Community Law and Revisions in Orthodox Constitutional Doctrine: A Bill of Rights for New Zealand?

by

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One of the major tenets of New Zealand constitutional law is the concept of absolute Parliamentary sovereignty. Inherited from England, the doctrine has remained one of the theoretical obstacles to the adoption of a Bill of Rights in New Zealand. Yet, trends in Europe confirm the view that English constitutional law is undergoing the most significant revisions since the seventeenth century. Is New Zealand law to remain static or do such revisions suggest that a rethinking of long-accepted beliefs is required in this country as well? This paper will examine the consequences of the acceptance of Community law as a source of constitutional law in the United Kingdom; possible solutions to problems arising from the conflict between the orthodox doctrine of Parliamentary sovereignty and the emerging concept of the supremacy of Community law; and implications for both the United Kingdom and New Zealand apparent from the resolution of this fundamental conflict. It will be submitted that the European Communities Act 1972 embodies a self-imposed denial of the traditional view of absolute legislative sovereignty and a rejection, at least theoretically, of the corollary *Ellen Street* rule of implied repeal. It will also be submitted that such fundamental innovations in English constitutional law emphasize the need for the New Parliament to reconsider a proposed Bill of Rights.

The Community Treaty is distinct from traditional United Kingdom and New Zealand public international law as it is self-executing and created an autonomous legal order binding not only the member states but also their citizens. Community law is thus interwoven with municipal law and is to be mainly applied by the national courts.

Some Community law, notably regulations of the Council of Ministers or the Commission, is "directly applicable" in the national courts without specific implementation by the legislatures of the member states. Article 189 of the Treaty unequivocally asserts the supremacy of Community law over all inconsistent municipal law, both antecedent and precedent.[1] Community law is also supreme to the extent that legislatures of the member states cannot pass *any* law (except for the purpose of implementation) where Community law has been designated to "occupy the field".[2] The Court has even confirmed the supremacy of Community law over fundamental constitutional documents and doctrines and has stressed that member nations have limited their sovereignty in areas of Community competence.[3]

The concept of supremacy conflicts sharply with the traditional English concept of Parliamentary sovereignty as "illimitable, perpetual, and indivisible". According to this doctrine, Parliament is competent to enact any law whatsoever, Acts of Parliament are not subject to judicial review, and no other law-making body is superior to Parliament.[4] Yet, the European Communities Act, while subtly avoiding any outright statement of the supremacy of Community law, undeniably accepts that concept. Section 2(1) gives present and future Community law legal force in the United Kingdom "without further enactment" and creates the concept of enforceable Community rights. Section 2(4) provides that, subject only to the limitations specified in Schedule 2, "any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section;" in other words, subject to the rule of the supremacy of Community law which is an enforceable Community right. By section 3 the United Kingdom has accepted the binding authority of the rulings and principles laid down by the European Court. Thus, the Act does not attempt to guarantee the supremacy of Community law by forbidding Parliament to enact conflicting legislation. Instead the guarantee is provided by denying effectiveness to such legislation within the legal systems of the United Kingdom to the extent that it conflicts with Community law. It is not surprising that the Act has been characterized as "a fascinating

1 See especially *Costa* v. *ENEL* [1964] C.M.L.R. 425; *Internationale Handelsgesellschaft* v. *Einfuhr und Vorratstelle für Getreide und Futtermittel* [1972] C.M.L.R. 282; *Commission* v. *Italian Republic* [1972] C.M.L.R. 699.

2 For example *Hauptzollant Hamburg* case [1970] C.M.L.R. 141; *Norddeutsches Vieh* case [1971] C.M.L.R. 281; *Re imported Thai* [1971] C.M.L.R. 521.

3 *Handelsgesellschaft* case (*supra* note 1).

4 See generally Dicey, *Introduction to the Law of the Constitution* (10th ed.), ch.2.

exercise in equivocation, a wilful manifestation of legislative schizophrenia".[5]

Although the European Court cannot hold national legislation to be void for inconsistency with Community law and no coercive sanction is provided against a defaulter, it must be assumed that as long as the United Kingdom is a member of the Community she will honour the legal and constitutional obligations of membership. It is true that there is a legal presumption that Parliament does not intend to derogate from international law, but by traditional doctrine such a presumption cannot prevail in the face of an expressly inconsistent and subsequent enactment.[6] Consequently, the greatest difficulties are envisaged in avoiding and resolving conflicts between Community law and Acts of Parliament passed subsequent to membership. The critical question is whether Parliamentary restraint must always be self-imposed or whether it can be compulsorily guaranteed by revisions in traditional English doctrine.

