main source of legal change.¹⁷ An older generation of comparative lawyers warned about the ‘misuses’ of comparative law, noting how some legal institutions are culturally ‘deeply embedded’ while others are effectively insulated from ‘culture and society’.¹⁸ The latter may be subject to legal transfer but in the case of the former transfer may be impossible. Laws based upon religious or moral beliefs provide an obvious example of the former. Enforcement of criminal law on an extra jurisdictional basis creates numerous procedural and substantive difficulties and barriers, a problem that the judicial and police cooperation provisions in the Area of Freedom, Security and Justice (FSJ) in the Treaty of Lisbon seek to address. The decision by the UK government to opt-out of pre-Lisbon provisions in this area with an opting back in if necessary for individual areas will present numerous problems in effective law enforcement within the UK.¹⁹ The government has acknowledged the scope of the problems when it announced that the UK would opt back into those measures that kept the UK safe. These included the European Arrest Warrant and Europol, both to be subject to safeguards.²⁰

A reaction to Europeanization has set in from those who see ‘convergence’ of legal cultures as impossible and/or bad and/or overstated. For David Cameron the

15. Case 33/76 *Rewe* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR I-2043; Case 222/86 *Heylens* [1987] ECR 4097; Case C-119/05 *Lucchini* [2007] ECR I-6199 – on non application of domestic law inconsistent with EU rights; Case C-432/05 *Unibet Ltd* [2007] ECR I-2271; for improper implementation of limitation periods see Case C-406/08 *Uniplex* [2010] ECR I-817 and SI 2011/2053; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283; *Test Claimants in the Franked Investment Income Group Litigation (Appellants) v. Commissioners of Inland Revenue and another (Respondents)* [2012] UKSC 19 (Chapter 10, note 205). On national procedural autonomy and res judicata, see Case C-453/00 *Kühne & Heitz; Lucchini* (above); Case C-2/06 *Willy Kempter* (Chapter 10, note. 206). A. Biondi (1999) 36 CML Rev 1271; R. Craufurd Smith in P. Craig and G. de Burca *The Evolution of EU Law* (1999) Ch. 8; T. Heukels and J. Tib in *Convergence and Divergence in European Public Law* (2002) P. Beaumont, C. Lyons and N. Walker, Ch. 7; M. Dougan *National Remedies before the Court of Justice* (2004) and in Craig and de Burca (2011) Ch. 14. M. Cremona *Compliance and the Enforcement of EU Law* (2012); D-U Galetta *Procedural Autonomy of EU Member States: Paradise Lost?* (2010).

16. See Chapter 10 pp. 489 et seq.

17. Alan Watson *The Evolution of Law* (1985); *Legal Transplants* 2nd ed. (1994); (1996) LQR 79.

18. O. Kahn-Freund ‘On Uses and Misuses of Comparative Law’ in *Selected Writings* (1978) and (1974) MLR 1. On more recent authors, see: B. Markesinis *Foreign Law and Comparative Methodology: A Subject and a Thesis* (1997) and *Always the Same Path* (2001).

19. EU Committee, *EU police and criminal justice measures: The UK’s 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159). <http://www.publications.parliament.uk/pa/ld201213/ldselect/lddeucom/159/159.pdf>.

The Government Response was dated 23 July 2013. The Home Secretary’s statement to the Commons is at: <https://www.gov.uk/government/speeches/home-secretary-oral-statement>.

20. Thirty five measures were to be opted into: <http://register.consilium.europa.eu/pdf/en/13/st12/st12750.en13.pdf>.

ECHR and the HRA were ‘un-English’ in the way they were expressed and what they contained – despite the very considerable influence of British lawyers on the drafting of the ECHR. A commission was therefore appointed to examine the case for a United Kingdom (not just *English* or *British*) Bill of Rights.²¹ The impossibility of convergence lies in the fact that convergence overestimates the capability of converging two or more different legal traditions because of their cultural, linguistic, historical and socio-political differences. Its ‘badness’ lies in varying assumptions about the distorting effect that lumping or forcing together institutions from different traditions will have so that what emerges will not serve a useful purpose, either practical or theoretical.²² In so far as a case sometimes may have to be overstated to be made effectively, then one must be cautious not to exaggerate. Teubner for instance has related how the doctrine of ‘good faith’ in contract²³ was introduced into English law by virtue of a regulation made in accordance with an EC Directive.²⁴ Relying upon judicial dicta he describes the doctrine as ‘inherently repugnant’ and ‘unworkable in practice’.²⁵ Ignoring the context in which the statements were made and simply grafting on one doctrine from another system because of some supposed beneficial effect it will have will appear to be at least naïve.

But, it must be emphasised this is not argued for in this present work. What a judge in one system may do is use a doctrine from another to reach a just solution to a case before the court. But in using that doctrine, the judge may modify it and use it for purposes that may not be an exact replica of its use in the ‘lending’ jurisdiction. But its use in the borrowing jurisdiction may enhance the capability of that judge to provide a just solution which in the doctrine’s absence may not be possible under existing law. Proportionality, a concept which I deal with in Chapter 8 and elsewhere in this book, has different nuances in EU, German and now English law. Its utility and the difference it will make to decisions reviewing executive action has been dramatically illustrated by the House of Lords in *ex p Daly*²⁶ and by a majority of the Supreme Court in *Bank Mellat*.²⁷ The ‘borrowing’, after initial reluctance, has been of fundamental importance. So long as we are aware of nuances of meaning and differences in points of detail, we should not deny the benefits of mutual influence. Chaucer wrote in English and had a decisive influence on the course of English language and literature, guaranteeing that we would today speak English, although the English we speak sounds completely different to that of Chaucer. To a modern ear, Chaucer sometimes sounds very French. He would not have written without a knowledge of French and French literature. He borrowed liberally. Did he do wrong?

21. See Chapter 9 pp. 478 et seq.

22. See P. Legrand (1995) *Mod LR* 262; P. Legrand (1997) *Mod LR* 44 and in P. Beaumont, C. Lyons and N. Walker (2002); C. Harlow in Beaumont et al.

23. ‘Good faith’ refers to being open and straight in one’s contractual arrangements: ‘playing it fair’, playing with one’s cards laid on the table face-up etc.

24. Directive 93/13/EEC and SI 1994/3159.

25. G. Teubner in F. Snyder ed., *The Europeanisation of Law* (2000) citing *Walford v. Miles* [1992] 1 All ER 453. The regulation concerns unfair terms in consumer contracts; *Walford* concerned a commercial agreement.

26. [2001] 3 All ER 433, HL.

27. *Bank Mellat v. HM Treasury* [2013] UKSC 39, see Chapters 8 and 9, pp. 374 et seq. and note 126.

There is a sense of anti-globalization and anti-Europeanization behind such attacks and perhaps a fear of some sense of pending legal imperialism driven by economic and commercial determinism.²⁸ The Euroscepticism that has become ascendant in the UK – more so in England than in Scotland – owes much to a fear of foreign influence ravaging the purity of the common law, loss of sovereignty and denial of ancient liberties. How difficult it will be to unravel post-war developments was seen when the Prime Minister appointed a commission to examine the case for and contents of a UK Bill of Rights (above). The overwhelming consensus from a divided committee was to maintain the rights of the Human Rights Act and to add to them.²⁹ As between different cultures, legal or otherwise, I join in with an exclamation of ‘*Vive la difference!*’. But we should refuse to deny the obvious benefits that may be gained by influences and developments outside our own or to close our eyes to the degree of mutual influence that *is* taking place.

