of the government to hold Daijosai. In the United States, a plaintiff could attack the constitutionality of public spending for the benefit of a religious institution under the Establishment Clause as a taxpayer.\textsuperscript{31} In Japan, however, a taxpayer suit is regarded as unlawful unless it is specifically authorized by the Diet. The Local Government Law authorizes local residents to file a suit against unlawful expenditures of public money, and this provision is generally viewed as allowing taxpayer suits. Both suits involved here were filed under this provision. There is no comparable provision, however, with regard to the expenditure of money by the central government. Therefore, no one is likely to be allowed to challenge the spending of public money for Daijosai.

As a result, the ultimate constitutional question was left unanswered by the Supreme Court; it will probably remain so, most likely to be relegated to a political decision made by the public in a future election.


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**United Kingdom: Parliamentary sovereignty under pressure**

**Mark Elliott**

*Doctrine of parliamentary sovereignty—challenge of European Union Law—moderification of traditional doctrine of sovereignty—effect of human rights and devolution on traditional theory of legislative power*

### 1. The unreality of parliamentary sovereignty

For Professor A. V. Dicey, author of the most influential treatise on British constitutional law\textsuperscript{1} of the last century, parliamentary sovereignty was “the dominant characteristic of our political institutions,”\textsuperscript{2} and meant

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 recognized by the law of England as having a right to override or set aside the legislation of Parliament.\textsuperscript{3}

\textsuperscript{1} ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Macmillan, 8th ed. 1996).

\textsuperscript{2} Id. at 37.

\textsuperscript{3} Id. at 38.
Although the doctrine of parliamentary sovereignty has long been considered the central principle of British constitutionalism, this paper argues that it sits increasingly uncomfortably in a constitutional landscape that is being transformed through membership of the European Union, as well as by a new emphasis on human rights and the dispersal of law-making authority among regional legislatures.

In spite of the lack of written constitutional limits on the United Kingdom Parliament, it has long been recognized that there are certain measures that it would be politically impossible to adopt and whose enactment would, therefore, never be attempted. For example, Mann observed that Parliament could not realistically enact legislation introducing racial or religious discrimination, or “vesting the property of all red-haired women in the state.” Similarly, once the United Kingdom Parliament has renounced legislative competence in relation to a particular country or territory, it is politically impossible—whatever the legal theory of parliamentary sovereignty may suggest—to regain such power. So, having relinquished its ability unilaterally to legislate for (what were then) dominions, such as Canada, Parliament could not later legislate to reclaim that power. As the Lord Chancellor, Lord Sankey, explained in *British Coal Corporation v. The King*:

> It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation it thought fit extending to Canada remains in theory unimpaired: indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute [of Westminster]. But that is theory and has no relation to realities.

Examples such as these prompt the realization that the theory of parliamentary sovereignty is ultimately inaccurate—or at least that, properly understood, it “denotes only the absence of legal limitations, not the absence of all limitations or . . . inhibitions, on Parliament’s actions.” However, when we confine our analysis to “inhibitions” that pertain only to the extreme or

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7 Statute of Westminster 1931, c. 4, § 4.

8 The Westminster Parliament.


the bizarre—e.g., Mann’s discriminatory treatment of red-haired women—it is easy to overlook the fact that the theory of parliamentary sovereignty errs by ascribing unlimited lawmaking power to an institution that is constrained in what it can do by the dictates of political reality. Since the situations in which the theory fails to describe reality are unlikely ever to arise, there is little incentive to revisit the theory: it works perfectly well for all likely eventualities.

It is partly for this reason that contemporary criticism of parliamentary sovereignty seems to lack immediacy of impact. Writers who urge reconsideration of sovereignty theory argue that it needs to be rewritten because Parliament should be denied—as a matter of law, not just of practical politics—the power to act grotesquely. However, by merely arguing against a legislative competence that is so broad as to permit the wholesale abolition of democratic governance or of judicial powers to review administrative action, these critiques fail to demonstrate the inadequacy of sovereignty theory except with reference to situations whose eventuation is inconceivable. The changing constitutional landscape, however, is causing the net around parliamentary sovereignty to tighten: the category of legislation that it is politically impossible for Parliament to enact is expanding substantially. Such developments ought in turn to alter radically our approach to the theory of parliamentary sovereignty, as abstract academic dissatisfaction with the orthodoxy’s inability to cope with extreme situations is transmuted into a more pressing need to develop a theory that can account for very real—albeit nascent at present—constraints on a once—virtually—omnipotent legislative body.

