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A 'Sovereignty' clause for the UK – essential Act, empty words or hidden agenda?

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Summary

At the Conservative Party Conference in October 2010, William Hague announced the government's plan to introduce a European Union Bill in the autumn of 2010 which would include a clause expressly stating that Westminster Parliament still retains sovereignty with regards to EU law.

On Thursday 11th November 2010 William Hague introduced the European Union Bill to the House of Commons for its first reading. Clause 18 of the Bill contains the much anticipated 'sovereignty' clause. Great speculation has surrounded this clause as, if it materialises into a statute, there is the possibility that, for the first time in the history of the UK constitution, the 'Sovereignty' or 'Supremacy' of Parliament will be given the status of primary legislation. This article will consider the speculation surrounding the creation of such a clause. It will also consider the potential consequences upon the UK constitution of such a clause, the purpose of enacting it and whether such a clause is necessary.

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Introduction

William Hague stated that a European Union bill would be introduced to Parliament in the autumn of 2010. Included in the bill would be a clause that the UK Parliament (Westminster Parliament) gives consent for EU directives to be enforceable in the UK and that the consent could be withdrawn by the UK – thereby expressly stating that the UK maintains ‘sovereignty’ over the EU (See the BBC coverage of the story at http://www.bbc.co.uk/news/uk-politics-11484355).

Part of the coalition agreement between the Conservatives and the Liberal Democrats was to explore this issue, but the Conservatives appeared to be going ahead with introducing a bill. The justification for such a clause is that due to the UK not having a ‘written’ constitution, there is no express legal statement within the UK constitution setting out that the UK maintains ultimate authority over the EU within the UK itself. Rather, this matter is governed by an unwritten doctrine of the UK constitution – the ‘Sovereignty’ or ‘Supremacy’ of Parliament.

Mr Hague said:

> “A sovereignty clause on EU law will place on the statute book this eternal truth: what a sovereign parliament can do, a sovereign parliament can also undo…It will not alter the existing order in relation to EU law. But it will put the matter beyond speculation…And it will be in line with other EU states, like Germany who in a different constitutional framework give effect to EU law through their own sovereign act…This clause will enshrine this key principle in the law of the land."

The European Union Bill was introduced to Parliament on November 11th 2010. Clause 18 is the ‘sovereignty’ clause:

> Status of EU law dependent on continuing statutory basis
>
> It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and

> procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in the United Kingdom.

The explanatory notes of the Bill say:

> ***Clause 18*** **of the Bill places on a statutory footing the common law principle of Parliamentary sovereignty** with respect to directly applicable or directly effective EU law. The clause provides that directly applicable and directly effective EU law is given effect in the law of the UK only by virtue of an Act of Parliament (emphasis added)

The commentary upon the clause says:

> 104. Clause 18 is a declaratory provision which confirms that directly applicable or directly effective EU law only takes effect in the UK as a result of the existence of an Act of Parliament. The words 'by virtue of an Act of Parliament' cover UK subordinate legislation made under Acts, and because of the particular context of this clause, also covers Acts and Measures of the devolved legislatures in exercise of the powers conferred on them by the relevant UK primary legislation.
>
> 105. This reflects the dualist nature of the UK's constitutional model under which no special status is accorded to treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU Treaties and judgments of the EU Courts provide that certain provisions of the Treaties, legal instruments made under them, and judgments of the EU Courts have direct application or effect in the domestic law of all of the Member States, such EU law is enforceable in the UK only because domestic legislation, and in particular the European Communities Act 1972, makes express provision for this. This has been clearly recognised by the Courts of the UK. As Lord Denning noted in the case of *Macarthys Ltd v. Smith* ([1979] 1 WLR 1189): 'Community law is part of our law by our own statute, the European Communities Act 1972.'
>
> 106. **This clause has been included in the Bill to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts.** By placing on a statutory footing the common law principle that EU law takes effect in the UK through the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute.
>
> 107. In the 'Metric Martyrs' case (*Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)), attempts were made, but rejected, to run the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the UK. It was argued that, in effect, the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States. This argument was rebutted by the High Court, who noted that Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the European Communities Act 1972.

> 109. This clause does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law. The rights and obligations assumed by the UK on becoming a member of the EU remain intact.
>
> 110. This clause is declaratory of the existing common law position and does not alter the competences of the devolved legislatures or the functions of the Ministers in the devolved administrations as conferred by the relevant UK Act of Parliament. (emphasis added).