Other observers have noted the particular difficulties in attempting to incorporate a ‘system’ of public law into a foreign political structure. The example often referred to is French *Droit Administratif* and its introduction into English law, or more accurately the development of a separate *system* of public law within England and Wales.³⁰ The ‘system’ had developed in a very different political and historical environment shaped very strongly by a separation of powers matrix and very different conceptions of the end objectives of subjecting government and public authorities to legal process. It would be unthinkable not because it would introduce ‘the very essence of tyranny’ as Professor Max Beloff referred to *droit administratif* over two decades ago.³¹ It would be unthinkable because as a system it is alien to the English way of relating legal control to governmental purpose. This is obvious to anyone who as I have, has sat and observed proceedings in the Conseil d’Etat in Paris or the Administrative Tribunal (a court!) in that city. The procedures are completely different to English judicial process in judicial review (see Chapter 3). But, might there be benefit in organizing our administrative courts on a regular provincial basis as do the French rather than insisting that claimants come to London for hearings before the Administrative Court?³² Judges have commented that this concentration in London has thwarted expertise in public law in the provinces in England and Wales. The major reforms to our tribunals

28. On ‘law stuff’ and globalization, see W. Twining *Globalisation and Legal Theory: Some Legal Implications* (2000); N.D. Lewis *Law and Governance* (2001); B. de Sousa Santos *Toward a New Legal Common Sense* 2nd ed. (2002); on globalization: J. Stiglitz *Globalisation and its Discontents* (2002); on judicial globalization A-M. Slaughter (2000) 40 *Virginia Journal of International Law* 1102. See J.B. Auby *La globalisation, le droit et l’État* 2nd ed. (2010).

29. Commission on a Bill of Rights *A UK Bill of Rights? The Choice before Us*. (2012); see Chapter 9 pp. 478 et seq. The Commission did not wish to be over prescriptive on new rights.

30. J.W.F. Allison *A Continental Distinction in the Common Law* (2000).

31. HL Debs col 690 (18 April 1989). This crudely exaggerates Dicey’s view. Dicey stated that the term ‘administrative law’ was unknown to English judges and counsel without further explanation. Maitland believed that in 1888, just after the first edition of Dicey’s work, over half the cases in the Queen’s Bench Division concerned rules of administrative law. Beloff’s intervention came under questions on the subject of ‘Executive Powers: Complaints Procedure.’

32. CPR 1998, Part 54 allows the Administrative Court to sit in Cardiff and elsewhere. The creation of the Administrative Court coincided with the introduction of the HRA 1998 in October 2000.

that occurred in 2008³³ have brought about regional tribunals dealing with administrative law and second tier tribunals to hear appeals and also with some judicial review powers.³⁴ Since 2000, the Administrative Court has been able to sit outside London and now sits in a variety of provincial cities and Cardiff.

§1.02 CONVERGENCE, CROSS-FERTILISATION AND ‘SPILL-OVER’

Professor Bell has argued that while convergence may be too strong an expression for the processes of mutual influence that are taking place, although in some areas that is an accurate expression (see competition law in Chapter 12 for instance), he prefers other terms which more accurately reflect the phenomenon. These are ‘cross-fertilization’ and ‘spill-over’ a term that others have suggested. Citing Professor Schwarze’s book on *Administrative Law Under European Influence*³⁵ Bell described how when national rapporteurs, of which the present author was one, were asked about the European impact on their national administrative law, they identified administrative law in different ways and spoke of different things.³⁶ For some it meant judicial review. Others were more concerned with ombudsmen techniques and processes aimed at furthering public goals. This is hardly surprising since if one asks an American what administrative law means the answer will be regulatory agency procedures and powers. Judicial review is a separate heading within administrative law. It is clear from Schwarze’s book, and the proceedings which took place in 1994, that there was occurring a significant degree of penetration into national systems of concepts from EU and ECHR law in relation to judicial review while there were also similar developments concerning privatization and regulation, liability, interim relief and human rights.

Bell suggests that cross-fertilization, which is more indirect than transplantation and convergence, is ‘an external stimulus promot[ing] an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.’³⁷ With respect, I believe this description captures both accurately and subtly the process of mutual influence that is taking place between European legal systems. I would add, that in some senses as I shall soon describe, there may well be signs of common law procedures being influenced by civil law procedures (see below) and there may be areas where ‘convergence’ willy nilly *is* taking place. I return to these points. What is obvious, however, is the all pervasive and fundamental

33. <http://www.justice.gov.uk/downloads/about/hmcts/tribunals/Tribunals-History.pdf>.

34. The courts had to deal with the scope of reviewing decisions of the Upper Tribunal where there was no right of appeal: see *Cart v. The Upper Tribunal* [2011] UKSC 28.

35. (1996).

36. J. Bell in J. Beatson and T. Tridimas *New Directions in European Public Law* (1998) Ch 11. See J. Bell *Judiciaries within Europe* (2006). On ‘autonomous and uniform’ interpretation of EU measures, see *Fish Legal and Shirley v. Information Commissioner* [2013] EUECJ C-279/12 (19.12.13) on ‘public administrative functions’ within Article 2(2) Directive 2003/4/EC on access to environmental information.

37. J. Bell in Beatson above p. 147.

influence that European legal thought, and the fact of being in Europe, have had on English and UK public law. Come what may, that influence is indelible and will continue.

When I began my legal studies in 1972, Community law was a component of the introductory English Legal System course. It was widely ignored by most students as irrelevant. We shared with Parliament and the legal community an ignorance of the full effect of Community law on our domestic legal order although in our case this ignorance was more excusable! When in 1981, Lord Diplock stated that the development of a coherent system of administrative law in England was the greatest judicial creation in his lifetime,³⁸ he was thinking primarily of that law in its domestic setting, although he famously suggested that proportionality may in the future enter the judicial lexicon as an aid to judicial review.³⁹ It was at about that time that case law began to grapple with the full implications of sovereignty and the European Communities Act 1972 (ECA 1972), section 2. But on a personal level, I soon realised that domestic public law was increasingly operating in a European context to such an extent that one could not practise or work in our domestic law without a growing appreciation of that context. In other words, without appreciating the European context in which our domestic law was operating, one was less and less likely to fully understand the progress of domestic public law. The point became crystal clear when in 1989 I was asked to be the UK rapporteur for the 1990 FIDE Congress in Madrid on the subject of public procurement and the impact of the Directives on national systems of law.

The Directives⁴⁰ basically addressed the position of contracts placed by public authorities in two basic areas: for goods and works (i.e., construction). They have since been extended to cover services and public utilities and remedies.⁴¹ In the 1980s, there was a prevailing feeling in the Commission that the existing Directives which sought to introduce transparency into notoriously closed markets protecting national champions and which attempted to place legal regulation on pre-contract procedures in which bidders are chosen, had been largely ignored. The Commission wished to strengthen the Directives and to add to them. In the area of public contracts in the UK, the subject had been devoid of any effective oversight – legislative or judicial – and it was assumed that the common law of contract would apply equally to government contracts as in contracts between private parties. In fact, public procurement spawned a vast network of subterranean and political processes in which ‘the rules’ were spelled out and in which judicial decisions would have no impact whatsoever. Grievances simply did not go to the courts: it was not in the interests of government or contractors to have a judicial determination of their dispute. In the case of the former, because judicial decisions might confine discretion exercised through contract in a way that would interfere with government prerogative; in the latter, because contractors would fear prejudice if they complained about aspects of a contract either at pre-allocation or at

38. *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 104g.

39. *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935, 950j: ‘I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognized in the administrative law of several of our fellow members of the European Economic Community.’

40. See Chapter 12, §12.06 below.

41. See Chapter 12, §12.06.

performance stage. They might be struck off tendering lists or not selected if included. We shall see that not only did the Directives apply to pre-contractual allocation of government contracts, but the area of public contracts has become much more subject to judicial decision (Chapter 12). There are dangers of post hoc/propter hoc reasoning but it is remarkable how for decades the litigation on government contracts, which was both minimal and deeply unsatisfactory, suddenly began to attract legal attention. A striking illustration came in 2012 when Virgin threatened a judicial review of the award of the West coast rail franchise to a rival. It immediately became apparent that the highly questionable statistics used by officials to make the award would be brutally exposed in the litigation (Chapter 12, note 166).