A number of possible solutions to this constitutional dilemma have been suggested. The 1967 White Paper stated that in fields occupied by Community law Parliament would have to refrain from enacting legislation inconsistent with such law.[7] Yet, this official position assumes that members of Parliament can accurately predict conflicts between proposed legislation and existing Community law; surely the increasing volume of Community legislation will deny the feasibility of such a procedural solution. Others have suggested that a formal clause be included in all Parliamentary statutes declaring that Acts of Parliament shall be construed not to conflict with Community law,[8] that Parliament pass every year a European Communities (Annual) Act removing current conflicts;[9] that conflict could be prevented by an Interpretation Act providing that (unless the content expressly stated otherwise) Acts of Parliament should be read subject to Community law;[10] or that reliance should be placed on the gradual emergence of a constitutional convention by which it would be recognized that Parliament could not legislate contrary to Community law.[11] These proposed solutions are procedural rather than fundamental, and it is submitted that such suggestions avoid rather than resolve the constitutional dilemma of supremacy. None of them

[5] S. A. de Smith, *Constitutional and Administrative Law* (2nd ed.), 82.

[6] See *Rustomjee* v. *The Queen* (1876) 2 Q.B.D. 69; *Inland Revenue Commissioner* v. *Collco Dealings* [1962] A.C. 1.

[7] *Legal and Constitutional Implications of United Kingdom Membership in the European Communities* (Cmnd. 3301), para 23.

[8] Hunnings, "Constitutional Implications of Joining the Common Market", (1968-1969) 6 C.M.L. Rev. 60.

[9] Wade, "Sovereignty and the European Communities", (1972) 88 L.Q.R. 1.

[10] Phillips, *Constitutional and Administrative Law* (5th ed.), 65.

[11] Martin, "The Accession of the United Kingdom to the European Communities: Jurisdictional Problems", (1968-1969) 6 C.M.L. Rev. 7.

directly contends with the challenge to the doctrine of Parliamentary sovereignty; none of them denies the validity of the *Ellen Street* rule of implied repeal that Parliament cannot bind itself as to the form of subsequent legislation.[12] Thus, if Parliament were to pass an Act that did in fact conflict with existing Community law, the constitutional dilemma would remain unresolved.

The challenge that the concept of supremacy poses for English constitutional law can only be adequately met by fundamental revisions in the orthodox doctrine of absolute Parliamentary sovereignty. Heuston, while not denying that Parliament is sovereign in the defined area of her power, argues that limitations can be imposed on the manner and form by which that power is exercised.[13] Mitchell has argued that a new legal order arose as of 1 January 1973 in much the same manner that the Act of Union with Scotland in 1707 was a constituent act imposing legal restraints on Parliament.[14] Professor de Smith has drawn on the experience of the Canadian Bill of Rights and the important case of *R.* v. *Drybones* and has suggested that there should be "an expressly enacted presumption that legislation and United Kingdom law generally are to be 'so construed and applied' as not to conflict with existing Community law."[15] Auburn has extended this line of reasoning relying on the *Drybones* construction to suggest the possibility of securing statutes against the doctrine of implied repeal by suitable wording.[16] This new view of Parliamentary sovereignty has been elsewhere defined: "Parliament cannot place any blanket prohibition on its future action but can place procedural restrictions on such action."[17]

[12] See *Vauxhall Estates Ltd* v. *Liverpool Corporation* [1932] 1 K.B. 733; *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590.

[13] *Essays in Constitutional Law* (2nd ed.), ch.1. The Privy Council held in 1964 that a legislature may not ignore procedural restraints upon the forms of law-making contained in the constitutional instrument from which the legislature itself derived its authority to make law: *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172.

[14] "Constitutional Aspects of the Treaty and Legislation Relating to British Membership", (1972) 9 C.M.L. Rev. 134; and Mitchell, *Constitutional Law* (2nd ed.), 69-74.

[15] "The Constitution and the Common Market: A Tentative Appraisal", (1971) 34 M.L.R. 612; *R.* v. *Drybones* [1970] S.C.R. 282. Professor de Smith's proposal is based on an assumption that the rule of implied repeal is correct and, therefore, appears to be merely a procedural solution. Subsequently, however, he has raised the *Drybones* case when expressing doubts as to the persuasiveness of the *Ellen Street* rule: *Constitutional and Administrative Law* (2nd ed.), 77 (note 59) and 89-90.

