https://asce-uok.edu.pk/journal
DOI: https://doi.org/10.56384/jes.v39i1.288

Limitations on Parliamentary Sovereignty in the UK: A Critical Analysis

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Abstract

The article aims to discuss some British parliamentary issues that are directly link with the democratic values, power distribution, limitations, overlapping of national laws with the EU laws before Brexit, and restoration of state sovereignty in the post-Brexit UK. Parliamentary Sovereignty is a doctrine where the parliament wields absolute power and can therefore make and unmake laws. Many scholars argue that the doctrine is the central principle in the UK but by weighing its advantages and its disadvantages, one may assume that it can no longer be regarded as the central element of the constitution. The issue of common law radicalism can also be seen as a limitation to parliamentary sovereignty. The paper also discuss some legal issues of translating Parliamentary Acts by courts and judges. Simultaneously an act count valid on certain circumstances but not applicable when it conflicts with other status.

This article emphasises on the study of factors that limit the most popular dogma. For instances, the UK entering the European Union in 1973, the Human Rights Act 1998, devolution of power to Scottish Parliament and Welsh Assembly, the doctrine of implied repeal, common law radicalism and democracy.

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Keywords: UK, Parliamentary supremacy, Limitation Clauses, Common Law, UK Human Rights Act 1998.

Introduction

The doctrine of Parliamentary sovereignty is considered as the fundamental principle of the UK constitution and its Acts of Parliament are the supreme form of law. It entitles the parliament as a supreme law-making body.

However, in recent past, British membership of the European Union, weakened its supremacy and this influence one can feel till now.[1] The United Kingdom entering the European Union in 1973 has affected the sovereignty of the parliament. It infringes on parliamentary sovereignty in such a way that in order to complete the membership it passed the European Communities Act 1972. Section 2(2) European Communities Act 1972 states that all members should interpret their laws in accordance with EU law,[2] entailing that even an English law passed by the governments required harmonization with the EU law, as the member states are obliged to follow the EU law even if it is conflicting with their own law. The euroskeptic literature has tried to capture the new dynamics behind the impact of Brexit on the domestic scene by understanding it as a will to dismantle previous Europeanized policies and politics. The paper is an attempt to deal with the UK's national laws in relations to the EU.

It also examines the issue that to what extent Brexit would impact on the EU's influence over British public policies. In other words, it is to identify several pathways to the EU – UK relationship which can be conceptualized along a continuum from de-Europeanization to re-engagement scenarios.

An example of a case where the supremacy of EU law was tested against English law is apparent in *'R v Secretary of State for Transport, ex p Factortame Ltd [1990]'* where claimants were Spanish ship owners who made use of UK fish reserves to fish courtesy of the Merchant Shipping Act 1894, which allowed them to fish in the UK then sell the fish they had caught in Spain.[3] The Secretary of State for Transport modified the Merchant

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1 M. Godin and N. Sigona, "Intergenerational Narratives of Citizenship among EU Citizens in the UK after the Brexit Referendum", *Ethnic and Racial Studies* 45, No.6 (2022): 1135-1154.

2 J. Jaconelli, Constitutional Review and Section 2(4) of the European Communities Act 1972, *International & Comparative Law Quarterly* 28, No.1 (1979): 65-71.

3 R v Secretary of State for Transportation, ex p Factortame, No.2, Crown, 1991.

Shipping Act 1894 to become the Merchant Shipping Act 1988, which set down that fishermen who are British and registered to a British address could only manage. However, the Act was suspended as the European court of justice ruled that it was contrary to EU law. This clearly shows that parliament is not sovereign where it conflicts with the EU law as the courts are obligated to prioritise EU law above National law. According to Lord Bridge:

> Under the terms of the Act of 1972, it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to conflict with any directly enforceable rule of Community law.[4]

Supremacy of the Parliament

A British constitutional scholar Albert Venn Dicey and a firm believer of supremacy of parliament over monarchy is well recognised as the author of *Introduction to the Study of Constitutional Law* (1885). His concepts are regarded as part of the uncodified British constitution. He rose through the ranks to become the Vinerian Professor of English Law at Oxford, one of the first Professors of Law at the London School of Economics, and the promoted the term 'rule of law'. He characterised parliamentary sovereignty in three ways:

> Parliament has the right to make or unmake any law whatever. No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[5]

The power of Parliament extends to every part of the Queen's dominions. This means it has a right to formulate and annul the laws and there are no legal restrictions on the laws it may enact. Furthermore, no other body can question the validity of the Acts of Parliament, including the courts. An example of a case where the defendant tried to challenge an Act of Parliament but failed is evident in the case of '*Pickin v British Railways Board*

[4] P. Norton, Divided Loyalties: The European Communities Act 1972, *Parliamentary History* 30, No.1 (2011): 53-64.

