House of Commons

European Scrutiny Committee

The EU Bill and Parliamentary sovereignty

Tenth Report of Session 2010–11

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The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers —

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

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1 Introduction

1. Under the heading of 'Europe', the Coalition's *programme for government* said that it would "examine the case for a United Kingdom Sovereignty Bill to make it clear that the ultimate authority remains with Parliament." On 10 September the Minister for Europe wrote to the Committee announcing the Government's intention to introduce legislation to ensure that the British people and Parliament would have more say on proposals to transfer power and competence to the EU. On 6 October the Minister wrote again to say that the Bill would include a provision affirming the principle of Parliamentary sovereignty. The European Union Bill was presented to Parliament on 11 November 2010. We immediately announced our intention to conduct an inquiry and to produce a Report on the Bill's asserted Parliamentary sovereignty clause before the Bill's Second Reading. It is our intention to report on the Bill's Part 1 provisions, which require "referendum locks" for transfers of powers or competencies and primary legislation for *passerelles,* at a later date.

2. This is the first occasion on which we have conducted pre-legislative scrutiny. We were conscious of the need to receive submissions from EU and constitutional legal experts of differing views and to challenge them in public evidence sessions; we therefore asked the Government for sufficient time to be made available between First and Second Reading to allow that to happen. In response to that request, the Minister replied:

> "You ask that there should be sufficient time after introduction of the Bill for your Committee to consider and take evidence on the Bill and its provisions. In implementing the Government's commitment for a referendum lock, I am very much aware of the need for Parliament, and indeed our wider public, to have political and legal clarity on what this will and will not mean in practice. It is therefore important that your Committee should be able to consider properly the Bill and its provisions, and in order to assist in your consideration of the Bill, I should be pleased to appear before your Committee soon after First Reading."[1]

3. Given these encouraging words it is hard to see why, in a Parliamentary session which has until 2012 to run, we were given less than four weeks in which to take evidence and agree a Report. The Foreign Secretary declined our request that he, rather than the Minister for Europe, should give evidence. The Minister for Europe's evidence session is now to be held on the day before the Bill's Second Reading. It appears to us that the Government has abided by the letter but hardly the spirit of its commitment to allow the Committee properly to consider the Bill and its provisions.

4. The Committee received 14 written submissions and took evidence from five expert witnesses: Professor Paul Craig, Professor in English Law, St John's College, Oxford; Professor Trevor Hartley, Professor Emeritus of Law, London School of Economics; Professor Trevor Allan, Professor of Jurisprudence and Public Law, Pembroke College, Cambridge; Professor Adam Tomkins, Chair of Public Law, University of Glasgow; and Professor Anthony Bradley, Research Fellow, Institute of European and Comparative Law,

1 Letter from the Minister for Europe, 6 October 2010 (not printed).

University of Oxford. We are extremely grateful to all those who took the trouble, at very short notice, to produce written submissions and give oral evidence. Regrettably, shortage of time before Second Reading denied us the chance of hearing from the Minister for Europe before agreeing this Report. We have, however, a detailed letter from the Minister on clause 18 and the Government's Explanatory Notes on which we comment in our Conclusions.

5. Given the complexity of the subject matter which it addresses, this Report sets out in some detail the legal relationship between the United Kingdom and the European Union and the current debate on the scope of Parliamentary sovereignty, before evaluating the Parliamentary sovereignty clause in the light of the evidence received and coming to our conclusions.

6. European legislation has a profound impact on the daily lives of the voters and the people of the United Kingdom in virtually every sphere of activity. The quantitative impact is significant. According to the House of Commons Library note of 13 October, "The British Government estimated that around 50% of UK legislation with a significant economic impact originates from EU legislation." But as the note also indicates, the qualitative effect is deeper, particularly with EU Regulations which automatically become part of national law as soon as they are adopted in Brussels.

7. All this is reflected in the immense range and impact of the myriad and specific competences and powers derived from the Lisbon Treaty. These can be judged by the several pages of the table of contents to the Treaty covering such matters as external action, foreign and security policy, security and defence policy, citizenship, internal market, agriculture, fisheries, free movement, border checks, asylum and immigration, civil and criminal and police matters, justice and home affairs, transport, competition, tax, economic and monetary policy, employment and social policy, public health, consumer protection, industry, the environment, energy, commercial policy and financial provisions.

8. All of these are regulated within a framework of European Union law within the jurisdiction of the Court of Justice of the EU with implications for Parliamentary sovereignty. Recent vivid examples of the application of European Union law and jurisdiction include provisions relating to the City of London, European economic governance and the Irish bailout, to name but a few.

2 The UK's legal relationship with the EU

9. To come to a conclusion on whether a statutory provision is necessary to shield the doctrine of Parliamentary sovereignty from EU law requires an explanation of the relationship between national and EU law.

European Communities Act 1972

10. The UK is a 'dualist' state, unlike many continental European countries, which are 'monist'.[2] In dualist states a treaty ratified by the Government does not alter the laws of the state unless and until it is incorporated into national law by legislation. This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the Government or a private individual.

11. Under the European Communities Act 1972 (ECA) Parliament voluntarily gave effect to the UK's obligations and duties under the former Community and now EU Treaties in national law. The ECA defines the legal relationship between the two otherwise separate spheres of law, and without it EU law could not become part of national law.

