

THE PRINCIPLE OF PARLIAMENTARY SUPREMACY IN THE UK CONSTITUTIONAL LAW AND ITS LIMITATIONS

Av. Ahmet Emrah GEÇER*

* Attorney at law in Istanbul Bar Association, Istanbul University (L.L.B.), King's College London (L.L.M.). The Author can be contacted on ahmetemrah1985@hotmail.com.

ABSTRACT

This article examines one of the crucial constitutional doctrines of the UK law, the principle of parliamentary sovereignty, in consideration of the European Communities Act 1972, the Human Rights Act 1998 and the Devolution Acts. Particularly, the leading cases such as the Factortame and the Hirst case are scrutinised. In terms of the traditional view of this doctrine, Parliament is omnipotent and therefore as mentioned by adherents of this notion that there are no limits on Parliament relating to subject matter. In this paper, nevertheless, it is argued that the supremacy of parliament is not absolute in the UK constitutional law anymore due to the reasons stated.

Keywords: *United Kingdom, Common Law, Constitutional Law, the Principle of Supremacy of Parliament, EU Law.*

INTRODUCTION

When any constitution in a democratic country which has whether written or unwritten^[1] is examined, it can be seen that ultimate authority stems from a statute, convention or history. If a country has a written fundamental document, it is governed by representatives with reference to the formal constitution^[2] and it is generally interpreted by constitutional court.^[3] What if a country such as the UK has not got a written constitution? This issue is highly divisive amongst jurists in United Kingdom due to the fact that there are various reasons as below mentioned.

In consideration of the history of British constitutional law in the last century,^[4] it could be concluded that the Dicey theory was the most influential theory amongst the other theories.^[5] According to Dicey^[6], “Parliament has under the English constitution, the right to make or unmake any law whatever; and further, ... no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.” Notwithstanding the notion, which explained the sovereignty of parliament, have shaped the pillar of British constitution, there are a number of sophisticated academic arguments against the doctrine. In recent years, notably, the theory has been discussed in the light of the European Union Law, the European Convention on Human Rights and Devolution. At this point, various authors continue to advocate conventional approach and they believe that it has an absolute power and it can change whatever it wants. Some, however, encounter this stance and they argue that even though parliamentary sovereignty is a fundamental rule of British constitution, its authority is limited to some extent. For instance, Lord Hoffmann highlights that despite the fact that Parliament has the power to make primary legislation contrary to rights in legal area, the aspect of the UK courts, even though acknowledging the sovereignty of parliament, they should consider those rights cannot be restricted by any power.^[7]

[1] Barnet, Hilaire, (2011;115), Constitutional and Administrative Law, Newyork, Routledge Press

[2] Weill, Rivka, (2012;457), Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power, Hastings Constitutional Law Quarterly, vol,39-2

[3] See footnote 2,

[4] Loveland, Ian, (1996;517), Parliamentary Sovereignty and the European Community: the Unfinished Revolution?, Parliamentary Affairs, vol.49-2, Oxford University Press

[5] Eleftheriadis, Pavlos, (2009;2), Parliamentary Sovereignty and the Constitution, Canadian Journal of Law and Jurisprudence, Vol.XXII, no:2 and Barber, N.W., (2011;145), The After Life of Parliamentary Sovereignty, Oxford, Oxford University Press

[6] Dicey, A.V., (1915,3-8), The Law of Constitution, Oxford Press

[7] Le Sueur, Andrew and et al, (2010;75), Public Law Text, Cases, and Materials, Oxford University Press

This paper will analyse the debate on parliamentary sovereignty from history to today in consideration of the above issues and Lord Hope words; “Our constitution is dominated by the sovereignty of parliament but parliamentary sovereignty is no longer, if it ever was, absolute.^[8]” It, then, will reach a consequence, which is absolute parliamentary sovereignty has no place in contemporary British constitution.

A. THE EFFECT OF EUROPEAN LAW ON THE SUPREMACY OF PARLIAMENT

Before United Kingdom entered European Community in 1973, the principle of the EU legal order which enabled the EU to have supreme authority over all Member States had already been established.^[9] Furthermore, the United Kingdom signed the Brussels Treaty of Accession in 1972. However, whereas international treaties concluded by the United Kingdom are binding on that state with regard to international law, they do not produce legal obligations in internal legal system unless they are incorporated by an Act of Parliament.^[10] Hence, the European Communities Act 1972 was made by Parliament. In terms of the Article 2(1) of the act: “...all such rights, powers, liabilities, obligations and restrictions from time to time arising by or under the Treaties ... are without further enactment to be given effect ... in the United Kingdom.” It is clear that it is a direct challenge to sovereignty of the UK Parliament and, also, includes a significant restriction on the parliamentary supremacy in relation to substantive issues. To put in another way, the United Kingdom provides for the supremacy of EU law in the European Communities law 1972. On the other side of the coin, whereas the European Communities Act 1972 came to force in United Kingdom, there had not been any dispute until the Factortame case in 1988 since the Parliament had struggled to avoid making a legislation, which is in conflict with European law and, in the same vein, judges zealously had interpreted domestic provisions in accordance with the norms of EU law.^[11]

[8] Parpworth, Neil, (2007;92), Constitutional and Administrative Law, Oxford University Press; (Lord Hope, Jackson v The Attorney General (2005;56))

[9] Turpin, Colin; Tomkins, Adam (2011;79), British Government and Constitution, Cambridge, Cambridge University Press. “...by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty on a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves...” cited in Costa v ENEL case 1964

[10] Carroll, Alex, (2003;96-100) Constitutional and Administrative law, Pearson Publication

[11] Barber, N.W. (2011;149) The Afterlife of Parliamentary Sovereignty, Oxford, Oxford University Press.