There is an express statement therefore (in the explanatory notes) that the doctrine of Parliamentary Sovereignty or 'Supremacy' is being put on a statutory footing. The doctrine has existed for centuries and, as part of the common law, has been governed by the Judiciary. Putting it upon a statutory footing is therefore a major constitutional shift; the consequences of this need to be considered.

In order to assess the potential impact of putting the doctrine on a statutory footing, we need to first of all define the doctrine. We need to look at the roots of the doctrine to consider its characteristics as they will be key in assessing the impact upon the doctrine of the transition from being an unwritten doctrine of the common law to being a statutory phenomenon. Given the vital role the judiciary have played in the development of the doctrine, we also need to consider how the judiciary would react to such a change to fully appreciate the potential impact of the sovereignty clause.

Parliamentary Supremacy Defined

The traditional doctrine of Parliamentary 'Sovereignty' or 'Supremacy' (Supremacy will be used in this article) essentially means that Parliament is the ultimate law making body within the UK. As the ultimate law making body Parliament can legislate howsoever it wishes. It also means that there is no other body that can legislate contrary to Parliament or set aside or override any law that Parliament has created. The most famous account of this doctrine was given by Albert Venn Dicey in his *Introduction to the Study of the Law of the Constitution* Dicey said that Parliament has:

> "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" (Dicey, 1885: 40)

Dicey did not create this doctrine – he merely observed its existence and commented upon it. His theory has been the most influential upon this doctrine and is invariably used as the starting point for learning the doctrine. As we shall later see, Dicey's theory has faced many subsequent challenges, nevertheless, it is a good place to start. From Dicey's theory three principles can be established:

1. Parliament can make any laws regardless of content or territorial extent
2. Parliament cannot be bound by its predecessors or bind its successors
3. No 'body', including the courts, can challenge the validity of an Act of Parliament

Parliament Can Make any Laws Regardless of Content or Territorial Extent

For Dicey, his theory was concerned with legal validity, rather than practical reality or politics. Sir Ivor Jennings came up with the famous example of would a law that said that smoking on the streets of Paris be a valid law in the UK? (Jennings, 1963: 170) According to Jennings and Dicey, yes it would. As long as the law was contained in an Act of Parliament, it would be a valid law. Its enforceability (this law would clearly not be enforceable in reality) was a separate question to the actual validity of the Act. (For a vivid practical illustration of this dichotomy see the case of *Madzimbamuto v Lardner Burke* [1969] 1 AC 645, and for an academic exploration of the this issue see Allan, 1985).

According to the traditional doctrine of Parliamentary Supremacy, there are no limits upon Parliament as to the content of laws that it passes, nor are there are territorial limits upon their laws. Cases such as *Mortensen v Peters* (1906) 8 F(J) 93 and *Cheney v Conn* [1968] 1 WLR 242 aptly illustrate this principle.

Parliament Cannot be Bound by its Predecessors or Bind its Successors

A particular Parliament can simply repeal or amend any legislation passed by a previous Parliament through the doctrines of express and implied repeal. This means that a Parliament cannot be bound by its predecessors nor can it bind its successors, as their successors could simply repeal any of the previous Parliament's attempts to bind the future one. *Ellen Street Estates v Minister of Health* [1934] KB 590 and *Vauxhall Estates Ltd v Minister of Health* [1932] 1 KB 733 are good examples of this doctrine.

There have been great debates upon the essence of this principle as to whether a Parliament can bind itself in any way or not – in other words, can a Parliament give away any of its powers for good: are some acts irreversible or can any act of one Parliament simply be undone by a successor. Such a debate is not the focus of this essay however. Interested readers can look further at Dicey's comments and consider other academic comments by those such as Sir Ivor Jennings (Jennings, 1963) and Sir William Wade (Wade, 1955) as a good starting point.

No 'body', including the courts, can challenge the validity of an Act of Parliament

At the heart of the meaning of 'Parliamentary Supremacy' is that Parliament has ultimate law making authority. There is no other body within the UK that can legislate contrary to or go against and challenge laws of the UK Parliament. There is no higher source of law than that which Westminster Parliament enacts.