[5] Dicey, Introduction to the Study of the Law of the Constitution 1885, (London: Macmillan, 1959), 247, 269.

1974'.[6] The defendant tried to challenge a private Act of 1836 and wanted the court to declare it ineffective, however, his claim was rejected on the basis that courts cannot question an Act of parliament. In 1688, the Bill of Rights established the parliament as sovereign. It used to be a central principle of constitutionalism however parliament has passed some laws that restrain the use of parliamentary sovereignty for example 1998 Human Rights Act UK, still European court of Human rights possesses some influences on the domestic laws of UK.[7]

Opponents would argue that the UK voted to leave the European Union in 2016 by holding a referendum, as Article 50 of the Treaty on European Union states that "Any member state may decide to withdraw from the Union by its constitutional requirements", now the UK is no longer obliged to impede laws in accordance to EU law because of Brexit. As the great repeal bill will repeal the European Communities Act 1972, the bill will end the power of the European Court of justice in the UK.[8] However, even though the UK voted to leave it still has not legally left the EU, which means it is still a member and therefore its parliament is still supreme.

These laws are referred to as the Acts of Parliament and are considered to be "extremely wide" as Davis confer. It is therefore the law that governs the entire citizens no one questions the validity of the law and the court enforces without questions since no one is recognised by the law of England as having the right to override or set aside the legislation of the Parliament. The limitations of Parliamentary sovereignty include;[9] the declaration of its incompatibility, the doctrine of implied repeal, the EU laws, democracy, the Jackson case and the common law radicalism.

Judges are known to uphold and apply an Act in court so the process of declaring the Act incompatible goes contrary to the sovereignty of parliament, therefore, limiting it. The declaration of incompatibility of an Act simply means that when an Act is conflicting with the Human Rights Acts like in the case where the Youth Justice and Criminal Evidence Act was found to

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6 Baldwin, Concluding Observations: Legislative Weakness, Scrutinising Strength?.

7 Steve Foster, "Reforming the Human Rights Act 1998 and the Bill of Rights Bill 2022", *Coventry Law Journal* 27, No. 1 (July 2022): 1-22.

8 Flaherty, History Right: Historical Scholarship, Original Understanding, and Treaties as Supreme Law of the Land, *Colum. L. Rev.*, (1999), 99-110.

9 H. Davis, *Human Rights Law Directions* (Oxford University Press, 2021).

contradict Article 6 of the Human Right Act, judges may however stop using the other Act leaving the Act for the parliament to either repeal or amend it. The Act is therefore in existence but it is not used in legal rulings.[10] Act conflicting with the Human Right Act, European Conventions among others are declared incompatible by judges in the court so one can say that, although judges are known for upholding or applying Acts, in practice they are not.

The sovereignty of the parliament depends on judges.[11] Judges are therefore made to wield an absolute power under the section 3 of the Constitutional Reform Act which makes them completely independent but in the case of parliamentary sovereignty, the sovereignty of the parliament is not written in the statute, therefore, leaving its sovereignty to the judges to uphold and declare by interpreting the laws and applying them. Judges declaring an Act invalid is a form challenging the statutes they make. We are therefore made aware of the constant process a Bill has to go through to become an Act. It goes through the House of Commons then the House of Lords, with a constant deliberation it is given Royal Assent so declaring the Act incompatible questions the sovereignty of parliament (enrolled Bill rule). It can therefore be seen as a limitation on Parliamentary Sovereignty but in a case where judges do not declare an Act conflicting with the Human Rights Act, the right of people can be abused. This renders the Human Right Act itself vague since this Act was made to protect the rights and freedom of people. It is therefore appropriate to say that, the Human Right Act is held in accordance but not passed on as an Act and not used or applied.