2. Parliamentary sovereignty and the European Union

This thesis can be substantiated most readily with reference to British membership in the European Union, although it is suggested below that parallel arguments may be developed in respect of human rights and regional government as embryonic constraints upon legislative freedom.

The United Kingdom has been a member of the European Union since 1973. Long before then, the European Court of Justice had explained that EU law took priority over the laws of individual states. This principle also finds expression in Article 1-10(1) of the EU’s Draft Constitution, available at http://europa.eu.int/futurum/constitution/table/index_en.htm.
themselves.”13 articulating a comprehensive principle of EU law supremacy that bites even on domestic constitutional laws.14 The rationale for this principle is self-evident: the raison d’être of EU law is to create (within certain fields) a pan-European system of regulation and body of rights, something that would be unattainable were member states able to opt out simply by adopting contrary domestic provisions. The difficulty, though, is that if EU law is supreme, then this appears to conflict with the orthodox position vis-à-vis parliamentary sovereignty.

Although the principle that EU law takes priority over domestic provisions was firmly established early in the life of the Union, relatively little attention was paid to this issue when the United Kingdom joined. The British legislation that was enacted to give effect to EU law in the UK is opaque and fails to confront squarely the problem of competing sovereignties, stating merely that “any enactment, passed or to be passed, . . . shall be construed and have effect subject to” directly effective15 EU laws.16 Whether this merely gives rise to a strong rule of construction, whereby domestic law must be read as consistent with EU provisions whenever possible or, more radically, to a rule of priority, has been the subject of much debate in academic17 and judicial18 circles. The question did not come up directly for judicial determination until the Factortame case,19 in which the House of Lords was asked to issue an interlocutory injunction disapplying primary legislation20 that appeared, and was indeed found,21 to be contrary to EU law. Surprisingly, when the Lords took the groundbreaking step of issuing an injunction to suspend the operation of an Act of Parliament, the court said little about the implications for the doctrine of parliamentary sovereignty. Only one judge addressed this issue in any meaningful way, and even then confined himself to remarking that the

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15 Namely those EU provisions that are capable of effect in national legal systems upon being adopted at EU level, without the need for domestic implementation.
16 European Communities Act, 1972, c. 68, § 2(4).
19 Factortame Ltd. v. Secretary of State for Transport, 2 A.C. 85 (H.L. 1990); R v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 2), 1 A.C. 603 (H.L. 1991).
20 Merchant Shipping Act, 1988, c. 12.
supremacy of EU law was “well established . . . long before the United Kingdom joined the [European Union]. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.”

The court’s failure to attempt any theoretical rationalization of this landmark decision reflects an established tradition in British constitutional scholarship, at least where parliamentary sovereignty is concerned. Wade’s leading academic account of the doctrine is dominated by the assumption that legislative supremacy is a constitutional given and “the ultimate political fact upon which the whole system of legislation hangs.” Such acceptance of sovereignty as a factual phenomenon that is somehow distinct from, and at once superior to, law has the effect of immunizing it against constitutional analysis; the supremacy of the legislature is constant and untouchable.

The Factortame decision throws the deficiencies of this approach into sharp relief. Of course, it is possible to argue, as Wade does, that one factual circumstance, in which Parliament was sovereign in the Diceyan sense, has simply been replaced by another, in which judicial acquiescence in the face of political expediency ensures that EU law, rather than the UK Parliament, is now supreme. To adopt such an analysis, however, is to reduce power—indeed, the seat of law-making power itself—to the status of political fact, thereby frustrating constitutionalism’s central purpose of anchoring power within a constitutional structure in order that it may be allocated consistently with the community’s expectations and values. Britain’s membership in the EU therefore demonstrates the inadequacy both of sovereignty theory’s absolutism, given that Parliament today is clearly constrained by EU law, and its related tendency to characterize lawmaking authority in purely factual terms, which, as we have seen, is not conducive to the articulation of constitutional theory by which legislative power may be understood and, ultimately, contained.