Classic authority for this principle can be seen in cases such as *Edinburgh & Dalkeith Railway v Wauchope* (1842) 8 CL&F 710, *Pickin v British Railways Board* [1974] AC 765, *R v Jordan* [1967] Crim LR 483 and *Jackson v AG* [2005] UKHL 56, [2006] 1 AC 262, where challenges to Acts of Parliament on both procedural and substantive grounds failed. The courts have not entertained any assertions that they have the power to decide not to apply an Act of Parliament for any reason. The courts have said they can do nothing other than apply

an Act of Parliament, regardless of what it says or how it was enacted (as long as it is an Act of Parliament).

The encapsulation of these three principles is known as the 'traditional' doctrine of Parliamentary Supremacy. We will now consider where this doctrine comes from as this will help us envisage and appreciate the impact upon the doctrine of putting it onto a statutory footing.

The Roots of the Supremacy of Parliament

The Supremacy of Parliament is a doctrine of the UK constitution. As the UK does not have a 'written' or codified constitution setting out the legal framework of the organs of the state, a different scheme has developed though time which does establish such a framework. The 'rules' of the UK constitution can be found in various 'sources' such as Acts of Parliament, decisions of the judiciary and constitutional conventions. In addition to these sources the UK also has a number of 'doctrines' that underpin the constitution. These doctrines include the 'Rule of Law', the 'Separation of Powers' and the 'Supremacy of Parliament'.

As a doctrine, the Supremacy of Parliament has a long history. It has survived for at least 320 years. There is no exact starting date at which we can point to for the creation of this doctrine, but the general consensus is that the main thrust of the doctrine can be seen after the Glorious Revolution of 1688. The Glorious Revolution was the culmination of the struggle between Parliamentarians and those loyal to the Monarch (see the Parliament factsheet on this topic, available at http://www.parliament.uk/documents/commons-information-office/g04.pdf). The Bill of Rights 1689 was created after the Glorious Revolution. It re-established the Monarchy as a 'constitutional Monarchy' and set out that Parliament was the ultimate law making power. It put an end to the ability of the Monarch to create laws without the consent of Parliament.

There is evidence to suggest the doctrine is older than this though. For example the Kings Bench in the case of *Heath v Pryn* 86 E.R. 11; (1669) 1 Vent. 14 refused a challenge to an Act of Parliament saying that as long as it had been enacted by the King, the Commons and the Lords together, they would not look into any defects as to how it was procedurally passed (startling similar to the House of Lords' sentiments more than 300 years later in 1974 in the *Pickin* case cited above). As a 'doctrine' its roots are not to be found in any Act of Parliament. It has no written source. Some of the leading English judges (Lord Steyn for one, more of which will be discussed below), believe that it is a construct of the common law.

Given the history and roots of the doctrine of Parliamentary Supremacy, it is a significant development of major constitutional importance to attempt to put such a doctrine upon a statutory footing. The Conservatives' proposal to put the doctrine on a statutory footing is specifically to address the concerns about the impact of the European Communities Act 1972 upon the Supremacy of the UK Parliament. We therefore need to consider for a brief moment the European Communities Act 1972.

The European Communities Act 1972

The European Communities Act 1972 (ECA) came into force on 1st January 1973. The purpose of the Act was to bring what is now the EU treaty (originally the Treaty of Rome, the

latest version has incorporated the changes brought about by the Lisbon Treaty) into domestic law. Section 2 of the Act sets out that laws created by the EU are to be enforceable in domestic courts. It also puts a duty upon the UK courts to give primacy to EU law where they are faced with a conflict between domestic law and EU law. Also contained within section 2 was the requirement that 'any laws passed or to be passed' within the UK are to be subject to the primacy of EU law. Section 2 has greatly impacted upon the traditional doctrine of Parliamentary Supremacy as per Dicey as all three of his principles have been affected:

Parliament can make any laws regardless of content or territorial extent

This is no longer the case as courtesy of the ECA the UK has said that in specific areas, the EU now creates the law for those areas. This means that within those specific areas, the UK cannot legislate however it wishes, it has to do what the EU says. The UK would be breaching domestic (ECA) and international law (the treaty itself) if it did not do so.

Parliament cannot be bound by it predecessors or bind its successors

Within section 2 it says that any laws 'to be passed' in the future are to be subject to the primacy of EU law. This is an attempt by the 1972 Parliament to bind its successors - an attempt that has worked thus far. If the UK Parliament in 2010 enacts legislation that contravenes EU law then the UK courts must give primacy, or supremacy, to EU law. The 1972 Parliament has, in this regard, bound the 2010 Parliament from legislating how it wishes.