Also, the doctrine of implied repeal is another limitation on parliamentary sovereignty. The rule of this doctrine is said to work "where two Acts conflict with each other, the courts apply the Act which is earlier in time and the later Act is taken to have been repealed by implication".[12] With this, the court does not expressly repeal the Act but apparently repeals it since the court cannot question the validity of the law. The act of repealing the Act questions the supremacy of the parliament since they make laws on issues in the

[10] S. R. S. Gilani, I. Khan and S. Zahoor, The Historical Origins of the Proportionality Doctrine as a tool of Judicial Review: A Critical Analysis, *Research Journal of Social Sciences and Economics Review* 2, No.1 (2021): 251-258.

[11] Smith, The Invisible Crown (University of Toronto Press, 2019), 69-81.

[12] Limbach, The Concept of the Supremacy of the Constitution, *The Modern Law Review* 64, No.1 (2001): 1-10.

country. This repeal does not state the fact that the Act is defective and must not therefore be used. Instead, it upholds the newest version and applies it leaving the old version to be dealt with either by amending or by repealing it by the parliament since they have the power to do so. Here, we are made to know that,

> "Every Act is made either to make a change in the law or for the better declaring the law and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment".[13]

Democracy and British Parliament

Democracy can pose another limitation to parliamentary sovereignty, due to fact that the House of Commons is elected by the general public thus, the public has the power to choose the people whom they want to be in authority over then. Also, the Jackson case led to the questioning of the Parliament Act of 1911 and 1949 where Acts were passed without going through both Houses which allowed certain Acts to be passed by going through only one House (the House of Commons) and receiving a royal assent can be a limit to the sovereignty of parliament. A sequence which is always followed for a Bill to become an Act was however broken at that time.[14] If democracy wants to preserve, it, needs the consent of both Houses for it to become an Act. However, the parliament did contrary to what was required. Parliament itself, limited its power in this sense, but the process of democracy ensures that partiality is done away with by selecting their leaders to make laws although democracy may limit the sovereignty of power, it removes partialness on behalf of the law-making bodies.

The Jackson case can also be seen as a limitation on parliamentary sovereignty. This case has an exception to legislation passing through both houses, the House of Lords and the House of Commons. The Parliament Acts of 1911 and 1949 lay down special procedures by which a Bill can become an Act without the consent of the House of Lords (after a specified time).[15]

Jackson had an interest in fox hunting and challenged the validity of the 2004 Act that banned the hunting of foxes with dogs. Jackson sought declarations

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[13] Drexl, British Supremacy of Parliament after Factor, *Am. J. Comp. L.* 41, 1993, 123-136.

[14] Baldwin, Concluding Observations: Legislative Weakness, Scrutinising Strength?.

[15] R (Jackson) v Attorney General , UKHL 56, [2005] 4 ALL (ER 123 2005).

that the 1949 Act was not an Act of Parliament and was consequently of no legal effect and that accordingly the 2004 Act was not an Act of Parliament and was of no legal effect. Jackson submitted that (1) legislation made under the 1911 Act was delegated or subordinate, not primary; (2) the legislative power conferred by s.2(1) of the 1911 Act was not unlimited in scope; (3) the amendments made by the 1949 Act were not authorised and that Act was invalid.[16]

The court however dismissed the appeal made in the case of Jackson. Looking back at this case, the mere fact is that someone questions the validity of the case can be seen as a limitation to parliamentary sovereignty. The appellants wanted the court to declare it invalid which could not be done because the court in the country cannot declare an Act invalid.[17]

The authority of the parliament is questioned in the case of Jackson and the procedure used in passing the Hunting Act 2004 is unlawful therefore making it invalid. Acts in the UK are seen to be the most powerful legislation governing the people and since no one is above it, it is therefore obeyed by all and it is seen to "extend in every part of the Queen's dominion" as well making it extremely powerful. This Act is however challenged in the case of Jackson making the authority of the parliament questionable as well because it claimed that the Act 1949 was invalid because it did not pass through the House of Lords. This case is seen as an exceptional case due to it questioning the validity of an Act. Although the Act was challenged in court, it paved a way for the Act to be properly reframed or explained to the understanding of all making it good enough for everyone to understand it.[18]

EU laws and parliamentary sovereignty

The EU law can also be seen as a limitation to parliamentary sovereignty in the sense that, the British's very existence in the EU limits its power to do certain things. Article 10 states the duty of all EU Member States to comply with EU laws without impeding their application. This can be seen in the case of Factortame when the House of Lords had to deny the effect of the Merchant Shipping Act (MSA) 1998 and apply the European Communities Act of 1972. It is therefore seen to 'display' the MSA as stated by the House of Lord.

