Parliamentary supremacy in the UK since joining the European Union

Justine Mitchell

The traditional view of the supremacy of Parliament was established by the enactment of the Bill of Rights 1689, in which it is stated: ‘That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall’ (Chapter 02-1), thereby placing Parliament’s law-making power above that of the monarchy. Until this enactment, it could be asserted by the judiciary that common law controlled statutes, rendering them void if an Act was ‘against common right or reason…or impossible to be performed’ (Bonham’s (Dr) Case, 1610). Although the Bill of Rights is over 300 years old, the fundamentals have been enshrined; ‘Parliament asserts sovereign legislative power’.

Sir Ivor Jennings illustrates this traditional view by suggesting that Parliament can legislate for all people and places – there are no limits on the territorial extent of an Act of Parliament. If a British citizen commits an offence under British law he or she can be prosecuted even if the act is not unlawful in the country where the offence was committed (Parpworth 2006, 71). The recent case concerning the UK citizen, Darryn Walker, illustrates this theory (Guardian Online). Mr. Walker had created an online blog on a website hosted in another jurisdiction. He penned a fictitious story regarding crimes of atrocity he wished to inflict on the members of the popular band, Girls Aloud. Although Mr. Walker was subsequently cleared, because it was held to be only fantasy, charges had been brought against him predominately due to Parliamentary supremacy – if Parliament advised it was an offence in the UK, it did not matter if the suspected crime was committed elsewhere. Impossible though it may seem, Parliament can even enact a law making it an offence to smoke on the streets of Paris. Although French nationals would not be bound by such a law, UK citizens would and could be prosecuted upon returning to the UK. ‘If [Parliament] enacts that smoking in the streets of Paris is an offence, then it is an offence’ (Jennings 1959). Parliament could legally enact any heinous law; one which would be morally incomprehensible, for example passing a law requiring all blue-eyed babies be put to death or people of a certain race to be executed (Bradley et al 2007, 60). However, morally incredulous this may seem in twenty-first century Great Britain, in legal theory, Parliament has such power. As T. C. Hartley warns, although political considerations may suggest that Parliament would not do these things, it does ‘not affect the legal position’ (1999, 125).
When defining the traditional view of supremacy, it is useful to consider the general rule that Parliament ‘cannot bind itself or its successors’ (Dicey, 1959). To remain supreme, Parliament must be able to alter or change any of its Acts, either by express or implied repeal. This has been challenged by Article 1 of the Act of Union 1706 which combined the states of England and Scotland to create Great Britain; more specifically, the Westminster Parliament: ‘That the kingdoms of England and Scotland shall…for ever be united’ (Parpworth 2008, 91). Notwithstanding, there is, as yet, no evidence either by statute or case law to substantiate the theory that certain parts of the Act are entrenched, merely non-binding statements expressed by certain Scottish judges. Implied repeal was illustrated in Ellen Street Estates Ltd v Minister of Health, whereby the earlier Acquisition of Land (Assessment of Compensation) Act 1919 was in conflict with the later Housing Act 1925 regarding terms of compensation. Maugham LJ stated that it was impossible for the legislature to bind itself in terms of future legislation and if Parliament ‘chooses to make it perfectly plain that the previous one is being to some extent repealed, that must have effect’ (Dicey 1959). In essence, it must have been Parliament’s wish to repeal the earlier Act by implementing the later Act.

It therefore does not stretch the imagination too much to speculate that Parliament could, for example, legally enact a law for all red-headed males to be executed, (Hartley 1999). The UK could even extend such a law to all Canadian, red-headed men, not just UK citizens. Until the Canada Act 1982, Parliament had the power to legislate for Canada. S.2 of the UK Act stated that a future British statute would not apply in Canada. As illustrated above though, Parliament cannot bind itself. It could be argued that the British Parliament could repeal all or part of the Act and legislate for Canada. Moreover, it has no limits as to the type of law it passes. However contentious it may seem, this illustrates how the UK Parliament could pass a law of legal status demanding that all red-headed men in Canada be executed. Theoretically, this would be legally binding on the UK judiciary to carry out Parliament’s wishes. Notwithstanding, Lord Woolf considered that if Parliament legislated without regard for the judicial position of upholding the rule of law, the courts might express that ‘ultimately there are even limits on the supremacy of Parliament’ (Woolf 1995, 69).