No 'body', including the courts, can challenge the validity of an Act of Parliament

Courtesy of section 2 of the ECA, domestic courts are not only empowered, but are under a duty, to give supremacy to EU law in domestic courts. This contravenes the principle that the courts are unable to challenge the validity of an Act as under section 2 they can challenge an Act of it contravenes EU law.

Impact of the ECA upon Parliamentary Supremacy

The seminal example of the impact of EU law upon the traditional doctrine as per Dicey is the *Factortame* series of cases. A very brief overview of the facts is as follows. All shipping vessels have a registered nationality. The flag that a vessel flies is the national flag of the vessel's nationality. Within the EU there were fishing quotas allocated to different member states. Factortame was a company which owned a large fleet of Spanish vessels. These vessels were obtaining Spanish quotas then re-registering (legitimately) as British vessels and obtaining British quotas. This was known as 'quota hopping'. British fisherman complained about this. The end result was that the UK passed the Merchant Shipping Act 1988 (MSA). This Act changed the rules about registration of vessels and it was intended to prevent the problem as identified by the British fishermen.

Factortame issued a claim in the High Court in England challenging the validity of the MSA, saying it breached numerous aspects of EU law. The High Court sent a reference to the European Court of Justice (ECJ) asking them for assistance upon the matter. This reference

could have taken two years to work its way through the system so Factortame asked the High Court to grant them an interim injunction in the meantime, preventing the MSA from operating and impacting upon them. They said that if they waited two years they would be bankrupted by that time, so they needed interim relief in the meantime. The problem the High Court was faced with in doing this was the MSA was an Act of Parliament, and could they 'disapply' the provisions of an Act? The problem also ran deeper than this, as in addition, there was another Act of Parliament, the Crown Proceedings Act 1947 (CPA), section 21 of which specifically said that the UK Courts could not grant an injunction against the crown. The High Court, very bravely some may say, decided to follow the provisions of section 2 of the ECA and decided to grant an interim injunction preventing the MSA from operating for Factortame. This means that the High Court disapplied the provisions of two Acts of Parliament – the CPA and the MSA. This is in complete opposition to Dicey's third principle, that the courts cannot challenge an Act of Parliament – the High Court did.

The Secretary of State for Transport appealed against the High Court's decision to the Court of Appeal. The Court of Appeal reversed the High Court's decision, saying the High Court were wrong in law to do as they had done, as they did not have the power to do so – the CPA expressly said they did not have the power to do so.

Factortame then appealed to the Appellate Committee of the House of Lords against the Court of Appeal's decision. Ultimately, the House of Lords re-instated the High Court's decision and granted the interim injunction (*R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 AC 603). The highest court in the UK thereby confirmed that under the ECA they do have the power to 'disapply' an Act of Parliament if it breaches EU law. This decision confirmed the proposition that the ECA had adversely affected the traditional doctrine of Parliamentary Supremacy. (For a recent exploration of the traditional doctrine as it stands today, see Gordon, 2009.)

Recent Developments to the Traditional Doctrine

Departing from the realm of EU influence upon domestic law, but relevant to the area nonetheless, is the case of *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262. In this case there were some very important *obiter dicta* comments made by the leading judges in England and Wales about the traditional doctrine of Parliamentary Supremacy. The case concerned a challenge to the validity of the Hunting Act 2004 by a group of pro-hunters. The challenge failed, but the judges felt an important issue had been raised about the limits of Parliamentary Supremacy. A number of the judges made some significant obiter dicta comments about this. When considering whether the House of Commons could in theory use the Parliament Acts of 1911 and 1949 to create radical changes to the constitution Lord Steyn at para 102 said:

> "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a

> constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish".

Lord Steyn's views were not isolated. Lord Hope, at para 104, continued:

> "I start where my learned friend Lord Steyn has just ended. Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified".

Although these comments are *obiter dicta*, they do indicate most acutely the attitude of the judiciary regarding Parliamentary Supremacy: they created the doctrine – they can amend the doctrine. This leads into the crux of the question that this article raised at the outset – what would the impact be of putting this common law doctrine onto a statutory footing and taking it away from the judiciary?