More generally, some Directives in the UK, especially the Procurement Directives, were not originally implemented by legal devices but by administrative means: by the use of Treasury guidelines and Departmental circulars. Following a series of judgments of the ECJ,⁴² that court has stated that a specific legislative act is not necessary to transpose a Directive. However, mere administrative practices which may not be publicised or which may be changed at will could not be regarded as a proper fulfilment of the obligation imposed on the Member States by Article 288 TFEU [249 EC]. Furthermore, the ECJ has held that where a Directive is intended to create rights for individuals, the implications for the legal position arising from implementing measures for such individuals must be sufficiently clear, precise and transparent and the persons concerned must be fully aware of their rights. Those individuals must, where appropriate, be afforded the possibility of relying upon them before national courts.⁴³ Ambiguous or non published legislation which does not give sufficient guidance on whether an individual may rely upon EU law would not fulfil the duty to transpose a Directive into national law.⁴⁴ The British government has abandoned the attempt at implementation by administrative devices in the case of procurement and elsewhere and has resorted to subordinate legislation usually under the European Communities Act 1972 section 2(4) – subordinate legislation is legislation and approved by Parliament. These regulations spell out in generally, if not universally, clear terms the nature of procedural and substantive rights for individuals and are a tremendous advance on the completely discretionary regime which they replaced and which in many cases were probably not legally enforceable.⁴⁵

It has to be said that regulation by administrative guidance has been a standard practice among administrators in the UK. The practice is covered by the soubriquet ‘soft law’, meaning a resort to non-legally binding devices around which regulators/overseers may exhort, encourage, negotiate or dictate an outcome. Too often, where the administered were concerned and where they lacked power, all the advantages were in favour of the powerful and manipulative.

42. For example, *Commission v. Italy* [1988] ECR 1323; *Commission v. Italy* [1988] ECR 843; *Commission v. Italy* [1986] ECR 2945.

43. *Commission v. Germany* [1985] ECR 1661 and *Commission v. Italy* [1987] ECR 1733.

44. *Commission v. Italy* [1988] ECR 1323, paragraph 212.

45. Birkinshaw, *L'Application Dans Les Etats Membres Des Directives Sur Les Marchés Publics: 'Grand Britannique'* FIDE Vol. 1 Madrid (1990) 287.

The catalogue of examples of influence of European legal thought on domestic law which will be examined in this book, is striking.

The most dramatic has been the full realisation that Parliamentary legislation is no longer sovereign within the UK in a field covered by Union competence. We shall see that this was no more than the jurisprudence of the ECJ demanded in the famous decisions of *van Gend en Loos*⁴⁶ and *Costa v. ENEL*⁴⁷ which are examined in detail in Chapter 2 together with *Simmenthal*⁴⁸ which established that directly effective provisions of Community (hereafter 'Union' unless context requires otherwise) law 'render inapplicable any conflicting provision of national law' even constitutional law and human rights.⁴⁹ In *Factortame v. Secretary of State (No 2)* the House of Lords realised there was no option but to disapply an Act of Parliament by issuing an injunction. The offending terms of the Act authorised breaches of the non-discrimination provisions of the Treaty of Rome.⁵⁰ The decision was made when a preliminary reference judgment of the ECJ holding that there should be no barriers to the effective enforcement of Community (Union) law was delivered to the Law Lords. The full effectiveness of Union law and the rights it protected had to be maintained:

The full effectiveness of Community law would be ... impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.⁵¹

It was clear what Union law required by way of legal obligation the non-application of an Act of Parliament even if that upset one of the central organizing concepts of British constitutionalism: the judiciary's recognition of the legal sovereignty of an Act of Parliament. In a subsequent decision involving the challenge by the Equal Opportunities Commission of certain sections of the Employment Protection (Consolidation) Act 1978 which it claimed contravened the Article 157 TFEU [141 EC] and certain Directives,⁵² the House of Lords declared that they had the ability to declare whether provisions in primary legislation of the UK Parliament were incompatible with Community law – and so ruled on the authority of *Factortame* and decisions of the ECJ, but not, it should be noted, after a reference this time to the ECJ for a preliminary ruling.⁵³

What needs to be examined more carefully is what is entailed in the concept of 'sovereignty'. The Treaty of Lisbon introduced the concept of 'primacy' into a declaration (No. 17) to the treaties removing the concept from the aborted

46. Case 26/62 [1963] ECR 1.

47. Case 6/64 [1964] ECR 585.

48. Case 106/77 [1978] ECR 629.

49. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

50. [1991] 1 All ER 70 (ECJ and HL).

51. Based on Article 4(3) TEU [10 EC] co-operation: see Chapter 3, p. 112. In most case in this book Union replaces Community. Here in this quotation I stick with Community.

52. *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 All ER 910, HL. The challenge concerned the use of a public law remedy of a declaration in a manner which previous authorities had ruled non-permissible: see Lord Keith at pp. 919–20.

53. G. Anthony *UK Public Law and European Law* (2002) p. 92.

Constitutional Treaty. This should be read with the accompanying annex on the Opinion of the Council Legal Service (1197/07 (JUR 260)). As explained in Chapter 2 (pp. 51 and 103) primacy is a more emollient and less confrontational term than ‘sovereignty’. Nonetheless, the ECJ has shown itself vigilant to assert that EU protection of human rights was ‘autonomous’ and ‘constitutional principles of the EC Treaty’ are not subservient to international treaties.⁵⁴ In different ways, English, German and French courts and other national courts have all ruled that ultimate sovereignty is something that resides in the national constitution. It has even been ruled that the CJEU may make ultra vires rulings by national courts (Chapters 2 and 4). The issue of sovereignty has become nuanced and interactive and subject to various confluences. This is true not only from the perspective of Union/MS relationships but also in discussions on sovereignty within the state at the domestic level. At the domestic level we pick up in Chapter 4 the implications of UK case law.

Second, since the early 1960s, the ECJ has been active, with varying degrees of urgency, in filling lacunas in the Treaty of Rome and its successors. This has been particularly emphatic in the areas of legal supremacy or sovereignty and in the doctrine of direct effect – that the Treaty may well create rights for individuals which they may pursue in their own national courts.⁵⁵ The Union differed from organisations established by international treaties because it conferred rights on individuals and not simply on nations. The ECJ developed general principles of law under the influence of the legal regimes of Member States and these have been influential in shaping domestic law, particularly, but far from exclusively, the doctrine of proportionality in judicial review. Another area of judicial development has been the establishment of a law of liability where Member States are in breach of Union law and where the conditions for imposing liability for such breaches are satisfied. The law was formulated in *Brasserie du Pêcheur* and *Factortame III*⁵⁶ and in the decision which preceded them in *Francovich*.⁵⁷ This developed from case law of the ECJ which decided upon the conditions of liability of Union institutions for breaches of Union law when individuals were injured and which were decided under Article 340 TFEU [288 EC] which specifically enjoins the ECJ to take inspiration from the ‘general principles common to the laws of the Member States’. Reference was made above to Article 6(3) TEU and the influence of this provision and Article 6(2) on shaping a European human rights framework. It will be seen how these developments have impacted on domestic law.

What is not so widely remarked upon is the decision in the Court of Appeal in *Factortame (No 5)* which concerned a possible remedy for a breach of a superior rule of law by domestic legislation: ‘we leave for consideration on another occasion the circumstances, if any, in which, quite apart from any requirement of Union law, our law will give a remedy for damage caused by legislation enacted in breach of a superior legal rule.’ Traditionally this remedy has not been available in our law. ‘Now that it is

54. Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 and *Yassin Abdullah Kadi, Re* [2013] EUECJ C-584/10 (18.11.2013).

55. *Van Gend en Loos* Case 26/62 [1963] ECR 1.

56. Cases C-46/93 and 48/93 [1996] ECR I-1029.

57. Case C-6 and 9/90 [1991] ECR I-5357.

undoubtedly available in circumstances which contain a Union law element it may be right on some future occasion to re-examine that tradition.’ Are the courts then countenancing a ‘rule of law’ superior to legislation which does not derive from Union law?⁵⁸ As we shall see in Chapter 4 (pp. 168, 190) domestic judges are giving recognition to ‘constitutional statutes’ conferring it would seem a higher status to these measures than to non-constitutional measures – a ‘hierarchy of norms’ or a hierarchy of statutes.⁵⁹ Under the HRA the only remedy where there is a breach of the ECHR by legislation is a declaration of incompatibility. But this is apart from remedies available before the Court of Human Rights.

