The UK Politics: Taking Back Parliamentary Sovereignty

A Constitution, in its broadest sense, is a body of fundamental principles by which a state or organization is acknowledged to be governed. The constitution remains uncodified; and is rather a set of principles which have emerged over the centuries from statute, case law, political conventions and social consensus- with its main purpose being to protect individual rights and declare general principles. One incredibly significant principle of the UK constitution would be parliamentary sovereignty. The focus of this analysis lies on parliamentary sovereignty and the effect Britain's departure from the EU will have upon it; specifically whether the United Kingdom will be "taking back control" from a constitutional perspective.

Parliamentary Sovereignty is a principle in the constitutional law of some parliamentary democracies which holds that the legislative body has absolute sovereignty over other governmental institutions. This is a traditional tenet of the UK constitution and a construct of the Common Law; parliament is the supreme legal authority, and arguably the most important organisational principle of our constitution.

Dicey's account of parliamentary sovereignty played a key part in the development of our public law; the idea that through an act of parliament, a piece of primary legislation, they have the right to make or unmake any law, and no person or body has the right to set aside the legislation. Dicey denotes the legally unlimited lawmaking capacity of parliament, splitting his doctrine into three aspects; the positive limb, negative limb, and the theory of continuing sovereignty. The positive limb dictates that parliament can make or unmake any law it chooses; this is seen in the Declaration of Abdication Act 1936, where parliament was even able to change the line of succession. This became possible after the Parliament Act of 1911; which created a mechanism whereby statutes could be passed without the consent of the House of Lords, enabling legislation to be passed after only receiving approval from the House of Commons and gaining Royal Assent. This act reduced the overall power of the Lords, allowing them to delay but not reject a bill. The Lord's power was then further reduced in the 1949 Parliament Act, which cut their delaying power to one year. The validity of reducing the Lord's power is upheld in the case of Jackson V Attorney General [2006] 1 AC 262 in which the Commons passed the Hunting Act [2004] and the 1949 Act was used to counter the Lord's delay (who opposed the act) and so it gained Royal Assent. After the claimant tried to assert that the 1949 act was illegal and therefore couldn't be used, the courts determined that it was, in fact, valid.

Dicey's negative limb dictates that no power can deny or override the legal effect of a parliamentary act. An implication of the positive limb; this means that nobody can challenge the validity of an act- and that there is an obligation present to treat it as legally binding. (N. Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 IJCL 144) This tells us that courts are in fact subordinate to parliament- they do not review the statute, but merely interpret and apply the legislation. This 'enrolled bill rule' is elicited in the case of Edinburgh & Dalkeith Railway Co v Wauchope 8 E.R. 279 (1842) 8 Cl & Fin 710, where the courts ruled that they could not enquire into legislation passed by parliament, their role was to look into where the act appears on the list of statutes and apply the terms- no matter the content.

The third element of Dicey's doctrine is the theory of continuing sovereignty; this essentially

means that parliament cannot bind itself through limiting the power of future parliament using legislation. Furthermore, parliament can make or unmake any law; save for passing an act which imposes a legal limit on itself; meaning parliament will continue to be sovereign.

With the enactment of the European Communities Act 1972 came the supremacy of EU law over UK national law; and legal authority for it to have effect as national law. Though parliament still had the ability to create and pass laws in the UK, the EU law was non-negotiable and could not be inquired into or decided upon.

There are two ways in which it did this; some types of EU legislation (including treaty obligations and regulations) had direct effect in the UK's legal system without parliament passing any further legislation- any group or company could apply these without even having to look at how our parliament implemented these policies. Safety standards on imported goods are an example of this; they were agreed at EU level and applied universally throughout the member countries. Alternatively, other EU legislation (such as directives and decisions) could be implemented in the UK through primary or secondary legislation (an act of parliament or statutory instrument). (https://www.instituteforgovernment.org.uk/explainers/european-communities-act-1972)

One significant example of this would be the Working Time Directive 2003 (Directive 2003/88/EC) which set minimum safety and health requirements for the organisation of working time, and aimed to protect workers from negative health effects due to shift and night work. This took supremacy over UK national law and had to be obliged by.

- https://osha.europa.eu/en/legislation/directives/directive-2003-88-ec

This power is arguably a forfeiture to parliamentary sovereignty in itself, and is elicited in the case of R (Factortame Ltd) v Secretary of State for Transport (no. 1) [1990] 2 Lloyds Rep 365, [1990] 2 Lloyd's Rep 365, [1990] UKHL 7, [1990] 2 LLR 365, in which a company of Spanish fishermen claimed that the UK had breached European Law by requiring ships to have a majority of owners in order to be registered. After the European Court of Justice confirmed incompatibility with EU law, the Lords officially clarified the superiority of EU law over national law.