Recent events suggest that Parliamentary supremacy can be and has been limited. In 2009 the oil giant Trafigura managed to restrict a fundamental right – the freedom of expression to report on Parliamentary debates enshrined in the Bill of Rights 1689, (Slapper 2010, 18). The company successfully bound The Guardian newspaper, amongst others, to absolute silence.
with a super-injunction, effectively shrouding the issue with an invisibility cloak. However, the injunction successfully prevented reporting on Parliamentary proceedings because Paul Farrelly MP had tabled a question on the Trafigura super-injunction which could not be reported. For a while it seemed that monetary incentives would prevail over Parliamentary supremacy, allowing Parliament to be controlled by a private party through the courts. Although Lord Chief Justice, Lord Judge stated he would ‘need some very powerful persuasion indeed that it would be constitutionally proper for a court to make an order to limit discussions in parliament’ (Rogerson 2009, 2) and the super-injunction was termed a violation of a ‘most fundamental and cherished part of the English Legal System’ (Slapper 2010, 18), the contentious factor remaining is that had the issue not been exposed on the digital communication tool Twitter, Trafigura, or more specifically their solicitors Carter-Ruck, could have successfully impinged on Parliament’s rights and privileges. The super-injunction was lifted but the principle remains.

The Courts Rebel
It might be argued that Parliamentary supremacy was limited during the contentious issue involving ouster clauses from Judicial Review in 2003. In an effort to manage immigration more effectively, Parliament presented to the Houses of Parliament the Asylum & Immigration Bill 2003. Clause 10 of the Bill endeavoured to exclude either the possibility of further appeal, or judicial review of the tribunal’s decision by the High Court. Effectively, a citizen’s safety from persecution could be decided at the first level, more specifically, the only level. The courts rebelled. The clause almost caused a constitutional crisis wherein Lord Hoffman alleged that judges would not ‘give any effect’ to the clause (Parpworth 2008), whilst Lord Donaldson argued that, as an independent state of the realm, the courts would ignore the ouster clause (Law In Action 2008). Effectively, for the first time in 300 years, the courts were prepared to deliberately contravene Parliamentary intent and thus limit their supremacy. We have seen from Lord Woolf earlier that it might be argued the courts were simply preventing Parliament from stepping outside the rule of law. Notwithstanding, considering Acts of Parliament are the supreme form of law which the court is bound to apply, this argument is weak against the stronger, contentious issue – the judiciary was prepared to deliberately rule contrary to Parliamentary intent, thus limiting their supreme status. It might be argued that considering Parliament has reneged on this issue, the judiciary has succeeded in limiting supremacy in this area. Notwithstanding, the three subsequent Acts: Criminal Justice Act 2003, Inquiries Act 2005 and the Prevention of Terrorism Act 2005
(passed after this potential constitutional crisis), serve to place limitations on the powers of the judiciary. It can be argued that the unspoken message emanating from the passing of these Acts is that whatever constitutional crisis from which Parliament may be at risk, it will ultimately find a way to ensure its wishes are carried out and its supremacy upheld. This apparent tremor in supremacy though, leads us to consider the impact of our membership of the European Union and the incorporation of EU law into the UK judicial system.

The Impact of the European Union

A day will come when all the nations of this continent, without losing their distinct qualities … will fuse together in a higher unity and form the European Brotherhood (Barnett 2008, 175).

This profound statement by Victor Hugo came to fruition for the United Kingdom when the European Communities Act 1972 incorporated the Treaty of Rome into the UK judicial system. ‘All rights…created by the Treaties, are without further enactment to be given legal effect’ (European Communities Act 1972). The Court of Justice of the European Union (CJEU) asserts the supremacy of EU law in all Member States. In the EU case Costa v ENEL 1964, the CJEU expressed that Member States had limited their sovereignty upon membership of the Union. This was further extended to apply to constitutional laws of the Member States (Internationale Handelsgesellschaft 1970). However, the CJEU made its strongest assertion in the EU case Simmenthal II 1978, by advising that the national court must ‘set aside’ conflicting laws.

Tensions arise when there is a direct collision between EU and UK law. The Court in Macarthys v Smith 1979 considered the inconsistency between the Equal Pay Act 1970 and Article 119 of the EEC Treaty concerning the Equal Treatment Directive. Lord Denning asserted in his judgment that ‘whenever there is any inconsistency, Community law has priority’; after referring the case to the CJEU, it was held that the statute was inconsistent with the Treaty – the UK Act did not sufficiently promote the EU philosophy of equal pay for equal work. The CJEU considered a teleological approach to the Treaty and it was therefore necessary to look beyond the literal meaning of the statute to avoid incompatibility. The court fixed the conflict through stretching the interpretation of UK law to fit the European approach. Lord Denning applied Article 119 of the Treaty because Community law prevailed
over UK law. It was their ‘bounden duty to give priority to Community law’ (*Macarthy v Smith* 1979).