However, the recent decision of the Administrative Court in Thoburn v. Sunderland City Council marks an important shift away from this traditional eschewal of constitutional analysis and, perhaps, the beginning of a more sophisticated approach that recognizes legislative authority as a legal concept that, like all other such concepts, is subject to the terms of the constitution, unwritten though it remains. The case arose from the prosecution of traders who had been convicted of selling fresh produce using imperial rather than

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24 Wade, supra note 17.

metric units of weight. U.K. legislation used to permit the use of both systems, but in order to bring U.K. law into line with the EU Metrication Directive\(^\text{26}\) the relevant statute\(^\text{27}\) was amended by means of secondary legislation,\(^\text{28}\) which was adopted under powers conferred (inter alia) by the European Communities Act 1972.\(^\text{29}\)

The issue that received most attention in the case\(^\text{30}\) was whether the primary legislation that, as originally enacted in 1985,\(^\text{31}\) allowed the use of both systems of measurement impliedly repealed the rule-making power contained in the 1972 Act\(^\text{32}\) to such an extent as to allow the enactment of secondary legislation prohibiting the use of imperial units. The question, in essence, is this: which act should take priority? The orthodox version of parliamentary sovereignty supplies a clear answer in the form of the doctrine of implied repeal: when two acts conflict, the more recent—in this case, the 1985 Act—prevails.\(^\text{33}\) This orthodoxy, however, was rejected by the Administrative Court, which preferred to articulate a new concept of “constitutional statutes”; that is to say, legislation that either “conditions the legal relationship between citizen and State in some general, overarching manner” or “enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”\(^\text{34}\)

Whether a statute is characterized as constitutional or not is crucial: “Ordinary statutes may be impliedly repealed. Constitutional statutes may not.”\(^\text{35}\)

On the facts of the case, treating the European Communities Act as a constitutional statute meant that it could not be impliedly repealed by any inconsistent provisions in the later (non-constitutional) Weights and Measures Act. The legality of the secondary legislation that was used to implement the EU Metrication Directive could not therefore be questioned. The significance of this decision, however, lies on a much broader canvas; two points, in particular, should be emphasized.

\(^{27}\) Weights and Measures Act, 1985, c. 72.
\(^{29}\) European Communities Act, 1972, c. 68, § 2(2).
\(^{30}\) Notwithstanding that it was technically \textit{obiter}:
\(^{31}\) Weights and Measures Act, 1985, c. 72, § 1(1).
\(^{32}\) European Communities Act, 1972, c. 68, § 2(2).
\(^{33}\) See Ellen Street Estates v. Minister of Health, 1 K.B. 590 (1934).
\(^{34}\) Q.B. 151 ¶ 62 (Adm. Ct. 2003). By “fundamental constitutional rights” is meant those which are recognized at common law as enjoying special status, albeit that they are not invulnerable to clear legislative override: see further R \textit{v. Lord Chancellor, ex parte} Witham, Q.B. 575 (Div. Ct. 1998).
\(^{35}\) Q.B. 151 ¶ 63 (Adm. Ct. 2003).
First, the analysis in Thoburn presents for the first time a convincing judicial rationalization of the status of EU law within the U.K. Constitution. It elegantly reconciles the legal sovereignty of Parliament with what may be termed the pragmatic supremacy of EU law. According to Thoburn, European Union law takes priority over an Act of Parliament unless the latter is specifically contrary to the former, but since such explicit contradiction of EU law is unthinkable—neither the European Commission nor other member states would tolerate unilateral departure from EU norms—the “sovereign” ability of Parliament to derogate from EU law is essentially notional. It is a construct that preserves the formal veneer of parliamentary sovereignty while, for all practical purposes, ascribing priority to the law of the European Union.

If the analysis in Thoburn stopped there, it would carry on the British tradition, outlined above, of overlooking Realpolitik in favor of an increasingly abstract notion of parliamentary sovereignty. The analysis, however, goes further. Lord Justice John Laws, giving the leading judgment, said: “The conditions of Parliament’s legislative supremacy in the United Kingdom necessarily remain in the United Kingdom’s hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.”