When the UK departed the EU through the EU Withdrawal Act 2018; the supremacy of EU law over domestic came to an end; the repeal means that we cease to have any obligations under EU law, which will no longer have effect. This includes protective areas of law such as environmental regulations and workers' rights- which will likely lead to legal uncertainty and confusion.

The Act essentially created a new category of UK law, EU retained law; which will be the law that is kept after the transitional period. The EU Withdrawal Act enables the conversion of most of the relevant EU law onto the UK statute book in order to ensure a smooth transition.

- https://www.instituteforgovernment.org.uk/explainers/european-communities-act-1972

However, the act of transfer is more complex than simply copying it over; given that EU laws often mention EU institutions which we will no longer participate in, or EU law itself, changes will have to be made. Completing these changes using only primary legislation would be a lengthy process, so the act gave ministers so-called 'Henry VIII powers' enabling changes to be made

to both primary and secondary legislation using statutory instruments, meaningless parliamentary scrutiny. This return of power to the ministers could arguably be a small step towards restoring parliamentary sovereignty in itself; UK legislation which is inconsistent with the ECC can now be passed, and by controlling the withdrawal process parliament can put forth its own legislation.

From a constitutional perspective, it could be argued that though Britain's departure from the EU, we are taking back control of parliamentary sovereignty; one reason for this would be that the ECA and its respective treaties fundamentally limited parliaments power with the EU's ability to make laws which apply in the UK. This supremacy and level of control from the European council is elicited in the Case of Simmenthal 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629]- in which taxes that conflicted with eu law was deemed invalid after the claimant was charged with veterinary fees on beef imports incompatible with EU law. This judgement was in virtue of the previous case Flaminio Costa v ENEL (1964) Case 6/64 whereby it was confirmed that EU law took supremacy and that Courts are obligated to hear and refer cases until they reach the furthest domestic appeal level where such cases concern EU law. Even disputes surrounding contradicting law were ruled upon by the Court of Justice of the European Union, which still contains judges predominantly from outside the UK; furthermore, restoring the power that comes from solidarity will partially restore parliamentary sovereignty since UK national law, created by parliament, will once again reign supreme.

Continuing on from this point; with the return to parliament being the sole creator of our laws, the House of Commons will once again play an integral role- as previously discussed the power of the Lords has been significantly reduced over the years- unable to reject a bill, but merely delay it until it meets their requirements- the Commons play the significant role in creating laws. Not only is this power a key aspect of parliamentary sovereignty, but it is also a more representative approach for the nation.

However, this argument does ignore the election of members of the European parliament that are from the UK, who provided at least some degree of democratic mandate; it is also important to note that these constraints are the result of a decision that parliament freely entered into with the signing of the ECA to join the EU in the first place.

Another point of significance would be that with the UK's departure from the EU, parliament will gain back the power to repeal acts that only went forward on our behalf through qualified majority voting; though the UK had mandate in the european parliament, decisions which our representatives did not agree with could still go forward if 55% of EU countries voted in favour, or if the proposal was supported by countries representing at least 65% of the total EU population (this was when the Council voting on a proposal from the Commission or the EU's High Representative for Foreign Affairs and Security Policy). A significant point of consideration in the Brexit debate; being able to make autonomous decisions will definitely return a degree of parliamentary sovereignty since the power is essentially in parliament's hands.

- https://eur-lex.europa.eu/summary/glossary/qualified_majority.html

On the other hand, it could be argued that Britain's departure from the EU will not have an effect on our 'taking control' of parliamentary sovereignty; one reason for this would be that the status of parliamentary sovereignty was questionable to begin with and that even before the

ECA parliament was not legally unlimited in its power. This can be seen through its inability to bind itself; parliament not being able to bind future parliaments creates ambiguity in the definition of sovereignty itself. And as stated in the Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590 case by Maugham Lj, “legislature cannot…bind itself as to the form of subsequent legislation”; the constitution does not permit parliament to bind itself.

Furthermore, with one of the fundamental bases of parliamentary sovereignty being that they have legally unlimited power, and this inability to bind itself being a limitation, the status of sovereignty even before joining the EU is questionable.

The establishment of the Supreme Courts could also be argued to actively reduce the sovereign status of parliament; although the Supreme court does not have the authority to revoke legislation, it does mean that parliament cannot control how their legislation is interpreted in a final setting where cases cannot be appealed.