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) applying 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.

Note what Lord Bridge said in the judgement in *Factortame* (No 2) [1991] 1 AC 603

> "Some public comments … have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception … [T]he supremacy within the European Community of Community law over the national law of member states … was certainly well established in the jurisprudence of the 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."

***Factortame* (No 2) [1991] 1 AC 603**

So after *Factortame*, there is now authority for the proposition that Parliament can impose limitations on what Parliament can legislate for; the old absolutism of sovereignty is no longer viable. The key point to remember here is that Parliament had “volunteered” to limit its sovereignty with the European Communities Act (ECA) 1972, and could, therefore, always reverse that limitation by exercising the very same sovereign law-making power and repeal the ECA 1972 which is what it did with the Withdrawal Act 2020.

Thoburn v Sunderland City Council **(2002) EWHC 195 (Admin)**

In 2002, *Thoburn v Sunderland City Council* the applicant, Mr Thoburn, became a martyr to the Brexiteer case. The case involved a market trader, who used pounds (imperial measure) instead of kilograms (EU metric measure) to weigh his vegetables in violation of an EC Directive.

It all fed into the self-image of a martyr of supposedly crazy European legislation. In this matter, Justice Laws determined that a number of laws and charters, such as the *Magna Carta in the 13th century*, the *Bill of Rights* 1689, the *European Communities Act 1972*, the *Human Rights Act 1998* and the *Scotland Act 1998* were to be given a special status under the British Constitution – but Justice Laws did not define the Constitution as such.

The Supremacy of EU Law

The dominant view among UK constitutional lawyers was this - European law enjoyed priority over UK law only insofar as Parliament accepted it. This was affirmed by section 18 of the *European Union Act 2011*.

So the commentator Mark Elliott explains that: "*The priority enjoyed by EU law in the UK is the product of an exercise of parliamentary sovereignty, not a threat to it*".

***R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3*)**

In the *HS2* case in 2014 the Supreme Court commented on how much credit and influence was to be given to European Law in case of conflict with major UK constitutional principles.

The case involved an attempt to block a proposed high speed rail network. Litigants claimed that the courts ought to review whether parliamentary debates had adequately taken into account the level of scrutiny imposed for such projects by the EU Environmental Impact Directive.

In light of this judgment in the *HS2 case* in 2014, it appears that the power of Westminster is not in such a state of decline after all. In fact, the majority of recent limitations on parliamentary sovereignty were self-inflicted by Parliament itself – namely the impact of devolution in the UK. For instance, it can be argued that devolving some if its powers to regional assemblies did not theoretically diminish the sovereignty of Westminster because the British Parliament retained the power to legislate in devolved areas, and to repeal the acts establishing devolved institutions.

Conclusion

Even after UK withdrawal from the EU – and therefore despite all of the 'Take Back Control' language of the 'Vote Leave' campaign – the UK Government appeared to endorse the view that Parliament *had*, in fact, remained "sovereign" throughout membership of the EU. This is clearly an important issue, and you will do well to have picked up on this. The key quote is given in HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (Cm 9417, 2017) para 2.1:

> "Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that."