The leading Factortame case clearly sets out the relationship between EU and UK law and the nature of parliamentary supremacy.^[12] The court held that European Law takes precedence over domestic law due to the fact that European Community Act signed up by the United Kingdom. It can be concretized by Lord Bridge statement^[13] in giving judgment in the Factortame case. The Lord argued that “...It was certainly well-established in the jurisprudence of the Court of European Justice long before the United Kingdom joined the community. Thus, whatever limitation of its sovereignty of parliament accepted when enacted the European Communities Act 1972 was entirely voluntary...”^[14] However, according to several writers, the effect of Act 1972 might appeared a rotation of parliamentary sovereignty from the UK Parliament to the EU, the statute may be repealed by parliament. That is to say, sovereignty has been lent rather than given away.^[15] On the other side, it is stated that the UK Parliament preferred an irreversible way because of the fact that even if taking the sovereignty back is likely to be possible in theory, this may not be possible in practise. Namely, while there is a formal veneer of parliamentary sovereignty in the UK law, for all practical purposes, ascribing priority to the law of the European law.^[16] It is concluded that the Factortame decision threw the deficiencies of this old view into sharp relief in consideration of UK’s membership of the EU.^[17] This is

[12] Business for New Europe,(2010;5),The Case for a UK Sovereignty Bill: Options and Analysis

[13] Factortame v Secretary of State for Transport 1991, (Lord Bridge,658)“Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in E.C.C. Treaty it was certainly well established in the jurisprudence of European Court of Justice long before the United Kingdom joined the community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. 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 be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.”

[14] See footnote 8, p.98

[15] See footnote 9,p.86

[16] Elliot,Mark(Undated;551) United Kingdom: Parliamentary Sovereignty Under Pressure, Cambridge Press

[17] Loveland,Ian(2011;26) Constitutional Law, Administrative Law, and Human Rights,

because the doctrine was improved originally by the judges in response to the political events of seventeenth century. The United Kingdom altered substantially its constitutional order that the principle of parliamentary sovereignty replaced the Monarchy. In the same fashion, it can be argued that it required another significant constitutional order alteration in the move towards greater European integration.^[18]

B. THE RELATIONSHIP BETWEEN EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PARLIAMENTARY SOVEREIGNTY

Human rights Act 1998 accepted by the UK providing the incorporation of the European Convention on Human Rights into domestic law.^[19] The adoption has resulted in a debate whether it takes precedence over the UK law.^[20] The HRA has affected on the UK law with the provisions of the European Convention on Human Rights and the ECtHR verdicts, even if there are not always direct restrictions.^[21] Various writers considered that the 1998 Act is the best thought of as a radical but not a revolutionary measure about the effect of Human Rights Act on Parliamentary sovereignty.^[22] They believe that it is radical because new values such as transparency and the accountability of governments are injected to domestic law. It, in contrast, is not revolutionary since it does not repeal the principle of parliamentary supremacy. At this point, especially prominent professor Feldman statement can be appropriate quotation to clarify above issue. "...The Act's ability to inject values which could fill the ethical vacuum at the hearth of public life depends on the perceived legitimacy of the Convention Rights, which in turn depends on their capacity to accommodate the most important element of the United Kingdom's constitutional heritage..."^[23] On the other hand, some jurists such as Sir John Laws classified statutes as two parts and he termed ordinary statutes and constitutional statutes. He, also, asserted that while ordinary statutes may be repealed, but constitutional statutes may not in the sense that the abrogation of a constitutional statute might cause negative effect on fundamental human rights. According to John Laws, in that situation, the courts may pay more

Oxford, Oxford University Press

[18] See footnote 10,p.116

[19] Twomey,Anne,(2007;1),Implied Limitations on Legislative Power in The United Kingdom, Sydney Law School, Legal studies Research Paper,no:07/59

[20] See footnote 2,p.137

[21] See footnote 16,p.552 E

[22] Such as Allen and Thompson

[23] Pollard,David;Parpworth,Neil;Huges,David(2007;60), Constitutional and Administrative Law, Text with Materials, Oxford University Press.