[16] "Trends in Comparative Constitutional Law", 35 M.L.R. 129. The court did not invalidate or repeal the inconsistent act in the *Drybones* case; rather the judgment had the effect of making the later act "inoperative". Auburn suggests that such a concept would "have the advantage of bridging the gap between the orthodox doctrine that English and New Zealand courts cannot declare an Act of Parliament invalid, and the recent trend in constitutional law towards general powers of declaring statutes invalid". *Ibid.*, 135.

[17] Marshall, *Constitutional Theory* (1971), 52.

This revised theory of sovereignty directly denies the *Ellen Street* rule of implied repeal and allows for the uninhibited incorporation of Community law into English municipal law. It might be argued that the European Communities Act is not a fundamental change in the constitution and, therefore, subject to implied repeal itself, but the submission of the issue to the people in the historic referendum and the resultant vote negates this reasoning. It is submitted that the long-accepted doctrine of absolute Parliamentary sovereignty no longer accurately reflects the realities emerging in English constitutional law. Only through the courts' adoption of the revised theory of legislative sovereignty can the conflict between the concepts be resolved. In theory at least the obligations of membership in the Community have spelled the doom for Diceyan orthodoxy.

Two questions remain. First, theory must be translated into reality, and this can only be achieved through the development of case law recognizing the primacy of Community law: to what extent have the national courts of other member states accepted this doctrine and, more significantly, what attitude have English courts taken towards Community law? Second, this entire discussion is contingent upon the European Communities remaining, minimally, a viable economic force: what are the prospects for the Community?

The supremacy of Community law as developed by the case law of the European Court has had a varied impact upon the courts of the member nations.[18] The concept has been generally accepted in Belgium and Luxembourg whose constitutions do not identify the relation of international treaties to municipal law.[19] There has been no judgment directly accepting the doctrine in Dutch courts, but no conflict is envisaged. The impact of the doctrine has been more modest in France where judgments of the two highest courts have conflicted. The trend, however, is undoubtedly progressive, and the 1973 decision of the Court of Appeal of Paris in the *Weigel* case confirms acceptance of the concept.[20] German and Italian courts were initially reluctant to recognize the supremacy of Community law over fundamental national law. Yet, German courts have since upheld Community law over subsequent municipal law, and recent decisions in Italian courts have firmly recognized the constitutionality of article 189 and the absolute supremacy of Community regulations.[21] Thus, the trend in all member states on the Continent has been progressive towards a general acceptance of the concept of supremacy.

[18] See generally Bebr, "How Supreme is Community Law in the National Courts?" (1974) 11 C.M.L. Rev. 3.

[19] For example *Minister for Economic Affairs* v. *SA Fromagerie Franco-Suisse "Le Ski"* [1972] C.M.L.R. 330.

[20] Simon, "Enforcement by French Courts of EEC Law", (1974) 90 L.Q.R. 467, 484.

[21] Bebr, *loc. cit.*, 35-36.

The cases in English courts involving conflicts with Community law have been few, but an emerging attitude may already be noted. In 1971 statements of claim to the effect that by signing the Community Treaty Parliament would be irrevocably surrendering part of its sovereignty and by so doing would be acting contrary to law were unanimously struck out by the Court of Appeal as disclosing no reasonable grounds of action.[22] Lord Denning M. R. stated:[23]

> We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality . . . Freedom once given cannot be taken away. Legal theory must give way to practical politics.

In *Esso Petroleum Co. Ltd* v. *Kingswood Motors* the court held, in the absence of any declaration of nullity by the European Court, that article 85 of the Community Treaty (concerning restraint of trade) did not invalidate solus agreements which had come into existence before entry into the Community.[24] Bridge J., however, implicitly accepted article 85 as directly applicable without any specific enactment to that effect by Parliament.[25]

Van Duyn v. *Home Office* was the first case to be referred by an English court to the European Court.[26] The plaintiff, a scientologist who had been denied entry on the grounds of public policy, relied on article 48(3) of the Community Treaty guaranteeing the freedom of movement by migrant workers within the Community. Although the European Court upheld the argument on public policy, the article was deemed directly applicable, thereby implying, at least potentially, far-reaching consequences for the immigration laws of the United Kingdom. In *Application des Gaz SA* v. *Falks Veritas Ltd*, the first case involving Community law to come before the Court of Appeal, the defendants succeeded in amending their defense to include articles of the Community Treaty.[27] Stamp L. J. commented:[28]

> Articles 85 and 86 are part of our law. They create new torts or wrongs. Their names are "undue restriction of competition within the Common Market," and "abuse of dominant position within the Common Market." Any infringement of those articles can be dealt with by the English courts.