In *R v Secretary of State for Transport Ex p. Factortame Ltd* (No2) 1991, Spanish fishermen complained to the EEC that the UK Merchant Shipping Act 1988 promoted discrimination on the grounds of nationality. This was considered to be the test case for supremacy because it was not open to interpretation unlike *Macarthy v Smith*. The national court had to set aside the statutory rule for EU citizens as previously stated by the CJEU in *Simmenthal II*, thus conflicting against the traditional view of Parliamentary supremacy: ‘no person or body…having the right to…set aside the legislation of Parliament’ (Dicey 1959).

Nowhere was Parliamentary supremacy tested more contentiously than during the BSE crisis lasting from the mid 1980s to 1999. As a result of the infection of many British cows with BSE, the EU introduced a ban on the export of beef from the UK to all EU Member States curtailing one of the four fundamental freedoms – free movement of goods within the EU (*UK v EC Commission* 1996). Moreover, the EU successfully banned the export of beef to non-Member States also. The complete ban lasted from 1996 until 1999, when limitations as to the age of the cattle at the time of slaughter were introduced. This restriction did not fully end until 2005, thus binding the UK to the EU’s decision for almost 10 years. The UK had tried unsuccessfully to argue that the decision was beyond the scope of the powers of the European Commission and thus not legally justified (para 46 & 49). Although it was argued in *Costa v Enel* that Member States had only transferred their sovereignty within limited fields, for the UK agriculture was a limited field because the EU has exclusive competency in this area. Consequently, they were bound by the EU provisions (Steiner *et al.* 2008, 87).

It might be argued that in response to the BSE crisis the UK could have simply defied the ban by passing an Act to override that particular area of EU competency. However, it was argued by Lord Bridge in *Factortame* that as a result of the European Communities Act 1972, Parliament could not impliedly repeal law emanating from the EU. It could, however, expressly repeal all or parts of the Act. On the face of it *Factortame* could have achieved the unimaginable, by successfully binding future Parliaments. Indeed, Sir William Wade in *Revolution or Evolution* suggested that Parliament had ‘succeeded in binding the Parliament of 1988 and restricting its sovereignty, something which was supposed to be constitutionally impossible’ (1996). Laws LJ raised the point in *Thoburn v Sunderland City Council* 2002
that, as a result of the European Communities Act 1972, certain Acts had a constitutional status, which could be argued as those statutes dealing with the fundamental rights of the citizen:

We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes … Ordinary statutes may be impliedly repealed, Constitutional statutes may not.

Although this was only a lower court non-binding statement, it has had significant impact. Acts of constitutional status are more entrenched and therefore difficult to alter or repeal. The devolution Acts for Scotland, Northern Ireland and Wales have all been described as having a constitutional status. Indeed it has been argued that it is unthinkable that Parliament would repeal these Acts. Similarly, the Human Rights Act 1998 has been suggested as having a constitutional status and shall be further considered.

**European Convention of Human Rights and the European Union**

Despite popular misconception, the European Convention of Human Rights (ECHR) does not flow from the EU. It is an entirely separate body, wholly independent from the Union. Notwithstanding, this theory will endeavour to show that indirectly the UK is bound to the Convention by the EU.

The UK is a signatory to the Convention. A pre-requisite for membership of the European Union is that all Member States are signatories to the ECHR. Thus, although it might be argued that the UK signed the Convention in 1951 before joining the Economic European Community (now the EU) in 1973, it would have had to sign the Convention upon membership. It cannot free itself from the Convention without withdrawing from the EU. It could theoretically be argued that the UK is bound to the ECHR whilst it remains a member of the Union.

Notwithstanding, the Convention applies in the UK because the Human Rights Act 1998 incorporates the Convention into the UK domestic legal system. It might therefore be argued that Parliament could simply pass a law to impliedly repeal the Act. However this would mean expressly repealing an Act which guarantees the fundamental rights of UK citizens. It might be suggested that Parliamentary supremacy lies within the hands of the electorate (as
recently demonstrated in the 2010 election) as to who is voted into power. It is highly
unlikely any Parliament would carry out a withdrawal of such fundamental rights. In the
event that such action took place and the Human Rights Act 1998 was expressly repealed and
/or replaced with a British Bill of Rights (BBC, 2010), UK citizens can still enforce their
rights from the Convention indirectly at the European Court of Human Rights (ECtHR) in
Strasbourg. It might also be argued that any British Bill of Rights would need to guarantee
the same Convention rights. In any event, it might therefore be argued that the UK has been
bound by the EU to the ECHR.