[16] Limbach, The Concept of the Supremacy of the Constitution.

[17] R (Jackson) v Attorney General , UKHL 56, [2005] 4 ALL (ER 123 2005).

[18] Flaherty, History Right: Historical Scholarship, Original Understanding.

> "The established rule about conflicting Acts of Parliament, namely that the later Act must prevail, was violated, since the later Act, in this case, was the Merchant Shipping Act 1988, yet it was misapplied under the European Communities Act 1972".[19]

The parliament is therefore to be going against its own rules in this case. The opposite of what is to be done is seen here in this context. This is therefore the first time the parliament is seen not to apply an Act of parliament. This shows the supremacy of EU laws over our national laws. "However, it is certainly true that the sovereignty of Parliament has been curtailed during continued membership of the European Community; and it is likely to be of little importance".[20] The issue of regulation set by the EU binding an entire legislative Act is seen as a disadvantage to the sovereignty of parliament. The EU is also seen to set goals for its Member States to achieve. One may say that at least the country has the freedom to do whatever it wants but the end goal is set by the EU and at the end of the day, it is to be obeyed by all. This could be seen as a limitation on the sovereignty of parliament but then again, it is made known that, the UK entered the EU voluntarily and can therefore withdraw from the Union by its constitutional requirements.[21]

Brexit on the other hand will contribute to restoring the UK as it used to be before joining the EU since the Great Repeal Bill will repeal the European Communities Act of 1972. The Bill will end the power of the European Court of Justice in the UK since the government plans to ratify all EU laws in the UK. This will therefore go a long way to regain back the sovereignty of parliament in the UK since necessary measures are being taken to restore the supremacy of the parliament.

The above mention points state the limitations of parliamentary sovereignty and how it can no longer be considered a central principle in the UK. The issue of the doctrine of implied repeal, the declaration on incompatibility, democracy, the Jackson case, the EU laws and common law radicalism can be seen as a major limitation on the sovereignty of parliament but Brexit can help restore everything making it better.

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[19] R v Secretary of State for Transportation, ex p Factortame, no.2, Crown, 1991.

[20] Baldwin, Concluding Observations: Legislative Weakness, Scrutinising Strength?.

[21] Limbach, The Concept of the Supremacy of the Constitution.

Human Rights Act 1998

The enactment of the Human Rights Act 1998 has affected parliamentary sovereignty, as the Act states that all the Acts of Parliament should be compatible with the European Convention on human rights. If an Act of Parliament does not comply with the convention, it could be challenged in the Court. Especially, section 4 of the Human Rights Act allows declaration of incompatibility. Where an Act of Parliament contradicts the Human Rights Act, courts have the power to declare an Act incompatible instead of overruling the law as they did in the Merchants Act 1998. An example of a case where an Act of Parliament was declared incompatible is in 'H v Mental Health Review Tribunal 2001' where the appellant's request to be discharged was denied as to the Mental Health Act 1983.[22] The appellant appealed to the Court of Appeal and the Act was declared incompatible as it was incompatible with Articles 5(1) and 5(4) of the European Convention of Human Rights in that, the Mental health act 1983 placed the burden of proof on the patient to show that he should be released. Human rights meant it should be up to the state to justify the continuing detention of such a patient.

This is a limit to parliament's sovereignty as where the Act is not compatible with the Human Rights Act 1998, parliament may amend the law or repeal it and, in some cases, judges may stop using it. This conflicts with Dicey's point that parliament can make or unmake any law and that nobody can question its validity however with the European Convention of Human Rights this is not the case, courts are bound to declare an Act incompatible if it conflicts with Human Rights Act 1998.