These cases reflect an acknowledgement by English courts that indeed fundamental changes have occurred in the legal order. While no court has yet ruled on municipal law enacted subsequently to

[22] *Blackburn* v. *Attorney-General* [1971] 1 W.L.R. 1037.
[23] *Ibid.*, 1040.
[24] [1974] Q.B. 142.
[25] For a similar comment see *Aero Zipp Fasteners Ltd. and Lighting Fasteners Ltd.* v. *YKK Fasteners (U.K.) Ltd.* [1973] C.M.L.R. 819, 820 per Graham J.
[26] [1974] C.M.L.R. 347. Graham J. had earlier refused to make a reference to the European Court: *Lowenbrau Munchen* v. *Grunhalle Lager Internationale* [1974] C.M.L.R. 1.
[27] [1974] 2 Lloyd's Rep. 493.
[28] *Ibid.*, 499.

entry into the Community, judges have already exhibited an acceptance of the principle of direct applicability and a willingness to refer debated interpretations to the European Court. The comment of Lord Denning M. R. in *Blackburn* that the United Kingdom's entry into the Community is a "political reality" must be extrapolated to "legal reality", and it is submitted that the courts must recognize the doctrine of the supremacy of Community law if they are not to defy obligations imposed by the European Communities Act.

Although the economic union is still partial and imperfect, a great deal has been achieved by the European Community. It is evident that there has been an increase in both the scope and intensity of the process of economic integration. The enlargement of the Community in January 1973 by the entry of Britain, Denmark and Ireland was a significant event in the post-war history of Western Europe, and how the Community develops in the coming decade is of importance to people throughout the world. At the Paris summit meeting held in October 1972, the leaders of the nine member countries set out an ambitious programme for the future. It was agreed that the ultimate objective of the Community should be the achievement by 1980 of a fully-fledged European Union intended to include economic and monetary union and common external economic, political and defense policies.

Too many uncertainties exist presently to make any reliable forecasts as to the future of the European Community. Sceptics point, justifiably, to inherent stresses such as divergent national interests which could lead to conflict and consequent crisis situations, and it may be that for some years there will be still too weak a shared sense of genuine community for any alternative form of government to be a viable possibility. There may well be periods of stagnation and stress as seen in the late 1960's. Much seems to depend on the continuance of a pragmatic style of political leadership within the Community. Thus, it is unlikely that the progress of the European Community towards a closer economic and political union will be smooth, but as one commentator has concluded:[29]

> . . . there is little to suggest the prospect of a complete breakdown, much less a disintegration of the new Community. There is too much at stake for all concerned; too many pressures impelling its members forward; and no real alternative to pursuing these new, peaceful methods of building together an effective Community.

The European Community is a growing reality, and it is imperative that English law accept it as such.

What then are the constitutional implications for New Zealand? In

[29] Pryce, *The Politics of the European Community* (1973), 187. For a different view see Dagtoglow, "European Communities and Constitutional Law", [1973] C.L.J. 256, 265-267.

the past it has been strongly asserted by academics that a New Zealand Bill of Rights would have no effect on subsequent legislation.[30] Indeed it has been stated, in a Diceyan echo, that "subsequent legislation could expressly or impliedly take away the rights in the Bill even without repealing it".[31] Yet, the revisions in constitutional theory noted previously suggest that such views are dated. Surely the integration of the concept of supremacy into English constitutional law will provide new impetus to revisionist theory and the repercussions will not be limited solely to Britain. Quite to the contrary, the retreat of orthodox theory will deny one of the major objections raised to any proposed Bill of Rights for this country. If this is so, certain alternatives are available to draftsmen of a Bill of Rights. First, New Zealand might follow the Israeli common law example of entrenchment of "Fundamental Law", the modification of which would only be valid if it followed required procedure.[32] Second, New Zealand might follow the Canadian experience of securing a statute against implied repeal by a statement of intent.[33] The new concept of supremacy gives fresh momentum to such possibilities.

[30] See *Evidence Presented to the New Zealand Constitutional Reform Committee* (1965), 27-41; Northey, "The New Zealand Constitution", Northey (ed.), *The A. G. Davis Essays in Law* (1965), 175-179; Palmer, "A Bill of Rights for New Zealand", in Keith (ed.), *Essays on Human Rights* (1968), 106-131.

[31] Palmer, *loc. cit.*, 113.

[32] See Likhovski, *Israel's Parliament* (1971), 19-23, 91-92; *Bergman* v. *The Minister of Finance* (1969) 4 Is.L.R. 559.

[33] Notes 12 and 13 ante.