Potential Impact of the Proposals – the Speculation

Before the first reading of the European Union Bill on November 11th there was much speculation about how the sovereignty clause would be worded. The wording of the clause is of crucial importance as the impact of the clause is dependent upon how it is worded. We now know what the actual wording of the clause is. However, the Bill has yet to be debated upon and the clause, if it survives at all, may be changed significantly in its passage through Parliament. It is therefore worthwhile considering the speculation as to how the clause might end up being worded.

One end of the spectrum would be to have a very weakly worded clause that merely says that within the UK constitution there is the doctrine of Parliamentary Supremacy. Such a clause would serve very little purpose and would not really make any practical difference to anyone. It was thought that it would be unlikely that the clause would be at this extreme of the spectrum.

The opposite to the proposed weakly worded clause would be a very strongly worded clause that stated the UK has not surrendered any sovereignty at all to the EU and Westminster Parliament maintains total supremacy over any EU law. The strong clause would expressly state that Westminster Parliament enjoys absolute supremacy over EU law. This means that Westminster Parliament could legislate contrary to EU law and they would require the UK courts to apply legislation that was incompatible with EU law. Whilst this is legally possible, it would not be politically desirable for the UK to create such a strongly worded clause. This would be a rebuff to the EU. (It is interesting to remember that the original draft of the EU Constitution, which was never ratified, contained a supremacy clause within it at Article I-6 stating the EU law had primacy over member states' domestic law).

A number of issues arise from such a strong clause. It would cause political uproar amongst EU member states. The UK would be breaching the obligations it signed up to which are now encapsulated in the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). A treaty is binding in international law – but in international

law only. The EU is unlikely to try to enforce the UK to comply with its treaty obligations through the court process. The consequences of the UK breaching its obligations would be political turmoil. The UK's relations with the other EU states would be severely damaged. A practical consequence of this would be major harm to the UK economy. It was considered patently obvious that the UK would not go down this route. It was therefore considered much more likely that the clause would lie somewhere in the middle of the spectrum as outlined above.

What would such a middle-ground clause contain? In order to preserve international relations, whilst at the same time not being too weakly worded as to be ineffective, the new clause would have to state that *ultimately*, Westminster Parliament maintains supremacy in theory, but the general nature of the UK's relationship with the EU is that the EU enjoys supremacy for as long as the UK allows them to. The clause could make it clear that the UK has, in effect, contracted out Supremacy to the EU, but, as contractor, the contract could be rescinded at any time and Supremacy recalled back to the UK. Perhaps the clause would say that the UK could, in exceptional circumstances and as a last resort, legislate contrary to EU law by making it expressly clear within the offending legislation that it has been enacted with the realisation that it contravenes EU law but it nevertheless requires the UK courts to apply the offending legislation should it ever come before them. Perhaps the new clause would ask for a Ministerial Statement to be put at the beginning of such legislation setting out the legislation's relationship with EU law, similar to Ministerial Statements required by s19 of the Human Rights Act 1998 in respect of an Act's compatibility with the European Convention of Human Rights and Fundamental Freedoms.

But the question remains, what would such a middle-ground clause achieve that the UK does not have already? Most people cognizant of the doctrine of the Supremacy of Parliament would say that the UK already enjoys such a position as the middle-ground clause would set out. So why bother with such a clause? That is a good question. Even more conjecture is required to consider a possible answer to that question. Perhaps the Conservative party want to try and win over EU sceptics within the UK by giving them some express reassurance that the UK is still in charge of its own affairs rather than relying upon an unwritten theoretical doctrine that only scholars are aware of. This argument says that having matters written down in clear, precise language, is better than leaving matters to unwritten, unclear, and disputed theory. There is clearly merit with such an argument. Those who would like to see the UK constitution itself be codified into a single document need no convincing of such an argument. Such people argue that with clarity comes certainty and ownership over the subject matter, endowing citizens with a deeper engagement with government and politics – not an undesirable outcome.