This presents sovereignty as both a legal and dynamic concept, contrasting sharply with the traditional account of sovereignty as factual and static. Parliamentary sovereignty is recast as a doctrine of the common law, subject to the same process of evolution as all other common law principles. Thoburn’s modest modification of the doctrine, namely the disapplication of the principle of implied repeal to “constitutional statutes,” is potentially only a milestone on a much longer journey—which starts with the realization that legislative authority is a function of constitutional law, not a historical fact, and may ultimately arrive at a far more limited concept of law-making power. Indeed, giving judgment in a different case, Lord Justice Laws confirmed that such a journey has begun, opining that “[i]n its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy.” The modesty of the Thoburn judgment should be viewed against this background, and the Administrative Court’s present unwillingness to acknowledge EU law as a fully substantive limit on parliamentary authority must be set against its readiness to acknowledge at least that legislative supremacy is not the immovable obstacle to mature constitutionalism that inheres in the orthodox account.

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36 This means that there must be “express words in the later statute, or ... words so specific that the inference of an actual determination to effect the result contended for was irresistible.” Id. ¶ 63.

37 Id. ¶ 59.

3. Parliamentary sovereignty, human rights and devolution

The difficulties that Britain’s membership in the EU poses for the traditional version of parliamentary sovereignty are mirrored, in a less developed form, by recent major reforms to the U.K. Constitution,39 two of which are particularly germane to the present discussion.

The Human Rights Act40 gives effect in U.K. law to many of the provisions of the European Convention on Human Rights.41 None of the rights contained in the ECHR are placed beyond parliamentary interference by the HRA: indeed, when the government set out its proposals for legislation in this area, it emphasized its ongoing attachment to the traditional doctrine of parliamentary sovereignty.42 This, however, evidences a rather myopic view, which unhelpfully dislocates legislative power from the wider political environment within which it subsists, and which the HRA has changed radically.43 The attention of Parliament is now systematically drawn to the human rights implications of draft legislation;44 its enactments must, whenever possible, be read consistently with relevant provisions of the ECHR45—an obligation that the courts have discharged with notable enthusiasm in some cases.46 Further, some national courts47 are empowered to issue declarations of incompatibility if


44 HRA, supra note 40, § 19.

45 Id. § 3(1).

46 See, e.g., Ghaidan v. Godin-Mendoza, Ch. 380 (C.A. 2003): The Court of Appeal had to determine whether the defendant could succeed to the protected tenancy of an apartment on the death of the original tenant, his same-sex partner. The Rent Act 1977, c. 42, sch. 1 ¶ 1, provides that only for the succession to a protected tenancy of the “spouse”—defined by ¶ 2 as “a person who was living with the original tenant as his or her wife or husband”—of the original tenant. The court held that to exclude same-sex couples from these arrangements would constitute discriminatory treatment under articles 8 and 14 ECHR, supra note 41, and therefore read words the words in ¶ 2 “as his or her wife or husband” as meaning “as if they were his or her wife or husband.” See also Geoffrey Marshall, The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained? PUB. L. 236, 245 (2003) (criticizing this decision): “To adjust the meaning of words to render consistent and compatible [with the ECHR] what is inescapably inconsistent and incompatible seems to require something more than interpretation.”

47 HRA, supra note 40, § 4(5).
legislation is found to fall short of ECHR norms, thereby triggering the possibility of fast-track amendment by means of administrative legislation. In the unlikely event that these national provisions prove insufficient to secure respect for human rights in a particular case, there remains the prospect of proceedings before the European Court of Human Rights. As Lord Borrie said in a House of Lords debate on the Human Rights Bill (as it then was known):

the political reality will be that, while historically the courts have sought to carry out the will of Parliament, in the field of human rights Parliament will carry out the will of the courts . . . [T]he intention of the Bill surely is that government and Parliament will faithfully implement any declaratory judgment made by the High Court.

Like its power to depart from EU law, Parliament’s ability to derogate from the ECHR, although formally undisturbed by the HRA, begins to look increasingly notional. A new political environment is emerging in which a legal doctrine of legislative supremacy appears at least anomalous.