Third, the requirements of harmonisation and approximation which are contained in Article 114 TFEU [95 EC] and other measures first introduced by the Single European Act 1987 which relate to the European Parliament and Council’s powers under the article to ‘adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’⁶⁰ are relevant to the discussion of growing convergence and European Public Law. Harmonisation was referred to as the method or policy through which internal barriers within the Union to Union trade were dismantled and in their place would emerge a truly common and unified Union system – the internal market. How attractive to other member states would a special relationship with the UK be as advocated by David Cameron which allowed a special position for the UK and exemption from legal regulation but which would maintain access to the internal market?

Laws of direct relevance to the internal market and which cover basic freedoms of the Union (though not in relation to fiscal policy or free movement of persons or rights or interests of employees⁶¹) were to be approximated to help realise the internal market.⁶² Under Article 114(1) TFEU, which is a residuary provision and one of several relevant provisions, legislation intended to complete the internal market could be passed through ordinary legislative procedure. This involves the Council deciding by Qualified Majority Voting under the co-decision procedure in Article 294 TFEU [251EC] (see Chapter 2, p. 42). Article 114(4) TFEU refers to ‘harmonisation’. The expression ‘approximation’ although used interchangeably is now preferred because it has less of a centripetalist connotation. The subject areas in which laws have been or are being approximated under relevant provisions include: company law, VAT, environmental regulation, health and safety at work, consumer protection, public procurement, data protection, competition law and financial services. Because it is ordained that approximation shall take place, that does not entail a neat and tidy practice. Doubtless, there are 28 ways to skin a cat! The detail and procedure adopted will differ, but the substantive provisions will have to be consistent with European requirements.

58. [1998] 3 CMLR 193, [1998] Eu LR 456.

59. *Thoburn v. Sunderland City Council* [2002] 4 All ER 156 (QBD DC).

60. The internal market was the first of three stages to bring about EU. The other two were monetary and political union.

61. Article 114(2) TFEU (Art. 95(2) EC).

62. Article 114 TFEU is a residual measure and must not be used where other provisions apply under the Treaty.

Member States may be allowed to maintain national provisions covered by the harmonisation measures only on grounds identified in Article 114(4) and (5) and subject to Article 114 (6) and (7).⁶³

The last sphere of European influence concerns the ECHR and the role of the Court of Human Rights (CHR) – and that court has described the ECHR as ‘a constitutional instrument of European public order.’⁶⁴ The court was reformed with effect from 1 January 1999.⁶⁵ There are proposals for reform under discussion as I write (Chapter 9, p. 479). Long before the UK incorporated the Convention into domestic law by virtue of the Human Rights Act 1998 (HRA 1998), it was clear that the Convention was going to have a profound impact on our governmental and administrative and legal practice. ‘The [domestic] court should take the convention into account’ said Lord Denning. ‘They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual.’⁶⁶ Subsequently, the Convention was used as an aid to the development of the common law (Chapter 9 pp. 420 et seq.). To single out early subjects where the impact was felt, one could turn to prison administration where decisions such as *Golder v. UK*⁶⁷ and *Silver v. UK*⁶⁸ showed emphatically that prisons were not to be allowed to continue as completely closed societies, so that in order to satisfy the requirements of Articles 6 and 8 ECHR when prisoners were subject to prison disciplinary proceedings or sought legal advice, they would have to be allowed access to a lawyer and ultimately the courts. The age-old reference to prerogative powers and the fact that government could do what anyone else might lawfully do to intercept communications were seen for what they were – a legacy of a feudal tradition but now one with global implications. Such practices now had to be based on legislation. Edward Snowden’s revelations on the extent of US and UK global eavesdropping via electronic communications revealed that the subject has taken a wider dimension that needs to be addressed at a European, and not simply a national, level.

The attitude of national courts and the government to the CHR was not always constructive; it was sometimes churlish. The decision by the Law Lords in *Brind*⁶⁹ where the Law Lords ruled that the Convention, specifically Article 10 providing for freedom of speech, could have no role to play when the powers of the statute and regulations made thereunder were clear. The Convention had no role to play in interpreting and limiting the exercise of a discretion by the executive – in this case banning voice broadcasts of members of proscribed organisations in Northern Ireland. Furthermore, proportionality was not a principle of English common law but a continental ground of judicial review.⁷⁰ The decision is indicative of a rigid division between the realms of

63. De-regulation has been a constant theme of the UK government since Margaret Thatcher’s government.

64. *Loizidou v. Turkey* (1995) Series A Volume 310, 27, paragraph 75.

65. Protocol No. 11 ECHR: www.coe.int.

66. *R v. Secretary of State for the Home Department, ex p Bhajan Singh* [1975] 2 All ER 1081 at 1083.

67. 1 EHRR 524.

68. 5 EHRR 347.

69. [1991] 1 All ER 720, HL.

70. Although there was some divergence of opinion on the proportionality point. See Chapter 8.

European legal thought and the domestic legal order. I say more about this further on in this chapter. But even while the judgment in *Brind* was being given, the growing confluence of European and domestic legal orders was well under way.

The impact of the HRA will be examined in Chapter 9. Nothing like the HRA has subjected the executive so dramatically to the force of the rule of law within the UK. Its success has been the motivation behind an assault on judges overextending their proper place in public life, an assault led by a new appointment to the UK Supreme Court.⁷¹ I make a prediction. The HRA will not be removed. If anything, it will be built upon as the Commission reporting in 2012 recommended. As Lord Bingham so forcefully argued – what specific HRA rights would one wish to remove?⁷²

I should pause to make the point that while I have spoken so far about the influence of European legal thought on domestic systems, the European systems which existed in the Union and even many of those that were members of the Council of Europe bore more proximity to a Roman model of public law than did the English or the broader UK model. Bell has been vigilant to point out that Roman law has been more influential in helping to shape private law continental systems than in shaping public law systems.⁷³ That point is taken, but until 1973, the dominant tradition in Member States was still one influenced by Roman law – the common law and Scandinavian systems were yet to sign up. Dominant in that tradition was a separation of public and private realms. In Justinian's *Institutes* (Book 1 Title I) law is divided into two branches, public law and private law. The former concerns the constitutional law of the Roman state, administrative law,⁷⁴ criminal law and *ius sacram* or religious law. Private law is concerned with relationships between individuals. The *Institutes* concentrate on private law. Definitions of public law are politically driven – they are forged by, and emerge from, the cauldron of political upheaval and conflict which has meant that apart from the division of public and private, the actual content of public law has not been subjected to the influence of Roman law as has private law. On the continent, Roman law was 'received' by universities especially in Germany and France while Italy carried on a tradition that never quite disappeared. In England, by contrast, when the flirtation with Roman law ended with Cardinal Wolsey's death in 1529 and when a separate system of public law administered through the Prerogative courts was abolished in 1642, English public law operated within the common law, not as public common law,⁷⁵ but simply as common law. Public law, as Maitland famously observed, was ubiquitous; it was not systematic. Formal division meant very little although there was no judicial review of private power;⁷⁶ what was important was how

71. J. Sumption 'Judicial and Political Decision-Making: The Uncertain Boundary' The 2011 F. A. Mann Lecture; see in response S. Sedley 'Judicial Politics' *London Review of Books* 23 February 2012. Sumption wrongly assumes that the French Conseil Constitutionnel has no power to enforce its decisions. See Chapter 2, pp. 78 et seq.

72. T. Bingham *The Rule of Law* (2010) p. 84.

73. J. Beatson and T. Tridimas *New Directions in European Public Law* (1998).

74. R. W. Lee *Elements of Roman Law* 4th ed. (1956) p. 35.

75. See C. Hilson (2003) 9 *European Public Law* 125.

76. Coke CJ in *Bagg's case* (1615) Co Inst iv 71 spoke of the Court of King's Bench rectifying all private as well as public wrongs. Abuse of private power could be addressed through the law on common callings, restraint of trade and abuse of market power. It was interstitial.

bodies were created and what powers and duties they exercised, and how they were exercised, for the purpose of judicial review. As we know, the inherent flexibility and malleability of this approach, although subject to long periods of ossification, also allowed the law to be applied and extended to ever changing patterns of government organisation and activity when the judiciary felt impelled to act. It was subject to fits and starts and not stable progression. We have witnessed that creativity not only the in HRA but also in the development of the common law of human rights, in the extension of judicial review to government contracting, to commercial and regulatory activity and even over the private sector.