or less deference to the legislature when in interpreting statutes even though acknowledging of parliamentary sovereignty.^[24] Accordingly, neither doctrine nor the courts reached a broad consensus regarding the issue. Pending case which is called *Hirst v United Kingdom*, however, would be a prominent source to tackle the she subject, concerns the franchise and general exclusion from it of convicted prisoners.^[25] British court concluded in favour of the domestic law and rejected the claimant's case. Subsequently divisional court ruled that the matter should be left for parliament to determine. The claimant, then, appealed to ECtHR. The Grand Chamber of ECtHR decided by majority of that this rule was unlawful. Afterwards, government have not tended to change in the law owing to that any change gives rise to entirely outcry in the community.^[26] In spite of the fact that the coalition government did not want to change the statute as its predecessor, it scared that further inaction would lead to amount of indemnity.^[27] The House of Commons, nevertheless, debated the matter and unfortunately MPs voted the majority against the amendment. The case is ongoing and it is shown that when the matter resolve, this decision will dramatically influence the UK law.

When the HRA is scrutinized, the court should consider two outstanding sections regarding relationship HRA, the UK parliament and British courts in this case. According to these articles, the courts have a right to decide which one use in that case. If they use the section 4 and the issue will remain in the hands of Parliament. In contrast, the section 3 is opted by courts giving effect in a way which is fitting with HRA.^[28] Overall, it is submitted that even though parliamentary sovereignty is being wounded by HRA, this is not always a direct restriction. It depends on whether the courts enforce section 3 or 4. If court interprets the matter in terms of the section 3, parliamentary sovereignty is affected by the court decision. If enforced the section 4, there is no influence on parliamentary sovereignty. In the next period, it is believed that it is likely to clarify with the *Hirst* case.

[24] See footnote 8,p.90

[25] See footnote 9,p.80

[26] Allen,Micheal-Thompson,Brian(2011;423) Constitutional and Administrative Law, Oxford University Press

[27] See footnote 9,p.80

[28] See footnote 9,p.81

C. IS DEVOLUTION MATTER AGAINST THE TRADITIONAL CONSTITUTIONAL DOCTRINE OF UK?^[29]

Labour government initiated a devolution process in 1998, by means the Scotland, Wales and Northern Ireland Act. They provide the nations of the United Kingdom with a system of self-government, in differing degrees, except with England. According to Barnett, since the authority devolved is the will of Britain parliament, thus Westminster Parliament can withdraw the authority from subordinate governments and institutions whenever it wishes. She, furthermore, advocated that the devolution enables the nations the granting of limited autonomy defined by the statutes and controlled by the courts. That is to say, the dependence of legal-theoretical sovereignty is upon the political sovereignty of the people of nations.^[30] Elliot, however, point out that the UK Parliament has not renounced legislative sovereignty in relation to the three nations. He, moreover, put forward a new comment, which is unilateral interference in the devolved matters by the UK Parliament would fundamentally undermine the spirit of the devolution scheme. This might be possible in theoretically, but in practice, it does not as it would be politically unacceptable for the Westminster Parliament to ignore the wishes of the nations.^[31] It is concluded that devolution apparently does not have an influence on parliamentary sovereignty, but indeed it is likely to restrain parliamentary supremacy in some issues.

[29] For detailed information: Bogdanor,Vernon,(2001), Devolution in the United Kingdom, Oxford University Press

[30] See footnote 2,p.137

[31] See footnote 16,p.545

CONCLUSION

Whilst parliamentary sovereignty has evolved in many years^[32], it succeeds in remaining as a matter of law.^[33] Even though it continue to remain a matter, parliamentary sovereignty have lost its effect on British constitution owing to the fact that there are several factors such as EU law, HRA, the initiative of Devolution and Common Law Radicalism.^[34] Taking everything into account, apart from these, however, it seems to prevalent idea that the most important challenge is phenomenon of Globalisation. It is known that Globalisation led to nations make a significant amount of treaties, pacts and collaboration with one another. Hence, nations felt the need standard of rules. Accordingly they established supranational institutions such as the EU and the some rules enforced by the institutions preceding domestic laws of nations. Thus, the effect of state authority on nation has declined. As Lord Hope words; "...But parliamentary sovereignty is no longer, if it was, absolute' because of the fact that the world has dramatically changed in the recent years."^[35] What is more, we conclude that the principle of parliamentary sovereignty was designated to eliminate conventional powers such as the monarchy. Once democratic practice spread across the world, nevertheless, a new threat emerged as democratically elected fascist regimes.^[36] Therefore, it is necessary to make limitations on the public's will. Particularly, even a democratically elected parliament should not be able to touch fundamental human rights.

[32] See footnote 26

[33] See footnote 9,p.95

[34] Bogdanor,Vernon,(2009;32), The New British Constitution, Hart Publishing Limited

[35] See footnote 8,p.92; (Lord Hope, Jackson v The Attorney General(2005;56))

[36] Ginsburg,Tom,(1997;1-3),The Decline and Fall of Parliamentary Sovereignty, Cambridge University Press

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Av. Ahmet Emrah Geçer

Erdem/Erdem Hukuk Bürosu, Abdi İpekçi Caddesi, Deniz Apt., no: 20, kat 4/5 Teşvikiye/İstanbul

