

## **The Paramountcy of EU Law Over National Law The Extent to which Lyon's Statements Reflect on the Relationship between EU and Domestic Law within the UK and Candidate States such as Albania**

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### **Abstract**

As we live in a world that is becoming ever more globalized, it is unavoidable to consider the effect supranational entities and globalization itself have on the national sovereignty of the state. The EU is probably the most well-known example of a supranational entity and as such it cannot help but bring about a number of sides regarding its power over its members. There are many that would claim the EU has undermined national sovereignty, especially when it comes to the legal sphere. The issue at hand has been addressed by scholars such as Dr. Anne Lyon and this paper is a direct analysis of her statement regarding paramountcy. In summation, Lyon has stated that EU law has undermined national law. This has happened due to a number of reasons, one of which is the passing of a parliamentary Act intending to prioritize EU law. At this point, shall they need to provide otherwise, it is quite an argument to claim whether they could give effect to national law instead. Therefore, it has become necessary to consider the extent to which these statements reflect the relationship between EU law and 'domestic' laws within the UK and try and apply to the legal future of candidate states, such as Albania. This paper analyzes the two parts of Lyon's argument, namely the paramountcy and parliamentary aspects of the issue, while also aiming to provide a framework on which future candidate states such as Albania can work on in order to achieve a more efficient assimilation into the EU legal system together with the forewarnings necessary shall they wish the opposite.

**Keywords:** *Sovereignty, UK, Albania, EU, Law.*

### **Introduction**

This paper seeks to examine the basis of Lyon's arguments throughout a thorough analysis of the doctrine of parliamentary sovereignty and the relevant case law to this subject. The relationship between UK and EU law is quite intricate and it has certainly not been unproblematic mainly due to the passing of the European Communities Act of 1972 and its effects on UK sovereignty. A review of the applicable sections of this Act is necessary in order to provide a superior analysis. It is crucial to look at how provisions of the 1972 Act have put UK courts in secondary position compared to the European Court of Justice, undermining parliamentary sovereignty and domestic law. A view over the intentional aspect of this change is also important. To approach the second part of Lyon's argument, scholarly opinions will be provided in order to evaluate whether the apparent decreased sovereignty of UK law could be reverted back to being of primary importance by a future Parliament.

Throughout the use of the aids mentioned above it will be argued that EU law does in fact

have dominancy over national law. As for the second part of Lyon's argument' it will be argued that although future parliaments can repeal previous Acts, it will be quite difficult to change this one and even if repelled, it will be impossible to follow domestic law rather than EU law due to treaty obligations to the European Union. Counter-arguments will also be provided in order to have a balanced understanding looking at both sides of the picture according to both proponents of UK Sovereignty and EU Supremacy. Simply put, this paper will agree with Lyon's description of the relationship between EU and UK law and disagree with her opinion relating to future parliament provisions.

## **The Doctrine of Parliamentary Sovereignty**

To begin with, in order to assert the relevancy of Lyon's description of UK-EU legal relations one has to look over the doctrine of sovereignty. A definition is required in order to make this analysis as clear as possible. According to R. J. Jefferey, "Sovereignty refers to the bundle of rights and competencies which go up to make up the nation state" (Jefferey, 1999, 12, 26). In this case it is essentially the parliament. Sovereignty of Parliament is considered to be the most fundamental characteristic of the UK constitution. It is a common law doctrine developed by the judges with origins in the 17<sup>th</sup> century struggle between the Crown and Parliament resulting in the Bill of Rights 1689. The relevant part of this Act is Art 9 which clearly protects any act of Parliament from being questioned by any courts.<sup>1</sup> In essence, it provided the basis for the supremacy of the parliament as no one could enquire into its provisions. Dicey would later support this point in *Jackson*, where he clearly stated that the "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."<sup>2</sup> The analysis of the concept of sovereignty is crucial to the examination of this relationship as it leads to an understanding of the proponents of the survivability of UK Parliamentary sovereignty. This applies to the sovereignty of other potential and/or candidate states such as Albania, which have obviously a 'yet-to-be-matched' legal system to that of the EU.

## **United Kingdom and New Member Sovereignty**

Furthermore, there are cases that support the proponents of Parliamentary Sovereignty. In *Cheney vs Conn*, a tax payer challenged tax assessments as the tax was used to manufacture weapons contrary to the Geneva Convention. He lost and this strengthened the point that statute prevails over international law. In addition, another argument used is that statute may override conventions.<sup>3</sup> In *Madzimbamuto vs Lardner-Burke*, Parliament passed an act saying Southern Rhodesia was part of the UK after the former's declaration of independence despite a convention saying they could not legislate for them.<sup>4</sup> Statute is

<sup>1</sup>The Bill of Rights 1689.