Nevertheless, despite these cultural eccentricities of the common law, the influence of European law and legal thought are being emphasised regularly and with growing authority.

In a publication of lectures delivered at the British Academy in 2002,⁷⁷ Lord Woolf quoted Lord Denning's famous quotation from *Bulmer and Bollinger*⁷⁸ of how the tidal waves of Union law were flowing into our estuaries. Lord Woolf carried on the quotation where Denning indicated the limited effect Union law has on those parts of English law which are untouched by Union law and 'which does not touch any of the matters which concern solely England and the people in it.' 'These are still governed by English law.'⁷⁹ While there are areas that are untouched by Union law, succession and real property law are examples, many areas hitherto untouched such as criminal law, contract, commercial law let alone our public law, are now increasingly influenced by Union law. Labour law, company law, regulatory and environmental law are directly affected by Union law. Family law is now heavily influenced by the EU, ECHR and the HRA 1998. Woolf begins by showing why he believes that there has been a process of cross-fertilisation of mutual influences⁸⁰ and he illustrates the influence of the common law on Union law. The ECJ has become more influenced by common law style of judgments, by the use of precedent and the manner in which previous case law is distinguished and departed from, by the invocation of general principles of substantive law. The 'role of case law and the handling of precedent are not as fundamentally and irreconcilably dissimilar as some may contend.'⁸¹ The ECJ's work is a fusion of different legal traditions in the EU. The fact that only one judgment is given has to cater for judicial differences of legal opinion and compromise. Although one should not over-exaggerate the differences between the civil and common law traditions, on the whole the Court followed previous judgments although it did not consider itself strictly bound by them. There was a natural reluctance to depart from them. Although case law was resorted to, the Court preferred vaguer references to 'the settled case law of the

77. B. Markesinis ed., *The British Contribution to the Europe of the Twenty-first Century: The British Academy Lectures* (2002).

78. *HP Bulmer v. J Bollinger SA* [1974] Ch. 401. T. Bingham's *Widening Horizons* (2010) Hamlyn Lectures were on the comparative and international legal influence (non EU) on domestic law.

79. Lord Woolf in B. Markesinis ed., *The British Contribution to the Europe of the Twenty-first Century* (2002) Ch. 1, 'The Tides of Change.'

80. B. Markesinis ed., *The British Contribution to the Europe of the Twenty-first Century* (2002); Bell in J. Beatson and T. Tridimas *New Directions in European Public Law* (1998).

81. Page 4. See Case C-10/89 *Hag II* [1990] ECR I-3711 and the reconsideration of an earlier case, Case -192/73 *Hag I* [1974] ECR 731 which the ECJ ruled was wrongly decided.

Court.⁸² The use of case law has certainly become more systematic and in *HAG II* for the first time in 35 years, the ECJ effectively overruled an earlier judgment.⁸³ Distinguishing rather than disagreeing with earlier judgments is the usual route of the ECJ.⁸⁴ The consequence believes Woolf, is a breaking away from the ‘syllogistic style’ of judgments in the ECJ which were influenced by the French superior courts.

That Court, argues Woolf, has been far more concerned with fleshing out the Treaty to give it specific shape, judges have been more prepared to intervene in the style of common law judges to resolve points of ambiguity in proceedings before them⁸⁵ and there has been a notable interest in providing effective remedies for breaches of Union law in national courts which, believes Woolf, owes much to the common law’s preoccupation with effective remedies rather than abstract rights.

As I shall point out later, there may be reasons why judges have become more receptive to outside influences. It may fit in with a realisation that domestic remedies required re-invigoration and that inspiration from elsewhere was needed. As Anthony has suggested,⁸⁶ it may well be that the domestic situation was ripe for influence. One of the most interesting areas where European influence has spilled over into a purely domestic situation concerned the case of the asylum seeker from Zaire who faced deportation, and a possibly hostile reaction in Zaire, and who by court order was to be kept within the UK pending consideration of his case. In breach of this order, the Home Office ordered his removal to Paris and thence to Zaire. This was a clear breach of a judicial injunction. But, the House of Lords had confirmed in the first *Factortame* hearing that injunctions could not issue against the Crown (government). Eventually, as we have seen, injunctions did issue against the Secretary of State (acting on behalf of, and for all intents and purposes as, the Crown⁸⁷) but this was as a direct consequence of the application of Union law in previous litigation. As Lord Woolf expressed the point in *M v. Home Office*.⁸⁸

82. Woolf above note 79. See A. Arnall in M. Andenas ed., *English Public Law and the Common Law of Europe* (1998) p. 93 and A. Arnall *The European Union and its Court of Justice* 2nd ed. (2006) pp. 625 et seq.

83. Case C-10/89 [1990] ECR I-3711 declaring *Van Duyn v. HAG (HAG I)* Case 192/73 [1974] ECR 731 had been wrongly decided. See also *Parliament v. Council* Case 70/88 [1990] ECR I-2041 (Chernobyl) and *Parliament v. Council* Case 302/87 [1988] ECR 5615 (Comitology) and Parliament’s capacity to bring proceedings under Article 230 EC; the earlier decision was effectively overruled although this was not stated. On the position of the CFI, see Case T-162/94 *NMB France and Others v. Commission* [1996] ECR II-427 and Arnall in Andenas note 82 pp. 124–127. See T. Tridimas in J. Dickson and P. Eleftheriadis eds, *Philosophical Foundations of European Union Law* (2012) Ch. 12.

84. Lord Mance on the interface between national and European Law, Second Sir Jeremy Lever QC lecture (2013): <http://www.supremecourt.gov.uk/docs/speech-130201.pdf> and (2013) *European L.R.* 437.

85. Though cf. David Edwards point on advocacy in note 10 above.

86. G. Anthony *UK Public Law and European Law* (2002) p. 92.

87. Sir S. Sedley ‘The Crown in its Own Courts’ in *Ashes and Sparks: Essays on Law and Justice*. (2011) Ch. 28. C. Forsyth and I. Hare eds, *The Golden Metwand and the Crooked Cord* (1998) p. 253.

88. [1993] 3 All ER 537 at 551a. On the position on enforcement orders in Scotland and the Crown, see Chapter 13, note 128.

so that the unhappy situation now exists that while a citizen is entitled to obtain injunctive relief (including interim relief) against the Crown or an officer of the Crown to protect his interests under Union law he cannot do so in respect of his other interests (i.e., purely domestic) which may be just as important.

The law decided in the original *Factortame* judgment that injunctions could not issue against the Crown or its officers was shown by Woolf to have been decided on inadequate examination of the authorities and precedents. They had got the law wrong not only in its Union setting, and on which the ECJ had to advise, but also in its domestic setting. Injunctions may issue against a Minister of the Crown, or a Crown servant, ‘on the public law side’ regardless of whether a question of Union or domestic law was involved.⁸⁹

But there are still many signs that there are judicial pockets of resistance to allowing European influence to overspill where it is not strictly necessary to resolve an issue before the court. We have been reminded that the general principles of Union law are not legally binding where a case has no Union dimension, whereas domestic measures, even if ostensibly outside the area of EU competence, *must not* contravene the EU Treaties and EU secondary legislation.⁹⁰ Some decisions show a wider ambit to the province of Union law (Chapter 9, note 72). Furthermore the attempt by the Labour government to limit the sphere of the Charter of Fundamental Rights by protocols to the Treaty of Lisbon has been thwarted by the ECJ and rubbished by domestic courts and by a Parliamentary Committee (Chapter 9 pp. 432 et seq.).⁹¹

Lord Woolf has not asserted that this is simply a one-way process of influence. The traditions of codification on the continent have made their impact in our domestic law in one of the preserves of the common law – civil procedure. He cites the 1998 Civil Procedure Rules as an example of a ‘new trend’ to codification in common law:

I think it fair to say that the result has been the creation of a system that is generally accepted as being far better organised, more proportionate and cost effective, and fair, not only for lawyers, but for unrepresented and represented litigants as well.

