

Constitutional law and european integration

Law



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There are few cases that rival Factortame in being concurrently substantively clear and decisive, and perplexing as to its full impact. The scope of the change to the UK constitution that has been instigated by it and other European Court of Justice decisions has been conceptualised as ranging from a 'legal evolution' to 'revolution'. Although some theories are more convincing than others, each faces its own weaknesses.

However, notwithstanding the conclusion of this particular speculative debate, the processes of European integration has undoubtedly quickened the pace at which UK Parliament and courts as part of a globalised world have had to squarely confront these constitutional changes, especially the departure from Parliament's stronghold over the constitution. A Diceyan view of the UK constitution is no longer compatible with the current relationship between UK and EU law.

It was decided in Factortame and confirmed in Equal Opportunities Commission, that the implications of the European Communities Act 1972 s. 2(4) is that EU law has supremacy in the case of clashes between EU and national laws. Within the orthodox view that Parliament is absolutely sovereign, inconsistencies between Acts of Parliament are to be dealt with by applying the doctrine of explicit or implied repeal to give effect to the later Act which is simply another illustration of how no Parliament can bind its successors.

It would never have been open to national courts to declare provisions within primary statute incompatible with EC law either temporarily or permanently as it is today. However, so long as UK remains a part of the EU, EU law will prevail when inconsistencies arise and any derogation from this position will

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have to be done expressly and unequivocally. Therefore, even if the current position of Parliamentary sovereignty cannot clearly be defined, Factortame and EOC alone emphasise the unworkability of a Diceyan view of Parliamentary sovereignty in an European context.

A radical but yet convincing argument that conceptualises the constitutional implications suggests that, EU law is able to place a substantive limit on Parliament's law making authority on overlapping areas because being a member state has partially changed the rule of recognition of Parliamentary sovereignty. Although this necessitates presupposing Parliamentary sovereignty is a legal principle, not a purely political one, it seems justified because instead of accepting Parliament to be sovereign merely by its existence, it allows for a justification based on normative arguments. This is important considering that the UK is a modern democracy and intrinsically different to the state it was in when the doctrine of Parliamentary sovereignty was originally developed. Being a legal phenomenon, the scope of Parliamentary sovereignty evolves through the judgments of the court which provides a more balanced and legitimate decision than considering just a political aspect because the political realities are still considered but are weighted against other principles such as the rule of obedience to statutes.

Furthermore, courts are gradually developing the idea that the authority of Parliament to make law is something that is subject to, and therefore controllable by constitutional law. For example, in the domestic case of *Anisminic*, the scope of Parliament's authority to confer on public authorities powers which are not subject to judicial review was sharply limited. Thus, the

effect of ECJ decisions on the constitution has been to develop it to a stage where Parliament is no longer sovereign at times when, and only when, inconsistencies between EU and national law occur within a field where both laws operate.

On the other hand, Sir William Wade would argue that 'constitutional revolution' rather than a mere evolution has resulted. However, this argument is not only at odds with Lord Bridge's judgement but lacks plausibility in itself. He explains that the courts have acted unconstitutionally and shifted their allegiance because Parliamentary sovereignty being a 'rule of recognition' and a solely political norm, is a constitutional fixture which may only be 'diminished' as a matter of practical politics.

There is a real difficulty in accepting this because it would suggest judicial whim may reverse a commitment that was reached democratic consensus among all branches of government and wider society through public referendum. This formidable weakness of Sir William Wade's argument supports viewing Parliamentary sovereignty as, at least partly, a legal concept. Although the theory that it is possible for the EU to place substantive limits to Parliamentary sovereignty accommodates the 'voluntary' contractual argument and 'functional requirement of EU' arguments that Lord Bridge presents, it is not without limitations either.

It fits well with Lord Bridge's alternative reasonings because they suggest that Parliament does have the power to limit its own powers and that the present conflict should be tackled on principled bases. This is important because legal phenomenon arise out of case law and albeit sparse, his judgment was the only one to address the topic. However, the

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persuasiveness of this argument is reduced by the fact that it simply leads us to another equally difficult question of what legal means set the width of its powers.

The judges themselves seem to be in disagreement amongst each other about this as Lord Hope says 'measures enacted by Parliament' itself whereas Laws LJ says the unwritten constitution as interpreted by the judges which seems legitimate but in practical terms, leaves everything just as uncertain. So far only the implications of ECJ case law has been discussed but there are other elements to European integration such as the doctrine of direct effect and the European Union Act 2011 which have affected the development of the UK constitution.

These developments suggest that the "new view" is the most plausible representation of Parliamentary sovereignty today because referendum locks and the possibility for individuals to present a case in national courts on law derived from sources other than Parliament present limitations on Parliamentary sovereignty but not in the substantive sense discussed above. Proponents of the "new view" view that ultimate sovereignty remains with Parliament but it may have to conform to certain manner and form limitations.

The appealing factor of this model is that it also accommodates for the limitations that Human Rights Act proposes on Parliamentary legal authority as well. Yet it is problematic in that the EU has explicitly stated in s2 of the ECA that on at least an EU level, Union law is regarded as supreme and this theory fails to encompass this dimension of the relationship between domestic and EU law. Most importantly, it accentuates how the increasingly

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multi-layered nature of the constitution must be taken into account in the broader debate.

The holding of a point of absolute power faces pressure from outside as well as inside the nation. When the broader question of whether we should be edging away from political and towards a more legal constitution is considered in light of the multi-tiered constitutionalism arising from the Parliamentary Acts of 1911 & 1949, Human Rights Act, Devolution as well as EU membership, it would seem that to maintain a wholly political view of Parliamentary sovereignty in any context would be to deny reality.

However, anything more exact requires us to assess what balance between adaptability and elasticity from maintaining a political constitution, and protected rights and principles from a legal constitution will provide the checks and balances necessary in dealing with the legal and political challenges of today. Due to declining public reputation of Parliament and diminishing respect for political process generally, as well as the aim of Parliamentary sovereignty having originally been to secure the broadest possible basis for ensuring democracy and legitimacy, we may not have to be so uneasy about adopting a more legal constitution.

The UK constitution must embrace the emphasis it has always placed on a dynamic experience and once again, like with the case of devolution, make a smooth transition before political repercussions manifest themselves.

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