<sup>2</sup>*R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>3</sup>*Cheney v Conn* [1968] 1 All ER 779.

<sup>4</sup>*Madzimbamuto v Lardner -Burke* [1969] 1 AC 645.

also known to alter constitution itself such as with the passing of the ECA in 1972. All these cases support the sovereignty of the Parliament so it is crucial to show how they can be argued against. The relationship between EU and UK law will be much clearer once it has been shown how parliamentary sovereignty described above has been undermined by EU law, namely and most effectively by the ECA of 1972. This would in itself provide a clear backgrounds for new members to consider before joining the Union.

## **The European Communities Act 1972**

It is now important to provide a thorough analysis of the ECA 1972 and the main components of this act that affected the above-mentioned supremacy of parliament in order to achieve an analysis of the European arguments and supporters of the concept that the EU is not sovereign over the UK Parliament. The ECA of 1972 created the means for EU law to become incorporated into UK law due to the absence of a written constitution. As the 1972 Accession Treaty was not in itself sufficient to bind the UK to follow EU law at a domestic level but only national, the provision of the ECA 1972 led to the direct applicability of EU law in the legal order of the United Kingdom on the 1<sup>st</sup> of January 1973 (Carroll, 2010, 113). This has been quite a topic of discussion as Parliaments cannot bind their successors so many argue that this act could be repealed but obviously not as easy as other acts due to political reasons and not as long as the UK remains an EU member. The main sections that emphasize the power and effect of the ECA in the UK legal system are sections 2 and 3. Under Section 2(1) ECA incorporates EU Law directly into UK Law and gives them legal effect as a parliamentary provision and regulation. Under Section 2(2) the ECA makes it possible for the UK to make a delegated legislation to implement EU Law, e.g Her Majesty by Order in Council, or any designated minister by regulation. Under Section 2(4) ECA requires that any enactment passed should be passed to be effective and construed under EC Law. Section 3(1) requires courts to follow decisions of the ECJ.<sup>5</sup>

## **The European Supremacy Argument**

The European Union was established as an independent order in *Van Gend en Loos*.<sup>6</sup> As far as the ECJ is concerned, EU law supremacy was established over national legislation in *Costa vs ENEL* where ECJ ruling that previous statutes and treaties such as the Treaty of Rome were undermined by the power of the ECJ and nationalization of the electricity sector supported by EU law prevailed over the Treaty over Rome even though it violated it.<sup>7</sup>

Furthermore, in *Internationale Handelsgesellschaft*, this power was proven to also override any national constitutional provisions “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to the fundamental rights and principles as formulated by the constitution of that State”.<sup>8</sup>

<sup>5</sup>European Communities Act 1972.

<sup>6</sup>*Van Gend en Loos vs Nederlandse Administratie Laboratories SNC* (case C-315/92).

<sup>7</sup>*Costa v ENEL* (case/6/64) [1964] ECR 585.

<sup>8</sup>*Internationale Handelsgesellschaft mbH vs Einfuhr und Vorratsstelle fur Getreide und Futter-*

Furthermore, the fact that EU law overrides any previous and future national law was further proven in *Simmenthal* where the ECJ stated that national courts must always apply Community law in its entirety and “set aside any national law which may conflict with it, whether prior or subsequent to the Community rule.”<sup>9</sup> EU law could now act retrospectively by overriding previous national laws in a similar manner as the UK acted in *Burmah Oil*, where the UK retrospectively removed the right to war damage compensations.<sup>10</sup> Additionally, UK statutes can now be simply disapplied as it was seen in *Factortame*, where an act of Parliament (The Merchant Shipping Act 1988) was effectively suspended due to a direct conflict with EU Law.<sup>11</sup> Now governments will be directly liable for financial loss suffered in result to a breach of EU law, further supporting EU’s supremacy. This was another “hit” to the proponents of UK sovereignty as now their points supported by old UK case law were being undermined and replaced one by one.

Further cases that show how UK courts interpret UK legislation to comply with EU Law are *Pickstone v Freeman*, where domestic laws that were specifically designed to implement EU law were accommodated into the direct applicability rule.<sup>12</sup> In *Litser v Forth Dry Dock and Webb* a literal reading was not effective and the court took a purposive approach by adding a clause that provided the importance of complying with EU law and the ECJ respectively.<sup>13</sup><sup>14</sup> It can be seen that in these cases, the courts followed Section 2(4) of the ECA strictly by construing laws to comply with EU law, thus supporting the paramountcy of EU Law.