But perhaps the purpose goes somewhat further than that. At paragraph 106 of the commentary upon the clause, set out above, it says the purpose of enacting the clause is to stop the doctrine of the Supremacy of Parliament being eroded by the judiciary. This is a major statement. This means that the clause is an assertion of power, of renewed supremacy of Parliament over the courts. Perhaps this is in reaction to the comments by the judiciary in the *Jackson* case as set out above. If this is the true purpose of the clause then that is of much more concern. It is an attempt to give the government, through Parliament, total constitutional control. The doctrine of the separation of powers attempts to equalise state power amongst three branches: the executive (government); the legislative (Parliament); and the judiciary (the courts)(see Montesquieu's *Spirit of the Laws* (1748) for the classic account of this doctrine). Whilst the UK has never truly abided by the doctrine of the separation of powers, it

has been influential in the UK constitution (see for example Lord Mustill's comments about the doctrine in *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513, at 567). If this is the purpose of the clause then it will skew power even more towards the legislative and executive than it already is. In the UK, due to the way Parliament works, the executive dominates the legislative. A government needs a majority in the House of Commons to get into office. The current coalition government, as long as it sticks together, outnumbers all opposition, so it can get through any measures it wants through Parliament by the fact of sheer numbers alone. The new clause would increase this power even further by restricting the power the judiciary have over Parliament by expressly stating that the judiciary have to do what Parliament tells them to do – something which the law lords were very keen to dispel in *Jackson*. If this is the purpose behind the clause, as the commentary suggests it is, then that is of genuine concern.

After the Speculation - What Has Actually Happened?

Clause 18 of the new Bill states that EU law is only recognised in the UK because of an Act of Parliament. It is therefore leaving a lot more detail unsaid as opposed to tackling the matter directly. If one looks at the explanatory notes and the commentary upon the clause, they outweigh the actual clause by a huge margin: the clause itself amounts to approximately 50 words; the explanatory notes and commentary amount to more than 850 words. This illustrates there is a lot more intention underlying the clause itself than is expressly stated in the clause.

The clause falls somewhere between the weak and the middle ground as set out above. It seems to be stating the obvious and very little else. What is the point of enacting such a clause? Parliament is aware that what the clause states is the current situation and the judiciary are acutely aware that this is the current situation (see cases such as *MaCarthys Ltd v Smith* [1979] ICR 785, *Pickstone v Freemans* [1989] AC 66 and *R v Sec of State for Transport, ex p Factortame* (No.2) [1991] 1 AC 603). One answer is that such a clause is aimed at EU sceptics, who have little or no knowledge of the common law doctrine of Parliamentary Supremacy, and serves to reassure them that the UK still retains its sovereignty. The Bill is leaving much unsaid in order not to offend the EU. It therefore serves the purpose of allaying EU sceptics whilst at the same time keeping on good terms with the EU. It is therefore analogous to a double agent – trying to keep both sides happy. Contrary to this though are the comments in the commentary upon the clause (set out above). At para 106 it is stated that the clause provides clear authority that EU law does not constitute a higher legal order – this is contrary to what the European Court of Justice has emphatically stated in cases such *Van Gend en Loos* (C-26/62) [1963] ECR 1 and *Costa v ENEL* (C-6/64) [1964] ECR 585. They may have something to say in response to this.

Does the clause as currently worded serve any useful purpose? If one values clarity and certainty then there is an argument that the clause is useful. It does serve to show UK citizens and any other interested parties that the UK maintains Parliamentary Supremacy. Without such a clause the matter was still certain, but one would have to be familiar with the common law constitutional doctrine of the Supremacy of Parliament to know that – a small minority of UK citizens.

Is the clause certain though? With leaving a lot more unsaid – such matters as raised by the explanatory notes and the commentary – than being expressly set out in the actual clause, this defeats the object of achieving total clarity. Perhaps the proposed clause does not achieve the

right balance of being sufficiently certain on one hand whilst maintaining EU relations on the other. Perhaps it is being too cautious and more clarity could be afforded.

If the clause does survive its passage through Parliament, whatever its final wording is, a key matter remains to be explored. As the explanatory notes of the clause make clear – the intention is to put the doctrine of the Supremacy of Parliament on a statutory footing. This begs the question of how would the judiciary react to such a request? Upon first glance this appears unproblematic as the judiciary's role is interpret and apply legislation. If an Act instructs them to give primacy in certain circumstances to UK law over EU law then that is straightforward. However, there is a deeper issue contained within this matter. The Supremacy of Parliament derives from the Common Law – it is a doctrine created by the judiciary. The clause would make the doctrine a statutory mechanism, thereby overturning centuries of tradition. It is therefore pertinent to ask how the judiciary would react to such a 'sovereignty clause'. Before we do this, it is worth considering the debates upon the Bill that have taken place on the floor of the House of Commons.

