Is ec law compatible with parliamentary sovereignty?

Is the primacy of EC law over inconsistent UK statutes compatible with the doctrine of Parliamentary Sovereignty?

The notion of Parliament as the supreme law-making body in the UK is a long-standing shibboleth of the British constitution [1] . Acts of Parliament have traditionally been deemed to be the highest form of law in the UK, and the courts were denied the authority to challenge them [2] .

In 1972, however, the signing of the Treaty of Rome brought the UK within the scope of EC law [3] . The European Court of Justice has emphasised the primacy of EC law over the national law of its member states [4] and national courts are expected to recognise this. The British courts' apparent capitulation [5] might suggest that Parliamentary sovereignty has now been usurped by the primacy of EC law. If true, this would be a major upheaval in our constitutional framework. However, on a closer analysis it seems that accession to the EC has had a less revolutionary effect on the British constitution than was initially feared.

This paper will consider the relationship between these two seemingly irreconcilable doctrines and examine the question of whether they are capable of co-existence.

Parliamentary Sovereignty

Parliamentary sovereignty has a lengthy history in British constitutional law [6] . The definitive analysis was provided by Albert Dicey in the late 19 th Century in his text *Introduction to the Study of the Law of the Constitution* [7] . Essentially, the principle provides that Parliament is the highest law-making

authority in the UK. It " *has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.* " [8]

Dicey expands on this assertion to emphasise that Parliament was competent to pass laws on *any* subject [9] . The only thing that it could not do is bind its successors [10] . Furthermore, the courts lack the authority to challenge any statute that has been enacted using the correct procedure [11] .

Primacy of EC Law

Britain acceded to the European Communities in 1973, with the signing of the Treaty of Rome. EC law was given effect in Britain through the enactment of the European Communities Act 1972, which gave direct effect and application to EC law [12] .

Article 10 of the Treaty of Rome, as amended, states that there is a duty on all member states to comply with Community law and not to impede its application and the European Court of Justice has vociferously emphasised its expectation that EC law will prevail where it conflicts with the domestic law of member states [13] . In *Costa* , for example, the ECJ states that " *the precedence of Community law is confirmed by Art 189 (now 249) EC, whereby a regulation " shall be binding" and directly applicable in all Member States* " [14] . In other words, EC law takes primacy over domestic law.

The British courts have since demonstrated their willingness to comply with this instruction [15] . In *Factortame No. 2* [16] , for example, Lord Bridge stated that " *under the 1972 Act, it has always been clear that it was the duty of a UK court when delivering final judgment to override any rule of national law found to be in conflict with any directly enforceable Community law.* " [17]

Conflict between the doctrines

The potential for conflict here is self-evident. The courts cannot serve two masters but, as long as these two competing doctrines co-exist, this effectively appears to be what they are being asked to do. On the one hand, Parliamentary sovereignty dictates that the courts have no right to question an Act of Parliament. On the other, EC law, which declares itself to be supreme, expects national courts to declare Acts of Parliament invalid to the extent that they are inconsistent with EC Law.

On a practical level, it appears that the primacy of EC law has overwhelmed Parliamentary Sovereignty. The UK courts have grown more comfortable with applying EC law where it conflicts with UK statutes and EC law has become an accepted part of the British legal system.

As Munro points out, however, it is important to remember that Parliamentary sovereignty is a legal doctrine [18] . It is not concerned with the political or practical effects of accession upon the authority of Parliament, but with whether, legally speaking, parliamentary sovereignty is preserved [19] . This is an important consideration.