The same point can be made in relation to the program of asymmetric devolution by which varying amounts of legislative and administrative power have been transferred to Northern Ireland, Wales and Scotland, reflecting different levels of public support for self-government in the constituent nations of the United Kingdom. Notwithstanding substantial differences among the schemes, an important common factor is that the U.K. Parliament has not

48 Id. § 4(2). The issuing of a declaration of incompatibility does not affect the “validity, continuing operation or enforcement of the provision in respect of which it is given” (id. § 4(6)(a)), and cannot therefore be formally equated with the quashing of legislation (for which the HRA makes no provision).

49 Id. § 10.


51 Although the Anti-terrorism, Crime and Security Act, 2001, c. 24, available at http://www.hmso.gov.uk/acts/acts2001/20010024.htm, interferes with the liberty of suspected international terrorists in a way which contravenes the terms of the ECHR, supra note 41, article 5, a derogation was entered under article 15, thereby rendering the legislation consistent with the ECHR as a whole. See A v. Secretary of State for the Home Department, 2 W.L.R. 564 (C.A. 2003).

52 See the legislation cited supra note 5; see generally, Rodney Brazier, The Constitution of the United Kingdom, 58 CAMBRIDGE L.J. 96 (1999).

53 At the time of writing, the Northern Ireland Assembly and executive are suspended because recent elections (which followed a year-long suspension caused by disagreements over the decommissioning of terrorist weapons) yielded a result that makes the operation of the power-sharing executive politically very difficult.

54 Although no provision is currently made for English self-government, the creation of regional assemblies within England is now envisaged. See also Cm 5511, Your Region, Your Choice (HMSO 2003): Regional Assemblies (Preparations) Act, 2003, c. 10, available at http://www.hmso.gov.uk/acts/acts2003/20030010.htm.
renounced legislative sovereignty in relation to the three nations concerned. For example, the Scottish Parliament is empowered to enact primary legislation on all matters, save those in relation to which competence is explicitly denied.\(^{55}\) but this power to legislate on what may be termed “devolved matters” is concurrent with the Westminster Parliament’s general power to legislate for Scotland on any matter at all, including devolved matters.\(^{56}\) In theory, therefore, Westminster may legislate on Scottish devolved matters whenever it chooses; in practice, however, it does not. A constitutional convention rapidly emerged to the effect that “the U.K. Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.”\(^{57}\) The reason for this convention is self-evident: unilateral interference in devolved matters by the U.K. Parliament would fundamentally undermine the spirit of the devolution scheme. It would be politically unacceptable for the Westminster Parliament to ignore the wishes of the Scottish people as expressed by their elected representatives in the Scottish Parliament. As time passes, and as devolution is woven ever more closely into the constitutional fabric of the United Kingdom, the theoretical ability of the U.K. Parliament to interfere unilaterally with devolved matters will be seen increasingly as a vestige of an unreconstructed doctrine of absolute legislative authority.

It is clear, therefore, that the doctrine of parliamentary sovereignty, in its traditional form, is increasingly under pressure. This phenomenon is demonstrated most clearly by Britain’s membership in the European Union. In that context, as we have seen, EU law now enjoys de facto supremacy in the U.K., and the judiciary is joining the academy in contemplating re-evaluation of the doctrine of parliamentary sovereignty itself. In this way, theory may eventually come to reflect the contemporary reality that the United Kingdom Parliament no longer wields absolute power, but instead operates within a pan-European constitutional framework whose supremacy is the price of participation in the European Union. These collisions between traditional theory and contemporary political reality are not, however, confined to the implications of EU membership. Parliamentary sovereignty cannot consist as an island, untouched by the radical changes entailed in embracing human rights and dispersing governmental power among devolved legislatures. It is to be hoped that theory will ultimately catch up with these changes, although the history of the British Constitution suggests that the process will be a slow and gradual one.


\(^{56}\) This position follows from the absence of any renunciation by the Westminster Parliament of its powers vis-à-vis Scotland, but is affirmed by the Scotland Act, 1998, supra note 5, § 28(7).

\(^{57}\) Cm 4444, Memorandum of Understanding and Supplementary Agreements (HMSO 1999), ¶ 13.