Parliamentary Debates upon the Bill

Clause 18 of the Bill was debated upon at the first sitting of the Committee of the Whole House on January 11th 2011. It was an extensive debate, lasting for five hours and thirty minutes (the following link takes you to the various stages of the debates: http://services.parliament.uk/bills/2010-11/europeanunion/stages.html).The main focus for debate was whether an amendment proposed by William Cash should be incorporated into clause 18. Mr Cash wanted the following to be added to the clause:

> "The sovereignty of the United Kingdom Parliament is hereby reaffirmed." And with a further amendment adding: "and not by virtue of a common law principle".

In this fascinating debate Mr Cash clearly states that the purpose of his proposed amendment is not for clarity for citizens or MPs, but to prevent the Judiciary from weakening the doctrine any further, and he refers to the passages of Lord Steyn *et al* in the Jackson case, discussed above, as evidence as to why this is needed. Mr Cash wanted not just a clause at the strong end of the spectrum as set out above, but a clause that in addition to this expressly removes the jurisdiction of the doctrine from the judiciary, placing it beyond their reach. This would have been a major change to not just the clause, but to the doctrine of Parliamentary Supremacy itself. This would be putting the doctrine clearly upon a statutory footing which would amount to Parliament giving itself its own powers. There are clear arguments about the legitimacy of such an approach. Ultimately, after hours of trying to persuade the House to adopt the proposed amendments, the amendments were rejected by 314 votes to 39.

The government members defending the Bill stated in the debate that clause 18 was deliberately drafted without a great level of detail about the doctrine of Parliamentary Sovereignty as to do so would encourage judicial activism rather than preventing it. The members commented upon the differing opinions about the origin of the doctrine of Parliamentary Supremacy and referred to commentators such as Sir William Wade and Professor Allan, who state that it is a common-law doctrine, therefore trying to put the doctrine upon a statutory footing would be more likely to cause judicial activism than trying to prevent it.

On 7th December 2010 the European Scrutiny Committee produced a report upon the EU Bill (*The EU Bill and Parliamentary sovereignty,* House of Commons Paper No. 633-I – which can be accessed via the following link: http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63302.htm).

Their conclusion in respect of clause 18 is very clear – it is not needed. They state that it merely says what the current situation is, and by attempting to put such matters on a statutory footing will invite litigation and potential problems, which for something that is not necessary in the first place, is unwise.

The government responded to the European Scrutiny Committee's report on the 10th January 2011 (it can be accessed via the following link: http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/723/72302.htm).

They rejected the Committee's concerns and restated that the clause is necessary as it achieves clarity in an area that may become problematic in the future. They again identify as a problem that the judiciary may take the doctrine in a direction that they do not want it to be taken, and the clause will prevent that from happening.

Out of all of this, the concerns that clause 18 is potentially dangerous and that there may be agendas behind it, are not unfounded. We now need to turn to what the potential reaction of the judiciary would be to clause 18.

How Would the Judiciary React to a Sovereignty Clause?

We have already seen the comments from the judiciary in the *Jackson* case regarding their position in relation to the doctrine of Parliamentary Supremacy. They feel they have ownership of the doctrine as they said that the doctrine is judge made, and as such, it can be altered by the judiciary. The Conservatives' proposal will mean that for the first time in the history of the doctrine (more than 300 years) it will be taken from the control of the judiciary and put under Parliament's control via an Act of Parliament. This begs the questions of can Parliament do this and how would the judiciary respond to this? They would be giving themselves ultimate authority over everyone else via one of their own Acts of Parliament? Is this not Parliament pulling themselves up by their own boot straps? Perhaps the only reason why the doctrine has lasted so long is due to the fact that the judiciary have acquiesced to such circumstances – they were the ones who created the doctrine and gave it a level of legitimacy. This legitimacy would be questioned if the doctrine was put on a statutory footing.

One possible response to this is that such concerns will not materialise under the current proposals. The new clause merely states that EU law takes effect in the UK only by virtue of an Act of Parliament, thereby asserting supremacy without expressly addressing the doctrine or putting it on a statutory footing. The biggest concern is the purpose underlying the enactment of the clause.

The explanatory notes to the clause do state that the doctrine is being put on a statutory footing though, so this does raise concerns about the impact of this upon the doctrine itself and it is worthwhile considering them, especially given the recent attacks upon the traditional doctrine of Parliamentary Supremacy from all quarters. Putting the doctrine upon a statutory

footing would not be legitimate for the reasons mentioned above – it would be giving oneself power by one's own assertion – this is neither possible nor legitimate.

