All-Party Parliamentary Group on the Constitution

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The Constitutional Implications of the European Union Bill

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This very strange Bill has given rise to three levels of constitutional problems –
And they are complex and difficult problems – conceptually and legally.

(1) a problem relating to the general structure of the British constitution;
(2) a problem relating to the reception of the EU legal system in the UK;
(3) a problem relating to the decision-making processes to be created by the Bill.

(1) General structure of the British constitution.
There has been a great deal of learned discussion about the Sovereignty of Parliament in connection with this Bill – I have to say that what I would regard as the best view is not quite the same as any that I have seen expressed in the documents of the H of C Scrutiny Committee.

We don't have a written constitution, but we certainly have a constitution – in the sense of a systematic organisation of public legal power – a conceptually and legally systematic organisation of public legal power.

We may say that the British constitution contains three fundamental principles –

a) the Rule of Law – all public power is subject to the law, as administered by the courts.
The most basic principle of liberal democracy, without which all the others are at risk.

(b) a separation of powers which is a complex and subtle confusion of powers. The three functions of government – legislative executive and judicial – are distributed among countless different bodies, but, at the top level, there is a complex distribution of power among the Government, the Queen in Parliament, and the Supreme Court.

Acts of Parliament override the common law, and the courts have accepted this, but the courts interpret and apply and enforce Acts of Parliament – - the courts have the last word on the effect of statutory provisions - and, of course, the courts may apply the Rule of Law principle to every exercise of power by Government.

As Lord Diplock once said: "the law is what we say it is" - ("we" being the courts and, especially, the Law Lords (in Diplock's time) - now the Supreme Court and the European Court.)

(c) conventions of the constitution – these are practices which are not themselves rules of law but which affect the application of countless legal powers and are recognised and implemented by the courts –

especially relating to the status of the monarch – as the virtual head of all three leading organs of the constitution – and especially relating to the dual status of ministers as members of parliament and as virtual embodiments of the monarch.

I have not mentioned "the Sovereignty of Parliament" among the fundamental principles of the constitution.

We have no necessary conception of sovereignty in the British constitution (like the US, unlike some other countries - eg France 'National sovereignty shall vest in the People' – Article 3).

The nearest we get to it is in the complex status of the Monarchy – in its three legal manifestations - the Queen personally; the Queen as a constitutional legal person, present in all three principal organs of the constitution; and the Crown as a notional holder of certain kinds of powers and rights (Crown servants, Crown estates etc.).

Sovereignty of the Sovereign, as it were.

It's a great pity that Dicey (1885) used the misleading expression of the "sovereignty" or "supremacy" of Parliament to encapsulate the legal power of the Queen in Parliament.

He used the phrase as a way of summarising the two historically acquired and legally recognised characteristics of the legal status of the Queen in Parliament –

In his own words -
The Queen in Parliament has 'the right to make or unmake any law whatsoever' and 'no person or body' has 'a right to override or set aside the legislation of Parliament'

In saying this, he was negating two features of the US Constitution – limits on the legislative power of Congress set by the written constitution of 1787, as amended (especially by the Bill of Rights, first ten amendments – 1789/91)

– judicial review of the constitutionality of Acts of Congress -
the US Supreme Court decided that it could enforce those constitutional limits by judicial review – *Marbury v. Madison* – 1803 – US unwritten constitution. (All written constitutions are surrounded by a penumbra of an unwritten constitution.)

Dicey certainly didn't mean that Parliament is above the law – because his other, and very great, piece of constitutional conceptualising was the Rule of Law principle that I have already mentioned.

And that principle says that no one – and no institution – is above the law.

A particular development in the 20th century has made the term "sovereignty of Parliament" especially undesirable, even as metaphorical shorthand
– the vastly increased dominance of the Government over Parliament.

To speak of the sovereignty of parliament now would be to legitimise a *de facto* sovereignty of the Government – the very thing that the Rule of Law principle had struggled over centuries to terminate –
it took centuries for the law finally to take power over the power of the King -
and the Government is the successor-in-title of most of the powers of the King –

Lord Hewart (LCJ)(1929) spoke of the new power of the Executive over Parliament as the threat of a 'new despotism'
and Lord Hailsham (Lord Chancellor) in 1976 referred to the phenomenon as 'elective dictatorship'.
Thomas Jefferson had written (1781) about the danger of creating an "elective despotism".

It would have been much better if Dicey had epitomised the constitution in the older metaphor – the historically sanctioned metaphor –

namely, the idea of the balanced constitution – the constitution as a subtle balance of power among the three principal organs of the constitution.

William Blackstone: 'herein indeed consists the true excellence of the English government, that all parts of it form a mutual check upon each other.'
(1766) – Blackstone was, of course, the great 18th-century theologian of English law.

It was this idea of the balanced British constitution that inspired the makers of the American constitution – they accepted the idea of a confusion of powers, but thought that they had corrected the notorious defects of the deeply corrupt British 18th-century constitution – leading to the famous "checks and balances" of the US constitutional system.

Jefferson had said - "the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others" – *Notes on Virginia*, 1781.)

So – better to avoid any talk of the "sovereignty of Parliament" – it was always inappropriate; it became very undesirable; and it is now, strictly speaking, incorrect- both of the Diceyan elements of the so-called sovereignty of parliament are no longer true –

There are limits on the legislative power of the Queen in parliament. – I can think of at least seven occasions on which a Parliament has bound its successors – but there are certainly many more.

And it is now possible to override or set aside Acts of Parliament – that is part of the essence of the EU legal system – and I would say this is also the effect, in fact, if not in form, of the Human Rights Act 1998.