He continues that while the Civil Procedure Rules were designed to provide a comprehensive code of procedure for the English and Welsh courts, they were heavily influenced by the practices in continental jurisdictions. ‘They have been described as being positioned mid channel.’⁹² Jacob has described how English case law is itself relying less on precedent which is being modified becoming more like guidance in the

89. Sedley above on niceties of relief note 87.

90. *R v. MAFF, ex p First City Trading Ltd* [1997] 1 CMLR 250, Laws J. See also Laws LJ in *R (GI) v. Secretary of State for the Home Department* [2012] EWCA Civ 867 paragraphs 29–44.

91. Case C-411/10 *NS v. Home Secretary* [2012] 2 CMLR 9 followed in *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336 paragraphs 43–48. The UK Supreme Court has accepted that the Charter operates ‘within the sphere of EU law’: *Rugby Football Union v. Viagogo* [2012] UKSC 55; see *R (Zagorski) v. Secretary of State for Business, Innovation and Skills* [2011] HRLR 6 140, paragraphs 66–71 per Lloyd Jones J; House of Commons European Scrutiny Committee *European Intergovernmental Conference* HC 16-iii (v) (2007–08) paragraphs 38–41. See Chapter 9, note 72.

92. Woolf note 79 above at pp. 10–11.

civil tradition.⁹³ It is not only in civil procedure where Woolf believes the influence of the civil system's codification is being felt, but also in criminal law where Sir Robin Auld has recommended codification in the 'criminal justice system' covering the substantive law, evidence, procedure and sentencing under a new Criminal Justice Council supported by, or working with, the Law Commission. This has not as yet occurred but there was a codification of criminal procedure rules in 2005.

One example of how procedure was influenced by the impact of Union law concerns statutory interpretation and the removal of the exclusionary rule which prohibited (with limited success) judges from citing Hansard and the record of Parliamentary proceedings in their judgments. Such citations would add to delay, uncertainty and usurped the constitutional position of the courts as interpreters of the law.⁹⁴ But the door had already been opened when five years previously the House of Lords had consulted Hansard and statements made by a Minister when introducing a draft instrument into Parliament which implemented Union provisions. The instrument was not subject to revision in Parliamentary Committee and 'it was entirely legitimate, for the purpose of ascertaining the intention of Parliament, for the court to refer to Hansard in order to take into account the terms in which the draft was presented by the responsible Minister' so as to interpret norms which had been incorporated into English law to fulfil UK obligations.⁹⁵ So in *Pepper v. Hart*, where a question solely of domestic law was concerned, in order to effect the 'purposive approach' adopted by the courts to interpret legislation, it would be proper to refer to Parliamentary material to aid statutory construction where a provision was ambiguous, obscure or the literal interpretation would lead to an absurdity and the statements were clear. The range of statements covered was also circumscribed and covered ministerial statements or those of other promoters of Bills leading to enactment of the Bill.⁹⁶ The rule in *Pepper v. Hart*, nonetheless, has been treated with caution in case law and its invocation and use may allow for powerful differences in interpretation.⁹⁷

The HRA 1998 has given British and Northern Ireland judges the opportunity to apply provisions of the European Convention of Human Rights as incorporated into domestic law in a manner which has to have regard to the judgments and decisions of the CHR and other matters⁹⁸ (so far as in the opinion of the court or tribunal it is relevant to the proceedings ...) but which does not slavishly adhere to them. As we shall see elsewhere (Chapter 9), several judges have seen the incorporation as an opportunity to apply a domestic gloss to Convention jurisprudence; to give it a

93. J. Jacob *Civil Litigation: Practice and Tradition in a Shifting Culture* (2001) pp. 10 et seq.; also D.N. MacCormick and R.S. Summers *Interpreting Precedent* (1995).

94. *Pepper v. Hart* [1993] 1 All ER 42, 59–60.

95. *Pickstone v. Freemans plc* [1988] 2 All ER 803, HL.

96. A broader test applies to EU provisions than domestic i.e. to ascertain the object of a measure as a whole and not simply where the provision to be interpreted was unclear: in *Thoburn* note 39, Laws LJ did not believe the rule in *Pepper* applied to construe 'constitutional measures' and in *Robinson v. Secretary of State NI* [2002] UKHL 32, paragraph 40, Lord Hoffmann believed invocation of *Pepper* was a 'last resort'. See Chapter 4, note 257.

97. *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22 and note *Jackson v. Attorney General* [2005] UKHL56, Lord Steyn at paragraph 97.

98. That is, the Commission on Human Rights and the Committee of Ministers.

distinctly British tone. And British judges have ensured that Strasbourg's first say is not always its final say.⁹⁹ The words of Lord Hope are prescient:

Nevertheless, there is good reason to think that, now that they [domestic judges] are able to engage themselves directly in issues about the application of Convention rights to our laws and practices, our judges will have an increasing influence on the development of the jurisprudence of the courts [EU and CHR]. In particular, the opportunity now exists for our judges to demonstrate, by means of reasoned judgments based upon established Convention law principles, how the basic human rights which are enshrined in the Convention can be respected without risk to the rule of law or to the established values of our democracy.¹⁰⁰

So the influence of European thought on our law is apparent. This is not best described as a 'transplant' and nor is it a convergence by design. It is simply that different systems have to work in ever increasing proximity and borrowing or influencing are standard and universal human characteristics. Some may fear that all this amounts to is the exploitation by a sophisticated legal profession in the UK of opportunities to advance the interests of powerful commercial clients. Lord Woolf felt that commercial law was an area where English law could have a wide influence in Europe.¹⁰¹ Some may see this as naked instrumentalism. There are old arguments here about law as a tool of oppression to be exploited by dominant classes. Law will always be used by the powerful, public or private, more than by the economically weak. Or law will be used for different purposes by the powerful: trouble avoidance rather than damage repair. The question is whether the content of law reflects values which protect us all and which foster democratic protection and advancement of human rights. My own belief is that the developments in the UK under European influence have advanced those values. Events outlined above on intelligence interceptions and communications data show us they need further advancement to protect our basic rights. This is not to say that other processes cannot advance them also. Courts are not alone in providing protection to those subject to improper domination and worse. But what we have seen courts do has been an advance for the good where the philosophy of the common law has been invigorated by European influence. This has been apparent in case law covering contentious denial of freedom and striking down legislative instruments that have not been democratically approved and which deny human rights.¹⁰²

§1.03 A MULTI-DIMENSIONAL PROCESS

I spoke earlier about a two-way process that is taking place. Much of what has been spoken of above concerns European influence on our domestic order. There have been hints of domestic influence on the European orders – the common law practice of

99. See e.g., *R v. Horncastle* [2009] UKSC 14 and *Al Khawaja and Tahery v. UK* Apps. 26766/05 and 22228/06 CHR (15 Dec 2011) on hearsay evidence convictions.

100. (2000) 5 EHRL Rev 439.

101. Page 12; and see R. Goode 'Europe and English Commercial Law' in B. Markesinis ed., *The British Contribution to the Europe of the Twenty-first Century* (2002).

102. See Chapters 8, note 193 and 9, note 52.

precedent and the adoption of something which, if not an exact replica, has certainly absorbed some of the features of the precedential approach have been identified. In Chapter 3, I will point out how the influence has gone from the Member States to the Union and elsewhere I will address domestic influence on the CHR (see Chapter 9). Reference has already been made to the ECJ's use of Member State systems to help fashion a law of liability for Union institutions which was then used to establish the basis of liability for Member State breaches of Union law. In *A M & S v. Commission*, the ECJ observed in establishing a form of legal professional privilege whereby communications between a lawyer and their clients are privileged, that 'Community Law derives not only from the economic but also the legal interpenetration of the Member States.'¹⁰³ Advocate General Fennelly has observed that:

Audi alteram partem (or the principles of natural justice/fair procedure) was introduced in 1974 in *Transocean Marine Paint v Commission* and *droits de la defense* were soon elevated to the status of a 'fundamental principle of Union law' in *Hoffmann la Roche v Commission*.¹⁰⁴

In this latter category it is worth mentioning the decision in *British Aerospace and another v. Commission*¹⁰⁵ where it was held if the Commission attempts to recover aid from a recipient without complying with the Article 108(2) TFEU [88(2) EC] procedure, the decision of the Commission that any aid given by the state must be repaid may be struck down by the Court where the concerned parties, including the beneficiary of the aid, were not notified and thereby denied the right to be heard before the decision on repayment was made.

