

Assessment 2

“The United Kingdom (UK) has left the European Union (EU) and will once again be free to make its own laws, post the Brexit Transition period. Some argue that the UK’s parliamentary sovereignty was indeed undermined by the EU and that the UK has finally got back its independence.”

Discuss this statement.

In your answer refer to relevant court decisions to support your arguments.

Please have a look at this document which you may use to help with your answer –

<https://journals.openedition.org/rfcb/1319#ftn14>

Origins of Parliamentary Sovereignty

Ideas and contesting the nature of parliamentary sovereignty was the *real* cause of the English civil war. The civil war itself was about who had control over the exercise of the **royal prerogative** – the power to govern by the Monarch, Charles I (for e.g the power to raise taxes without getting the approval of Parliament first). This seems outrageous to us does it not – how could anyone raise taxes without getting approval from Parliament first?

The English civil war in the 1640s brought to the battle field the contested claims of who would exercise the prerogative (gradually the executive branch of government took control over the exercise of certain prerogative powers such as the right to make treaties and the right to declare war) and to what extent would the Monarch’s remaining prerogative powers be limited by Parliament.

The prerogative and Parliamentary Sovereignty

In 1689 the *Bill of Rights* (England) and *Claim of Right* (Scotland) laid the foundations of the English/British constitution. This laid the foundations of the modern constitution by getting rid of the more extravagant claims of the Stuart Kings to rule by prerogative right. And this laid the foundation for what we today understand by Parliamentary sovereignty – the idea that Parliament could pass any law it chose to.

A. V. Dicey's famous definition of Parliamentary Sovereignty:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament ... has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

This definition obviously sits somewhat uncomfortably with the consequences of joining the European Economic Community (EEC) in 1972 as our domestic law in the UK was now lesser or subordinate to the law been made and proposed by the European Commission.

What happened to Parliamentary Sovereignty when Britain joined the EU

The possibility of the UK joining the EEC in the 1960s-70s was debated on the basis of their supposed effect on the sovereignty of the UK Parliament. Those opposed to British membership of the EC proposed in 1972, without success, an amendment to the Bill which became the *European Communities Act 1972* declaring that British membership would not affect Parliamentary sovereignty.

In principle the sovereignty of Parliament has not been compromised by joining the EEC in 1972. However, UK courts would have to take on board EU law in the process of interpreting domestic UK/English law.

The Supremacy/Primacy of European Union Law

The UK's legal obligation as a member of the EU was this – to be bound by the principle of the *supremacy* of EU law. This is where the essence of the “challenge” to the doctrine of parliamentary sovereignty, throughout the period of Britain's EU membership, comes from.

Students may reference the following European Court of Justice (ECJ) case law as authority for the proposition that EU law prevails over the domestic and constitutional law of Member States: Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

EU Law taking Supremacy/Priority over UK Law

Section 2(2) of the 1972 *European Communities Act* enables government ministers to implement required changes to UK law via delegated legislation. Delegated legislation is ministers making law so as to bring UK law into line with EU law. The 1972 *European Communities Act* also stipulates that all UK legislation shall have effect 'subject to' directly applicable EU Law - in practice this meant that the UK domestic courts were placed under an obligation to interpret UK law in light of EU law/legal principles. This provided a direct challenge to parliamentary sovereignty as traditionally conceived/understood for it implied that EU Law would take priority over UK Law.

The European Court of Justice (ECJ) which sits in Brussels had already ruled, in *Costa v Enel* (1964), that a national law of a member country of the EU had to be set aside if it was found to be incompatible with EU law - ***Costa v. Enel*, 1964, Case 6/64, [1964] ECR 588.**

Parliamentary Sovereignty Challenged

Following A.V Dicey (who believed in absolute Parliamentary sovereignty) the question was asked:

“How do we resolve the clash between the *supremacy* of EU law and the *sovereignty* of the UK Parliament?” One answer to this question was this given by the courts in 1979 in the following case:

Macarthys Ltd v Smith [1979] 3 All ER 325 (Lord Denning MR, dissenting, obiter): “If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the [European Community/Union] Treaty (by which the UK joined the EC/EU) or any provision in it or intentionally of acting inconsistently with it and says so in express terms then **I should think that it would be the duty of our courts to follow the statute of our Parliament.**”

So in this view then Parliamentary sovereignty is not effected by joining the EEC.

EU Law however is interpreted as having supremacy over UK law

The concrete effects of the ECJ's decision in ***Costa v Enel*** were soon felt within the UK. In 1983, in ***Garland v. British Rail Engineering [1983] 2 AC 751***

Then, in ***Pickstone v. Freemans Plc, AC 66 (1989)*** the HL held that subsequent UK/English law/legislation passed by Parliament should be read as giving effect to European Community rules, even when not explicitly stated. So this is a clear statement that EU Law comes first (takes priority over UK law).

In ***Litster v. Forth Dry Dock and Engineering Co. Ltd., 1AC 546 (1990)*** legislation implementing an EU directive was 'assumed' to fulfil the directive's objectives, although the legislation passed by Parliament in fact was not able to do so in its entirety.

In *Lister* it was held that the UK 'courts . . . are under a duty to follow the practice of the ECJ [whenever necessary].' This interpretation in the case of *Lister* marked a move away from the regular role of the UK courts, which had up to now always involved (unquestioningly) applied UK Acts of Parliament. Here the courts were applying EU law/rules.

We have then a new rule of interpretation that gives priority to EU Law/Regulations in an unquestioning way. By this I mean there is no room for doubt on the supremacy of EU law in the UK. BUT this was of course the case in every EU member state – where domestic law was interpreted in a way that gave priority to EU law.