Rather than 'the sovereignty of Parl', it would be better to say –
the legislative omnicompetence of the Queen in Parliament.
And the omnicompetence of Parliament includes the competence to limit or condition its own competence (unlike the omnipotence of God).

The legislative omnicompetence of the Q in P is not created by the common law – it is created by English constitutional history - it is recognised by the common law.

Correct principle –
Parliament may bind its successors until its successors decide otherwise.
(= until the Q in P repeals a self-binding statute, it binds the Q in P)

(2) The reception of the EU legal system in the UK

It's a fascinating puzzle to work out how we came to acquire a third source of law in this country – EU law – a third source of law beyond statute and the common law – a source of law geographically external to this country.

(Phrase *source of law* missing from the Scrutiny Committee papers.)

And it's a fascinating puzzle to work out how we came to acquire some new organs of the constitution at the highest level – exercising legislative, executive and judicial powers - constitutional organs geographically external to this country,

The answer to these puzzles is certainly not merely the "sovereignty of Parliament" – the word "only" in Clause 18 of the Bill is incorrect and should be deleted –

Text of Clause 18 -
'It is only by virtue of an Act of Parliament' that the direct effect and direct applicability of EU law are recognised in the UK.

It would be more correct to say that there are three legal forces that came together to produce the reception of the EU legal system in the UK.

(a) our international obligations – in the original Accession Treaty, as amended – in other words, international obligations undertaken by Government in exercise of the so-called prerogative – that is to say, using the Crown's inherited common-law powers.

Section 2(1) of the 1972 Act says that direct effect and direct applicability are to be recognised 'in accordance with the Treaties'

- and section 2(4) gives effect to the supremacy of EU law by referring back to the provisions of section 2(1)

– – and section 3 says that the effect of EU law is to be determined 'in accordance with the principles laid down by and relevant decisions of the European Court' (which include d.e. and d.a. and supremacy of EU law).

(b) Parliamentary legislation – the European Communities Act 1972, as amended – that is to say, Parliament acting in a traditional role of adopting the legislation necessary to give legal effect to international obligations within the UK legal system.

(c) decisions of the British courts recognising a new source of law – the direct effect and direct applicability of EU law in the UK – and implied recognition by the courts of the legislative, executive and judicial powers of the EU institutions –

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Conceptually, we should now regard the British constitution as having a second existence as an integral part of an unwritten EU constitution –
The British constitution is now an unwritten partially federalised / mostly unitary national constitution embedded in a written partly federal / partly confederal / partly international-law EU constitution.

It is better to regard the EU as a union of constitutions rather than a union of states.
Ph. Allott, 'Integration von Verfassungen, nicht von Staaten,' *Frankfurter Allgemeine Zeitung*, 9 May 2001.

(3) the Bill

I will not say what I think of the political wisdom of what is proposed.

Clause 18 is rather like the resolutions adopted in recent years by the legislatures of many of the US States, affirming "states rights" – but, of course, they can't affect the legal application of Art. VI – the supremacy clause of the US constitution – and they can't reverse the vast increase in federal power in the US in the 20th century.

I suppose it is a principle of the EU constitution that it is up to each member state to organise itself constitutionally and administratively its participation in the EU system.

Protocol 1 to TEU (Preamble) says that the scrutiny by national parliaments of the activities of their governments in the EU is 'a matter for the particular constitutional organisation and practice of each Member State'.

The member states differ greatly in how much they involve national parliaments in their participation in the EU system.

So far as I know, there is nothing in any other member state remotely approaching what is proposed in this Bill.
4 quick constitutional points –
(a) a puzzle about the legal source of the powers of ministers acting in the Councils - – not prerogative in foreign affairs – not statutory – so must be EU powers –
Bill drafted in the form of orders to the government ministers –
As a matter of EU law, can a national parl. give orders to a government of a MS acting in the Council – when the job of the Council is to act in the common interest of the EU?

(b) The Q in P could, at any time, adopt an Act of Parl. saying that a particular proposed EU decision would NOT be subject to a referendum or other special procedure – ?paper tiger – constitutional mirage.

(c) good faith provision in the TEU . – Art 4 (3) TEU – Kantian universalising – what if all member states did this? – the thing would grind to a halt.

'The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

(d) the legal meaning and effect of the EU Act (including the interesting clause 18) will be finally determined by the courts – the Supreme Court and the European Court.

SUPPLEMENTARY

(self-binding Acts)

British North America Acts

Parliament Acts 1911 and 1949

Government of Ireland Act 1920, Ireland Act 1949

Representation of the People Acts

Statute of Westminster 1931

Colonial independence Acts

Devolution Acts

EC Act 1972

Human Rights Act 1998 – enforcement: special, indirect, imperfect

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1911 Parliament Act –

'An act to make provision with respect to the powers of the house of lords in relation to those of the house of commons, and to limit the duration of parliament.'

Statute of Westminster 1931

'No act of parliament of the united kingdom passed after the commencement of this act shall extend, or be deemed to extend, to a dominion as part of the law of that domininion, unless it is expressly declared in that act that that dominion has requested, and cosnented to, the enactment thereof..'

Art VI of US Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Ph. Allott, 'The Courts and Parliament. Who whom?'

(!979 *Cambridge Law Journal*).

Ph. Allott, 'The Courts and the Executive. Four House of Lords decisions,'

(1977 *Cambridge Law Journal*).

Human Rights Act 1998
Statements of compatibility.
(1)A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a)make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b)make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2)The statement must be in writing and be published in such manner as the Minister making it considers appropriate.