I have already pointed out how general principles were borrowed from domestic legal orders and how in the case of proportionality it was used by the ECJ and then found its way into English law. There was criticism by German commentators about the manner in which the ECJ used, or failed properly to use the concept in the famous 'bananas' judgment in 1994 when a former judge of the ECJ and a leading legal commentator in Germany argued that that court's treatment of proportionality had brought 'judicial control to a minimum'.¹⁰⁶ As will be seen in Chapter 2, where the ECJ borrows from a Member State it cannot apply a doctrine in necessarily the same way as would the Member State. The ECJ and General Court have to apply legal principles in a Union context and it cannot be bound by the interpretation or application that a court in a Member State, applying domestic law, might give. This has been seen particularly in the field of human rights (Chapter 2, pp. 58 et seq.). We should not forget, as the rest

103. Case 155/79 [1982] ECR 1575; legal professional privilege is a common law doctrine and there are modifications for 'in-house' lawyers under EU law.

104. [1979] ECR 461: Case C-32/95 P *Commission v. Lisrestal*, at paragraph 21, see, *inter alia*, Case C-135/92 *Fiskano v. Commission* [1994] ECR I-2885, paragraph 39, and Joined Cases C-48/90 and C-66/90 *Netherlands and Others v. Commission* [1992] ECR I-565, paragraph 44). Case C-395/00 *Distillerie Fratelli Cipriani* paragraph 51 (12.12.2002); Fennelly in Andenas ed., *English Public Law and the Common Law of Europe* (1998). See Case C-315/99 P *Ismeri v. Court of Auditors* [2001] ECR I-5281 on fair procedure.

105. [1992] 1 CMLR 853.

106. Case C-280/93 *Germany v. Council* [1994] ECR I-4973 and U. Everling [1996] CML Rev 401 and Fennelly in Andenas ed., *English Public Law and the Common Law of Europe* (1998), pp. 16–17. See Chapters 2 and 8 below.

of this chapter suggests, that there is likely to be increasing influence of domestic systems on each other through their influence on Union law. There has been a pooling of sovereignties and a pooling of ideas from which we have all benefited.

The efforts of the Convention under Valerie Giscard D'Estaing to produce a constitution for the Union came to a conclusion in 2005 when the French and Dutch voted against the treaty for a constitution for Europe in national referenda. Nonetheless, a great deal of work has gone into examining whether European integration is having an impact on national constitutions so that it is possible to identify very similar influences having similar effects, indeed if not bringing them in any way closer together in points of detail:

The mutual influences of national and European law unmistakably cause an approximation of the respective national legal systems – even though national particularities continue to persist which determine the character of any national constitutional order to a considerable extent. Thus, it can be shown that a growing concordance has evolved in the process of European integration not only between European and national constitutional law but also between the respective constitutional orders of the Member States. In keeping with Konrad Hesse's recent conclusions, certain elements of this development could indeed be viewed as the framework of a 'common European constitutional order.'¹⁰⁷

At the time of the first edition (2003) it was inconceivable that France would allow a judicial review of legislation that had come into effect (Chapter 2). It was inconceivable that the UK constitution would be changed to remove Parliamentary sovereignty and hand that sovereignty to the people in a plebiscite over future EU treaties (Chapter 4).

To recapitulate: European Public Law is concerned with the influence of Union law and Convention law on European states. It is concerned with the influence of the laws of those states on the Union and ECHR courts. It is concerned whether the influence operates directly by one Member State upon another, but more realistically through the mediation of the EU courts and the CHR. As well as this evolving constitutional and administrative law of the EU and of its Member States and of its non-Member States, and the refinement of the law relating to human rights in modern Europe, there is the question of EU law itself constituting a system of administrative and constitutional law in its own right. Paul Craig has investigated the administrative law side in detail in his work and while I have not covered the work in the same way as he has, his work and ideas have been highly influential.¹⁰⁸ There is a wide area – a sort of hybrid – which has grown from relationships dominated by private law but where a growing public interest has ensured more regulatory involvement by national and EU government. Here we include environmental law, financial law, labour relations, equality, competition and regulation of mergers, state support for industry and public procurement, regulation of utilities and social welfare (Chapter 12).

107. H. Schafer in J. Schwarze *The Birth of a European Constitutional Order* (2000) at p. 464. See R. Arnold ed., *The Emergence of European Constitutional Law* (2009). See citations Chapter 2, p. Asterisk footnote (*) below.

108. P. Craig *EU Administrative Law* 2nd ed. (2012) and (2013) EPL 503.

No one can honestly say that the division between public and private law in any jurisdiction represents the outcome of rational conceptualisation – or at least not completely so. Some will doubtless want to refine the nature of the distinction; others to argue that increasingly it is of little consequence. And in a sense I am sympathetic with Emile Durkheim who over a century ago expressed the view that ‘All law is public law’.¹⁰⁹ All law is social, he continued, and all the functions of society are social. ‘There are [no functions] ... which are not, in greater or lesser degree, under the supervision of action [or inaction] by governmental bodies.’

It is a statement of fact and not wishful thinking to say that public law suffuses our existence in Europe and in each European State whether it be in our relationships with officialdom or some aspect of the State or in our relationships with each other. We are more administered and more ruled than we were 40 years ago. We are more spied upon and more regulated. The weaknesses of domestic regulation have necessitated supra national or global responses – the banking crisis starting from 2007, environmental regulation, the war on terrorism, the fight against internationally organised crime and mass migration. More and more lawyers and more and more legal discourse throughout Europe and throughout the world embrace complex social and state developments in terms of powers and jurisdiction, discretion and its control, procedural regularity and human rights, and natural justice or fairness in action in decision-making. This is as true in the United Kingdom as elsewhere.

How are we, if at all, influencing each other in the development of our public law systems? How are national systems of law being influenced by EU law and is there a clear vision of European Public Law emerging? National systems will retain their distinction and they will remain distinct from supra national entities. But they will be subject to more international influence in the way their systems develop. In Trieste, at a seminar organised by the Council of Europe for states from south east Europe, I was asked pointedly: ‘What system should Bulgaria adopt?’ Where was my suggestion of a legal panacea? I suspect there was a recollection in the questioner’s mind and a hint of the free marketeers who invaded the Soviet Union and Eastern Europe to advise on wholesale importation of Anglo Saxon capitalism without delay – invariably with disastrous consequences for social solidarity and cohesion. Bulgaria should adopt no *system*: but any country should learn what others are doing about common problems and what approaches are being shared and how, if at all legal doctrine and practice are coming together. What have we to learn from each other?

The pragmatism of the English may have been resistant to refined, abstract or rational models of law, so common in the continental tradition and which have had more of an impact on the shaping of EU law than has the English system – if ‘system’ is the correct phrase. And this is no place to rehearse why a relatively stable political framework has not until comparatively recently felt the need for a developed system of public law. The need is becoming increasingly felt and our presence in Europe is

109. Emile Durkheim *The Division of Labour in Society* (1933) The Free Press, p. 127 (1st ed. (1893)). All law is private he argues in so far as it relates to individuals; but all law is public in so far as law is a social function and ‘all individuals are functionaries of society’; attaching legal classifications to obscure notions such as the ‘state’ was unsatisfactory, he believed, p. 68.

making us all ever more keenly aware of that need. However, we have, along with all other jurisdictions in Europe, rich traditions and wide experience in a variety of practices including the use of tribunals and inquiries which have helped to bring greater transparency to the administrative process and also in our experience with Ombudsmen, a concept borrowed in the UK from Scandinavia by way of New Zealand.

The institution was introduced into the EU in 1992 and elected to office in 1995 (Chapter 11). As the world moves ever closer together temporally and in terms of communication and as ancient barriers and not so ancient evaporate or are dismantled, and new ones emerge, we must increasingly seek enlightenment from each other to see how political power may be tempered with legal discipline. What have different jurisdictions learned about the relationship between law and politics and what are comparatively recent ones, by which I include the EU, doing and learning about the balance between might and right? The problems are increasingly of an international dimension and posed by bodies which are not governmental in nature or, more precisely, in form. And they occur whether we like it or not when we are being pulled towards ever closer union and cooperation.