In cases that followed the enactment of the 1972 Act, Lord Denning attempted to reconcile the apparently conflicting norms [20] . He argued that, although EC law was treated by the courts as prevailing over conflicting domestic law, EC law was only offered this status on the basis of an Act of Parliament, the 1972 Act. As the 1972 Act has no greater status than any other parliamentary statute, it could be repealed by an express provision in a subsequent Act of Parliament. The legal concept of Parliamentary sovereignty is therefore preserved. [21]

The 1972 is not presented as being in any way superior to a normal Act of Parliament [22] . Indeed, during the ministerial discussions that preceded the passing of the Act it was acknowledged that any attempt to do so could readily be overturned by a subsequent Parliament [23] . Of course, the doctrine of implied repeal cannot operate in respect of the 1972 Act since it is not considered to be overridden by subsequent contradictory enactments. As Munro points out, however, this is a characteristic shared by other legislation and does not necessarily threaten the sovereignty of Parliament [24] .

Ward believes that parliamentary sovereignty is an archaic legal fiction that ignores political realities and serves no purpose in a modern setting shaped by the twin influences of globalisation and decentralisation of power [25] . He considers that we would be best served by abandoning the idea of Parliamentary sovereignty in favour of a " new constitutional order" [26] . However, even he acknowledges that, on the legal plane at least, the

concept of Parliamentary sovereignty undoubtedly continues to exist alongside EC law [27] .

Conclusion

As Munro has argued, is important to distinguish the legal concept of Parliamentary sovereignty from a political or pragmatic interpretation of the term. While it may be that repeal of the 1972 Act and withdrawal from the EC would be impossible in real terms, Parliament retains the legal option to do this. Therefore, it is theoretically possible to reconcile the apparently conflicting doctrines within our constitutional framework.

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McCarthys Ltd v Smith (1979) 3 All ER 325

R v Secretary of State for Transport ex p. Factortame Ltd (No. 2) [1991] 1 A. C. 603 (HL)

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Footnotes

[1] See generally Goldsworthy, J. D. *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press: Oxford) 1999

[2] Bradley, A. " The Sovereignty of Parliament – Form or Substance?" in Jowell, J. and Oliver, D. *The Changing Constitution* (Oxford University Press: Oxford) 2004 (hereinafter " Bradley") at 28

[3] Barnett, H. A. *Constitutional and Administrative Law* (Cavendish: London) 2004 (hereinafter " Barnett") at 192

[4] *Ibid*

[5] Bradley *supra* note 2 at 46

[6] See e. g. Munro, C. *Studies in Constitutional Law* (Butterworths: London) 1999 (hereinafter " Munro") at 127

[7] Dicey, A. V. *Introduction to the Study of the Law of the Constitution* (Macmillan Education: Basingstoke) 1959 (hereinafter " Dicey")

[8] Dicey *supra* note 7 at 39

[9] *Ibid*

[10] Dicey *supra* note 7 at 44

[11] Dicey *supra* note 7 at 45

[12] Munro *supra* note 6 at 201

[13] See e. g. Algemene Transport en Expeditie Onderneming Van Gend en Loos v Netherlands Inland Revenue Administration [1963] C. M. L. R. 105 (hereinafter " Van Gend en Loos") and Costa v. Ente Nazionale per l'Energia Elettrica (ENEL) [1968] C. M. L. R. 267 (hereinafter " Costa")

[14] Costa *supra* note 13 at 271

[15] Bradley *supra* note 2 at 46

[16] R v Secretary of State for Transport ex p. Factortame Ltd (No. 2) [1991] 1 A. C. 603 (HL) (hereinafter " Factortame")

[17] Factortame *supra* note 16 at 659

[18] Munro *supra* note 6 at 206

[19] *Ibid*

[20] Ward, I. *The Margins of European Law* (Macmillan Education: Basingstoke) 1996 (hereinafter " Margins") at 76

[21] See e. g. McCarthys Ltd v Smith (1979) 3 All ER 325

[22] Munro *supra* note 6 at 204

[23] Bradley *supra* note 2 at 47

[24] Munro *supra* note 6 at 207

[25] Margins *supra* note 7 at Chapter 4

[26] Margins *supra* note 7 at 82

[27] Margins *supra* note 7 at 85