12. Section 2(1) provides:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this sub-section applies.

More simply stated, section 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically "without further enactment" incorporated and binding in national law without the need for a further Act of Parliament. Section 2(1) applies to EU law now and as it develops in the future "from time to time" either by Treaty revision "created by" or interpretation by the Court of Justice of the EU "arising under". So, when an EU Regulation enters into force, it automatically becomes part of national law, as it does in the other 26 Member States on the same day. The uniqueness of section 2(1) is that it gives effect to directly applicable or effective EU law without the need each time for implementing legislation, as would usually be required for the incorporation of other obligations assumed under international law by a dualist State. The domestic courts are obliged to give full effect to section 2(1), in the light of the case law of the Court of Justice (section 3(1)).

2 In a 'monist' state, a treaty obligation becomes directly applicable in domestic law simply by virtue of the act of ratification, cf. Article 55 of the Constitution of the French Republic.

13. Section 2(2), by contrast, applies to measures of EU law that are neither directly applicable nor have direct effect. This provision makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as statutory instruments; importantly, such secondary legislation can amend an Act of Parliament (section 2(4)) since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.[3]

14. Section 2(4) also provides that:

> any enactment passed or to be passed [...] shall be construed and have effect subject to the foregoing provisions of this section" (the 'foregoing provisions' include section 2(1)).

15. Section 3(1) provides:

> For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

16. Section 2(4) and 3(1) give effect to the doctrine of the supremacy of EU law, as interpreted by the Court of Justice, over national law; and where EU law is in doubt, requires UK courts to refer the question to the Court of Justice. As a consequence of the rule of construction in section 2(4) all primary legislation enacted by Parliament after the entry into force of the ECA on 1 January 1973 is to be construed by the courts and take effect subject to the requirements of EU law. This obliges the courts to disapply legislation which is inconsistent with EU law. This, in short, is what happened in the celebrated *Factortame*[4] case: Part II of the Merchant Shipping Act 1988 was held by the House of Lords to be inconsistent with EU law and therefore disapplied. The same principle was followed by the House of Lords in disapplying discriminatory provisions in the Employment Protection (Consolidated) Act 1978.[5] In neither Act was there any provision expressly providing for the later enactment to apply notwithstanding the ECA.

17. The power given to national courts under section 2(4) is remarkable, because, by disapplying provisions of primary legislation, the court refused on these two occasions to give effect to an Act—the will—of Parliament. It is also unique: it is only by virtue of the ECA that the courts have this power. Under the Human Rights Act, for example, the courts have the power to make a declaration of incompatibility, but not to disapply the offending statutory provision.

3 The provisions of s.2(4) do not, of course, displace the power to implement by Act of Parliament, and it would remain necessary to implement by Act of Parliament (or under some other power) in those cases where Schedule 2 of the ECA limits the scope of s.2(2).

4 *Factortame (No 1)* [1990] 2 AC 85; *Factortame (No 2)* [1991] 1 AC 603.

5 *R v Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

A challenge to that legal relationship – the 'Metric Martyrs' case

18. The relationship between EU law and national law—in this case national constitutional law—was most prominently tested in the 'Metric Martyrs'[6] case, which was decided by the Divisional Court (part of the High Court) in 2002. The leading judgement was given by Lord Justice Laws. It is to counter the arguments made in this case, the Explanatory Notes tell us, that the so-called Parliamentary sovereignty clause was included in the Bill. Counsel for Sunderland City Council (one of the prosecuting authorities), Eleanor Sharpston QC, now the UK Advocate-General at the Court of Justice, argued before the Divisional Court that the binding effect of the EC Treaty in domestic law did not depend solely upon the terms of its incorporation by the ECA, but also upon the higher principle of the supremacy of EU law, independent of national law, established by the Court of Justice in cases such as *Costa v ENEL.*[7] In *Costa v ENEL* the Court of Justice held that:

> It follows […] that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal base of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[8]

The effect of this argument was that EC law had become *entrenched*, rather than merely *incorporated*, into domestic law, by virtue of a principle of EU law which was independent of constitutional principles of national law, such as dualism. If this argument were right, the consequence would have been that the EU institutions could set limits on the power of Parliament to make laws which regulate the legal relationship between the EU and the UK.[9]

19. Lord Justice Laws rejected the argument, saying that it would mean that Parliament, in enacting the ECA, had agreed to bind its successors to EU supremacy over it, which, being sovereign, it could not do: "[t]here is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy."[10] In so deciding, he also held that the ECA was a "constitutional" statute which could not be impliedly repealed by subsequent statutes. His reasons for this finding were as follows:

> "In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental […]. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" and "constitutional" statutes. The two categories

6 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

7 [1964] ECR 585.

8 Paragraphs 593–594.

9 See paragraphs 56 and 57 of the judgment of Laws LJ in *Thoburn.*

10 Paragraph 58 of the judgment of Laws LJ in *Thoburn*, quoted in full in paragraph 108 of the Explanatory Notes.

> must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the H[uman] R[ights] A[ct], the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It maybe there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.
>
> "Ordinary statutes may be impliedly repealed Constitutional statutes may not. For the repeal of a constitutional Act the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think this test could only be met by express words in the later statute […]."[11]

20. We asked the witnesses to assess the impact of *Thoburn*. In his written evidence, Professor Bradley commented that, in failing to include the quotation above, the Government's Explanatory Notes "do not present a balanced account of this complex judgment".[12] We agree with this view. He concluded that four propositions could be drawn from the judgment:

> "(1) All the specific rights which EU law creates are by the 1972 Act incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation.
>
> "(2) The 1972 Act is a constitutional statute: that is, it cannot be impliedly repealed.
>
> "(3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes.
>
> "(4) The fundamental legal basis of the UK's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate

11 Paragraphs 62 and 63.

12 Ev 26.