The doctrine of implied repeal could be considered as a significant limit to the sovereignty of parliament as instead of Parliament repealing an Act, judges do it. It is different from the express repeal; the doctrine of implied repeal is used by the courts instead of the Parliament. For instance, when two statutes contradict each other, the courts are constitutionally obliged to give effect to the most recent one, preferring the recent legislation over the earlier legislation.[23] As the principle ensures that the court always considers the latest expressed will of the Parliament in terms of an Act. It gives the latest statute superiority which leads to the older statute being impliedly

[22] Ibid.

[23] N. Fox, Transparency and government accountability in Brexit negotiations, *Accountability and the Law* (2021), 193.

repealed. This is a limit to the supremacy of Parliament as sovereignty implies that not only the parliament retains the ultimate law-making power, but also that every statute enacted by parliament is legally valid and binding.[24] That courts should interpret every statute 'in a way that is consistent with parliament's legal authority to enact it, and their corresponding obligation to obey it. An example of a case where the doctrine of implied repeal was used can be seen in '*Vauxhall Estates Ltd v Liverpool Corporation (1934)'* the claimants were supposed to get compensation for their land which was bought for public use however there were two different statutes.[25] The Accusation of land Act 1919 and The Housing Act 1925 set out different schemes of compensation. Due to the implied repeal principle, the recent Act which was the Housing Act 1925 was applied, therefore implied repealing The Accusation of Land Act 1919.[26] Judges are going against the old version of the Act, so they are going against the Parliament. This limits the Parliamentary Sovereignty because the ones that have to apply the law are going against it.

Hunting Act 2004 made it an offence to hunt wild animals with dogs, this Act was passed using the Parliaments Acts 1911-49. The applicant claimed that the Hunting Act 2004 was made unlawfully as it was passed without the consent of the House of Lords. The claim was rejected, although courts may pass judgement on whether a statute was valid by the way it passed, the Hunting Act was passed lawfully and so was valid. The 1949 act followed the provisions of the 1911 Act. Parliaments can be bound by changing requirements of form imposed by their predecessors. This is a limit to the sovereignty of Parliament as Dicey's second point states that 'No body or person is recognised by the law of England as having a right to override or set aside the legislation of parliament; however, courts did try to question the validity of an Act of Parliament, the courts do not have the authority to question the legality of an Act of Parliament but, House of Lords judges were relegated to check whether the Hunting Act 2004 was a lawful Act of Parliament.

[24] S. White, How Should a Progressive Parliament Advance Proportional Representation?, *The Political Quarterly*, 2022.

[25] Limbach, The Concept of the Supremacy of the Constitution.

[26] A. Orakhelashvili, Parliamentary Sovereignty before and beyond Brexit. *ICL Journal* 15, No.4 (2021): 435-464.

Conclusion

Sovereignty of Parliament depends on the court, as judiciary upholds the principle and the custodian of the Act of Parliament. Adam Tomkins enlightens one of the challenges to parliamentary sovereignty in a recent renaissance called 'Common law Radicalism', which means that the courts sometimes refuse to apply an Act of parliament. The Role of courts and judges is more dominant than the rule of the Parliament and the lords. This was demonstrated in 'Jackson v Attorney', where the appellants challenged the Hunting Act 2004 and wanted the court to declare it invalid. As Dicey stated, "sovereignty is limited on every side by the possibility of popular resistance".[27] He meant this by relating the UK's democratic society to the House of Commons, the representative of the public. If parliament passes a law that the majority is not willing to conform to, they might avoid to follow it. As Lord Hope said, "Parliamentary Sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the people at large refuse to recognise it as law".[28]

To conclude even though the doctrine of parliamentary sovereignty is considered to be the supreme making body but in recent years it has lost its effect on the constitution because of joining the European Union, Human Rights Act 1998, Common law radicalism, Implied repeal, Democracy and the Devolution. If it did not have these principles, then it would be sovereign. Opponents who claim that parliamentary sovereignty is still the central principle of the UK constitution state that due to Brexit (the UK leaving the EU) the parliament will have its sovereign power as they will not be obligated to prioritise the EU law over the domestic law, but other factors would suggest otherwise. For instance, *Jackson's* case was marked as the first case where the courts tried to question an Act of Parliament without contradicting the EU law.

[27] Dicey, Introduction to the Study of the Law of the Constitution (1885), 247, 269.
[28] Drexl, British Supremacy of Parliament after Factor.