

Chapter 5 Problem scenario: Parliamentary sovereignty, the European Union, and Brexit

Pursuant to the European Union (Notification of Withdrawal) Act 2017, Prime Minister Theresa May invoked Article 50 in Spring 2017 – the legal process through which the UK will leave the European Union (EU). This process entails two years of negotiations, during which the nature of the UK's future relationship with the EU will be discussed and agreed. The proposed European Union (Withdrawal) Act, which will come into force on the day the UK actually leaves the EU, seeks to repeal the European Communities Act 1972 and provide legal foundation for the deal that will eventually be struck with the EU.

It is a centrepiece of the government's (fictitious) 'Hard Brexit' policy, though, that the free movement of EU nationals across UK borders be heavily restricted, with Irish citizens being the only EU nationals enjoying a degree of freedom in this regard as a result of the British–Irish Common Travel Area. All other EU nationals will be subject to strict immigration rules upon entering the UK from the continent. Contrary to this, and during the course of the negotiations, the other EU Member States are insistent that EU nationals should be able to enter the UK as before, pursuant to the free movement arrangements that had existed in the UK while it was a Member State. As a result of both parties' position on this issue, negotiations between the EU and UK become difficult and the relationship strained. Two months prior to 'Brexit Day', the UK Government decides that it will cut its losses and abandon any attempts at reaching an agreement with the EU. A Bill is introduced into Parliament seeking to effect the UK's departure from the EU unilaterally by repealing the 1972 Act and declaring that the UK is no longer a member of the EU. The Bill, entitled the 'European Union Departure Act 2019' is enacted a week later.

Imagine that you are presented with this scenario and asked to discuss the legality of the European Union Departure Act 2019.

There are a number of possible answers to this question. The straightforward answer would be that on the basis of the UK Government's triggering of Article 50 on 29 March 2017, and pursuant to Article 50(3) TEU, the EU Treaties would 'cease to apply . . . from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification'¹ is given. Simply put, the Treaties would cease to have effect from 29 March 2019 or a date stipulated in any agreement reached and finalized between the UK and the EU.

Recalling, however, that in the problem scenario, the UK Government abandons its negotiations with the EU and passes, with Parliament, the European Union Departure Act 2019, there is scope for an alternative answer. The effect of the 2019 Act would be to repeal the 1972 Act and to revoke the UK's EU membership unilaterally; that is, without the agreement and consent of the EU institutions and members. To consider, therefore, whether the EU Treaties would cease to have effect in the UK at an earlier point than that stipulated by Article 50, we need to consider the question of whether or not unilateral revocation of EU membership is possible under the UK's constitutional order and, therefore, whether the 2019 Act is effective in withdrawing the UK from the Union. On this point, we can refer to the discussion in 5.4.1, and the contrasting views of Lord Bridge and Allan and Wade.

Starting with Lord Bridge's judgment in *Factortame*, on the basis that he describes the limitation of sovereignty effected by the 1972 Act and the UK's membership of the EU as voluntary,² by which he meant that the limitation of sovereignty that comes with EU membership was understood before the UK joined the Union and was something to which Parliament actively subscribed and accepted upon enactment of the 1972 Act, it can be argued, on the same basis, that Parliament could voluntarily take its sovereignty back through repeal of the European Communities Act. Any repealing statute would have the

¹ Article 50(3) TEU.

² [1991] 1 AC 603, 658–9.

effect of removing the legal basis for EU membership, thereby ensuring that the EU Treaties, and other such laws given effect under the Treaties, would cease to have effect from the moment that Act came into force. On this basis, and keeping in mind the circumstances of the problem scenario, it is argued that the European Union Departure Act 2019, through its repeal of the 1972 Act, would be effective in withdrawing the UK from the EU.

This would appear to be a conclusion with which Allan might agree. In respect of *Factortame*, Allan argued that the limitation of Parliament's sovereignty realised through the House of Lords' acceptance that EU Law should take precedence over UK statutes was what he called '[an] example of evolution',³ necessary 'to avoid a result thought unacceptable on general constitutional grounds'.⁴ It is argued that a similar view could be espoused in respect of the 2019 Act in the scenario. Realisation of the UK's exit from the EU, and with it the recognition once more of Parliament's sovereignty, could be seen as an evolution, underpinned by public opinion recognised in the referendum result, with the 2019 Act accepted as valid so as to avoid any further 'result thought unacceptable on general constitutional grounds'⁵ (ie a rejection of Parliament's sovereignty, in favour of EU supremacy, at a time when EU law is ceasing to have effect).

Wade's view, however, is different. Recalling the discussion in 4.4.1, Wade argues that Parliament cannot unilaterally alter or assert its sovereign power, stressing that the only way in which the ultimate political fact of Parliament's sovereignty can be changed is through a revolution, wherein the courts recognise an alternative source of power as superior to Parliament.⁶ As 5.4.1 discusses, this is what Wade described as having happened in respect of *Factortame*: the domestic courts disapplied a UK statute, in preference to another supreme source of law, thereby effecting a constitutional revolution.⁷ Coming back to the 2019 Act in the problem scenario, however, it is a logical extension of Wade's view that Parliament cannot simply pass an Act that reasserts its sovereign power; the consent of the existing sovereign power (ie the EU) must be granted and a further constitutional revolution must occur. To that end, the 2019 Act could be argued as invalid on the basis that the courts would deem it contrary to the prevailing and supreme law applicable at that point—namely the EU Treaties and, specifically, Article 50 TEU.

³ TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *Law Quarterly Review* 443, 447.

⁴ *Ibid* 447. ⁵ *Ibid*.

⁶ HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *Cambridge Law Journal* 172.

⁷ HWR Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568, 574.