The UK found its sovereign powers severely curtailed by the 2008 ECtHR case involving
samples taken from persons arrested and retained on a DNA database – S & Marper v UK
2009. The UK in this case had retained DNA samples of persons who had been subsequently
released without charge. Interestingly, the UK is the only EU Member State which expressly
permits the indefinite retention of ‘DNA profiles and cellular samples of persons who have
been acquitted or in respect of whom criminal proceedings have been discontinued’ (S v
United Kingdom para 47). The EU has clearly stated its position regarding this matter throug
Directive 95/46 thereby stating that the processing of personal data must protect Article 8
ECHR – Right to Privacy. As a result, the UK was found to be in breach of Article 8 because
its infringement on private life was disproportionate thus enforcing a change in domestic law.
The contentious issue, however, was that although the directive allowed the UK to legislate
within this area as a necessary measure for the prevention, detection and prosecution of
crime, the UK could not enact legislation without taking into consideration the
Recommendation R(87)15 of the Committee of Ministers of the Council of Europe.

Conclusion

We must not, however, forget Victor Hugo’s far-reaching statement to Parliament in 1849 –
States would be united ‘without losing their distinct qualities.’ In consideration of this
statement, it is evident that visions of a unified Europe did not extend to complete unification.
By the CJEU’s own admission in Costa v Enel, the UK has only relinquished its sovereignty
within limited fields. It was argued that the EU was predominately created for economic
purposes thus the ‘Community, as it had been cast in the Rome Treaty, represented little
immediate threat to the integrity of the sovereign nation state’ (Ward 2009, 14). However,
leading European Parliament figure, Altiero Spinelli, stated that his ‘initiative was aimed at
transforming the Community into a “genuine political and economic union”...’ (Ward 209, 24).

Whether the UK is too entrenched in the European Union has been the subject of much debate in the House of Lords. Lord Stoddart stated that it was assumed to be ‘inconceivable that Britain should leave the European Union’, despite professing that:

Huge areas of our national life are being decided not in this country by our own Government and Legislature but by a group of 27 countries, of which the UK is only one.

Union law has certainly affected Parliamentary supremacy; it has been suggested that the UK is bound to the EU far more than was ever intended (Barnett 2008, 176). However, it must be accepted that it was Parliament’s intention to be thus bound. If there ever came a time when Parliament intentionally created an Act deliberately to contravene EU law with the express statement that its wishes be carried out, it must be accepted that it is the wish of Parliament to do so. As we have already seen, it would be the UK court’s duty to give effect to that wish as illustrated by the red-headed males scenario, rather than the conflicting EU law. This was asserted as far back as 1979 when Lord Denning stated in Macarthy v Smith:

If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty ... I should have thought that it would be the duty of our courts to follow the statute of our parliament.

The Treaty itself is not binding on Parliament; it is the European Communities Act 1972 which incorporated the Treaty into UK law, thus carrying an express statement that the Act is binding on all other Acts. Notwithstanding, the Act only binds implied repeal, it does not mean that, at a later time, Parliament could not expressly repeal the Act, thus withdrawing itself from the EU entirely. On the issues discussed, it would be accurate to suggest that there is a qualified acceptance by Parliament regarding EU sovereignty. The theoretical unlimited nature of supremacy remains, and it can be argued that the Westminster Parliament still maintains the principle enshrined over 300 years ago in the Bill of Rights 1689: retention of absolute supremacy. Notwithstanding, tentatively it can be suggested that legal developments in the EU and ECtHR have in practice, backed the UK into a corner. This article has
endeavoured to show that, year-by-year, the UK has found its powers increasingly diminished. The UK has limited itself to the extent that, at best, it has developed a dual personality, born from a myriad of laws emanating from two different legal systems, wherein UK law prevails in certain competencies only as far as Union laws will allow; or, at the far end of the spectrum, UK Parliamentary supremacy has all but disappeared, overshadowed by an ever-increasing Union. The UK Parliament could only reassert its theoretical supremacy by withdrawing entirely from the European Union and there is no realistic prospect, under current or foreseeable political developments, of the UK freeing itself from its commitments.

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