Globalisation has brought common problems. It requires cooperative responses. The statement that the UK government was minded to opt-out from all the pre-Lisbon criminal justice measures adopted under the Maastricht Treaty, before the Luxembourg Court acquires jurisdiction over them in December 2014 was even by UK standards a parochial thumbs down to foreigners. A Napoleonic system of justice would subvert common law purity. It would do no such thing. Many of the measures would simply allow effective enforcement of criminal law for the safety of us all through greater judicial and police cooperation.¹¹⁰ The government's more reflective response was referred to above. Crime increasingly crosses borders and the measures covered by the opt-out are designed to ensure that justice crosses borders as well. The European Arrest Warrant (EAW) has some procedural defects that need to be addressed but it replaced an uncertain, slow and costly process with one that is relatively fast and relatively cheap. Decisions were shrouded by government secrecy but now have to be taken in public by courts.¹¹¹

I have already quoted from Durkheim and I conclude this section with a prescient passage of the same author from his classic work on *The Division of Labour in Society* where he wrote of the nature of an international society:

Truly ... we must recognise that this ideal [international society] is not on the verge of being integrally realised, for there are too many intellectual and moral diversities between different social types existing together on the earth to admit of fraternalization in the same society. But what is possible is that societies of the same type may come together, and it is, indeed, in this direction that evolution appears to move. We have already seen that among European peoples there is a tendency to form, by spontaneous movement, a European Society which has, at present, some idea of itself and the beginning of organisation. If the formation of

110. J. Spencer (2012) *Cambridge Yearbook of European Studies* 363.

111. *Opting out of EU Criminal law: What is actually involved?* (CELS Working Paper No. 1) – Alicia Hinarejos, J.R. Spencer and Steve Peers http://www.cels.law.cam.ac.uk/publications/working_papers.php.

a single human society is forever impossible ... at least the formation of continually larger societies brings us vaguely nearer that goal.¹¹²

§1.04 CHAPTER OUTLINES

It will help if I set out the outline of the contents of chapters at this early stage.

In this chapter, the primary concern was the question: what is European Public Law? Some remarks were made about the national context of Union law although it raised further points. The inquiry focused on some introductory questions concerning: what has happened to English Public Law under *European* influence and what influence in return is English Public Law having on Union law? Is something new and different emerging? In later chapters, these questions will also be asked about French and German law. Are there signs of national systems borrowing from each other as well as from Union law and also from the ECHR? Are claims for European Public Law exaggerated? By the conclusion of this work, readers will have the evidence before them.

In the following chapter it will be necessary to say something about the relationship between law and government in the EU, France, Germany and the UK. The traditions and constitutional cultures and institutional frameworks are very different and have to be explained in order to appreciate any limitations to possibilities in European Public Law's development. The United Kingdom's sovereign Parliament will dictate the terms of constitutional and even administrative law development in the UK – the Ministry of Justice has sent out proposals for consultation on changes to judicial review.¹¹³ The proposals were highly qualified in their outcome. Germany's strict observance of constitutional guarantees of fundamental rights and democratic government will affect developments in that country. In the French tradition the strong executive and a weak Parliament partly explain the emergence of a strong system of *droit administratif* and a limited *conseil constitutionnel*, or at least until recent reforms. The different traditions will have to be explained to inform what follows.

Chapter 3 will examine the contribution of the French, German and English (sic) legal cultures to the development of European Public Law. Specific themes will be looked at in chapters in Part II e.g., Principles of Review and Principles of Liability.

Chapter 4 will assess in detail the impact of European integration on UK constitutional Law, now of course subject to devolution. It is a very rich story.

In Part II, I wish to tease out the major themes confronted in Part I by looking at specific areas. I hope these will be self explanatory. Chapter 5 will concentrate on devolution within the UK and subsidiary within Europe.

Chapter 6 examines the familiar themes of openness and access to information within Europe. Increasing conflict is seen between the more liberal tendencies of some Member States and the less liberal tendencies of the EU, especially the Council and

112. Emile Durkheim *The Division of Labour in Society* (1933) The Free Press, p. 405.

113. *Judicial Review: Proposals for Reform* (December 2012) Ministry of Justice and *Government Response* (Cmnd 8611, April 2013) and *Judicial Review: Proposals for Further Reform* Cm 8703 (September 2013); see Chapter 8, p. 364.

Commission as witnessed in recent suggestions for reform. The chapter will concentrate on the position within the Union.

Chapter 7 examines our national Parliament and review of draft legislation and EU policy and its role alongside the European Parliament (although the latter is a partner in EU legislation). It concentrates on the role of national parliaments in the Union architecture. What needs to be introduced into such oversight – more national or more European oriented bodies or a combination?

In Chapter 8 there is an examination of the principles of review now being employed by English courts and the extent to which these principles have been influenced by European doctrines. Chapter 9 examines the contribution of human rights protection and the European influence in that subject. The Human Rights Act 1998 has made a deep impact on judicial control of governmental decisions affecting individuals. How adequate is the coverage of the concept of human rights that the HRA addresses? What, for instance, of third generation rights such as information and participation in decision-making, environmental regulation let alone second generation rights such as social and economic rights? What of the absence of an overriding judicial power to strike legislation down; to realise in other words the safeguard of true constitutionalism? What concept of citizenship is conveyed by the HRA and the ECHR?

Chapter 10 covers an area of substantive principles of law, on the liability of public authorities in which the jurisprudence of EU law and the CHR has been influential in developing the liability of public authorities for tortious wrong-doing.

In Chapter 11, I examine the EU Ombudsman and other devices for dealing with grievances/complaints of citizens both in a European and in a domestic context. In the subject of grievance redress, too much attention is perhaps paid to courts. Growing interdependence between the EU ombudsman and national ombudsmen is likely to be an emerging feature of Ombudsman activity as the EU expands. And what of redress within EU institutions themselves before the Ombudsman intervenes?

The subject matter of Chapter 12 is broad and deals with competition, regulation and markets with reference to provision of essential services, problems associated with liberalisation and regulation in a European context and in competition law the fact that UK law has virtually incorporated the EU provisions for its domestic use. While the chapter offers some examples of glaring EU influence in shaping domestic law, it also reveals some of the greatest divergences between some continental traditions and Anglo Saxon approaches to the provision of essential services.

While the coverage in Part II is broad, there are some obvious omissions. One such could be discrimination. Although this will not feature as a chapter in its own right, it will be discussed in the chapter on human rights (where the ECHR is seriously deficient, although in the process of development). Although I do not deal with economic law or law and monetary policy as part of public law, I address the impact of the Economic and Monetary Union and the changes brought about because of the eurocrisis in the concluding chapter on Future Questions. I am open to criticism about what might be omitted, including social and employment policy and environmental regulation but I cannot cover every area in a comprehensive or even fleeting fashion. Nor has it been my intention to give textbook treatment to topics. Pursuing themes has been my objective.

Part III containing the final chapter will include discussion of present and future questions such as EMU, codifying European administrative law and possible influence of codes of good administrative practice produced by the EU Ombudsman, which is discussed in Chapter 11 and the impact of the new EU Charter of Fundamental Rights discussed in Chapter 9 and future accession to the ECHR by the EU. Is codification desirable or possible? What will be the national impact? Will a legally binding Charter and accession to the ECHR effectively produce a constitution for the EU – is that not what the TEU and Charter now are? What will the impact of these developments be, if they come to pass, on a country like the UK which does not even *possess* a written constitution?

The last chapter will seek to mesh these developments in the field of European Public Law with wider, international or global developments. Principles of national European systems are pervasive throughout the world; in the Commonwealth and common law world as well as in the French speaking world and so on. European law's influence is also spreading ever eastwards. What consequences are we likely to witness? What contribution can, or should, European Public Law make to global order and governance? Or will its influence simply whither in the face of overwhelming global forces. The most powerful of these, America, is most likely to set the context and determine the UK's future position vis à vis the European Union.¹¹⁴

114. On two accounts of the difficulties confronting Europe see L van Middelbaar *The Passage to Europe: How a Continent became a Union* (2013); G. Hewitt *The Lost Continent* 2013).