## Unbound Successors and the Future of the ECA

Pursuing this further, there are others such as Dicey that support the idea that the supremacy of the UK Parliament is still evident. Lord Bingham draws upon the intentional part also mentioned by Lyon of the passing of the ECA by the Parliament in 1972 by clearly stating in *The Rule of Law*, that the ECA and other examples used by skeptics to prove the loss of sovereignty do not support their proposition. This, according to Bingham, is due to the fact that they “all involve a curtailment of the Westminster Parliament’s power to legislate, but that curtailment takes effect by express authority of the Parliament, which, at least, theoretically, it retains the power to revoke” (Bingham, 2010, 164). In *McCarthy’s Ltd*, Lord Denning’s comments are similar as he states that the parliament could clearly repeal the ECA. Based on these comments, there is no legal restraint on the Parliament and its law-making powers therefore making the idea of another body overriding UK law absurd.<sup>15</sup> However, the reality is quite different and although these are valid points, they remain theoretical in an environment where such repeals would be considered as political

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*mittel* (case11/70) [1970] ECR 1125.

<sup>9</sup>*Amministrazione delle Finanze vs Simmenthal* (case C-253/00\_ [2002] ECR I-7289. <sup>10</sup>*Burmah Oil Co vs Lord Advocate* [1965] AC 75.

<sup>11</sup>*R v Secretary of State for the Environment ex parte Factortame* (No. 2) [1991] 1 AC 603. <sup>12</sup>*Pickstone vs Freemans plc* [1988] 2 All ER 803 (HL).

<sup>13</sup>*Litser vs Forth Dry Dock and Engineering Ltd* [1989] 1 All ER

1134. <sup>14</sup>*Webb vs EMO Air Cargo (UK) Ltd* [1995] 4 All ER 577.

<sup>15</sup>*McCarthy’s Ltd vs Smith* [1979] 3 All ER 325.

mistakes.

Arguing against the possibility of repeal from a future parliament, Akerhurst and Malanczuk state clearly that even if it were to be repealed, the UK would still be bound by Treaty Conventions to follow EU Law (Akerhurst & Malanczuk, 1997, 65-66). Furthermore, although in *Thoburn* it was argued that later parliaments can repeal previous legislation through doctrines of express and implied repeal, it was clearly argued by Laws LJ that “constitutional statutes such as the ECA 72 cannot be impliedly repealed”.<sup>16</sup> This demonstrates the impossibility or at least the unarguable difficulty for future governments to prevent EU law from prevailing by using the doctrine of implied appeal in the event of a conflict. This goes clearly against Lyon’s second argument about future changes. Even Lord Denning admitted in *McCarthy’s Ltd*, after stating his points about parliamentary supremacy that the UK is entitled to look the EU as an overriding force.<sup>17</sup>

## Conclusions

In conclusion, drawing upon the analysis provided above, it is clear that the passing of the ECA 1972, although intentional, marked the end of the sovereignty of the UK Parliament and could in itself mark the end of any other joining members such as Albania. Courts have gone through great lengths to make sure that UK and new members’ legislation follows EU Law strictly and national laws have been suspended and disregarded when incompatible with the provisions of the ECA, asserting the supremacy of the ECJ and EU law in general. Thus, Lyon’s first part of the argument is correct.

When looking at Lyon’s second argument it is difficult to provide any supportive case law as it is a matter of future predictions. However, scholarly opinions as well as statements by judges such as Laws LJ make it clear that even though it is theoretically possible for the ECA 1972 to be repealed, it would prove to be a difficult, nearly impossible task. Even though previous parliaments do not bind their successors, it would be nearly impossible for a future parliament to repeal the ECA 1972 as this was a constitutional act that cannot be impliedly repealed. Even if such change is a legal possibility and capability, it would be a political mistake as long as the UK remains a member state. However, in Albania’s case this could serve as a forewarning to not create any domestic laws reflecting and imposing EC law. Thus, Lyon’s second argument, even though theoretically correct, is flawed and speculative. The sovereignty held by the Westminster Parliament prior to the passing of the ECA in 1972 was ‘surrendered’ to the ECJ and EU law and is difficult to regain. In final consideration, while Albania would definitely thrive and gain from the incorporation of EU law into its legal system, it would certainly be a mistake to create any national laws enforcing this; shall they consider to one day leave this Union, as the UK is doing now.

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<sup>16</sup>*Thoburn v Sunderland City Council* [2002] 4 All ER 156.

<sup>17</sup>*McCarthy’s Ltd v Smith* [1979] 3 All ER 325.

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- The Bill of Rights 1689.