It is also worthwhile remembering Lord Hope's comments in *Jackson* where he was considering (again, *obiter dicta*) the relationship between the doctrine of Parliamentary Supremacy and the Rule of Law. At para 107 he said:

> "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty".

This comment from Lord Hope is of crucial importance as he suggests that the Rule of Law could be used as a check and balance upon Parliament's legislative power. If Parliament tried to legislate contrary to the Rule of Law then the Courts are saying it is in their power, and in accord with the UK constitution, for them to prevent them from doing so. The new sovereignty clause, as interpreted by the commentary, is asserting that Lord Hope is wrong and that Parliamentary Supremacy is the ultimate controlling factor. Would such an Act mean that Parliament is hijacking the role of constitutional watchdog from the judiciary? Would trying to put the doctrine of the Supremacy of Parliament itself onto a statutory footing contravene the Rule of Law? Perhaps it would as there would be too much power concentrated in one source – Parliament. When commenting upon the Separation of Powers in the UK, Sir William Blackstone believed that a true separation was not desirable as the existence of the doctrine of the Supremacy of Parliament would mean that Parliament would be too powerful (Blackstone, 2001). He felt the UK needs some level of cross-over between bodies to act as a check and a balance. Putting Parliamentary Supremacy within the control of Parliament via an Act of Parliament would fall foul of this. Parliament would be too powerful, and the Courts may, given Lord Hope's comments, be less likely to defer to Parliament than they have been in the past and be ready to challenge such an Act on the grounds of the Rule of Law. If the clause does survive its passage through Parliament, there is scope for a clash between the clause with its underlying purpose and the judiciary.

Conclusion

In light of what has been outlined above, it was unsurprising that the Conservatives did not put forward a bill that tried to put the doctrine of Parliamentary Supremacy fully upon a statutory footing. The fact that they are intending to put a 'sovereignty clause' in the bill though, and due to the explanatory notes saying that Parliamentary Supremacy is to be put on a statutory footing, in conjunction with the commentary upon the clause stating the underlying purpose, does give rise to legitimate concerns about the impact of the clause upon the UK constitution. Care needs to be taken to make sure that the government does not persuade Parliament to usurp too much power. The long established checks and balances of the judiciary upon Parliament, whilst rarely exercised, need to be protected. Giving Westminster Parliament ultimate law making power without allowing the judiciary to review that position would contravene the rule of law. This would be akin to the US Supreme Court being unable to rule actions of the US legislature to be unconstitutional (the case of *Marbury v Maddison*, 5 U.S. (1 Cranch) 137 (1803) established that they did have the power to do this – despite the constitution being silent on this matter) – otherwise the legislature would have too much power.

Whilst some may think that all this is a far cry from what the current proposals are in the EU Bill, we need to keep these matters in mind to make sure that it stays that way, and significant changes do not materialise under the radar.

If the clause does survive its passage through Parliament the likely final solution will be to merely say that the UK can ultimately legislate contrary to EU law if is so wishes to do so. This would be an attempt to answer the question raised by Lord Denning in *MaCarthys Ltd v Smith* [1979] ICR 785, where he asked what would the UK courts do if they were faced with an Act that contravened EU law but it did so expressly. He said:

> "If the time should come when our Parliament deliberately passes an Act — with the intention of repudiating the Treaty or any provision in it — or intentionally of acting inconsistently with it — and says so in express terms — then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation".

This situation has never arisen. If such a situation did, then the UK Parliament would be reliant upon, and expect, the domestic courts to follow the UK Act using the doctrine of the Supremacy of Parliament. The EU Bill is confirmation that some people do not feel confident leaving matters to an unwritten doctrine. They would rather that the situation be spelled out expressly for the avoidance of doubt. If such a circumstance arose, and we did not have a 'sovereignty' clause, the response of the Courts would almost certainly be the same as if there were such a clause in place. What then is the point of the EU Bill? If the answer is the short and simple one: to achieve clarity and certainty, then that would be a welcome situation. If, however, the purpose is something else, and is an assertion of ultimate constitutional control, then there are legitimate concerns about such a clause. That is why it is imperative that we all keep a close eye on the clause's passage through Parliament.

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