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Can Britain Survive?

by David Radlett

This may appear to be a gloomy question for the new millennium. However, it is one that must be addressed by those who recognise that a country which no longer controls its defence, its external relations nor vast parts of its economic and taxation policies has no real right to call itself a country. The steps taken in 1999 to bring these matters within the sphere of European Community competence do not need repeating here. They are enough to show that the Treaty of Amsterdam may be the last staging post for Britain on the road to European satrapy.

The collective epitaph of the present government may well be “When I am dead and opened, you shall find ‘Brussels’ lying in my heart.” The question is what might a future government be able to do to reclaim Britain as a country.

The most cogent response, short of withdrawal from the whole enterprise, is to seek a fundamental re-negotiation of the terms of membership. Such re-negotiation will demand strength and teeth.

Strength, because the recent excoriation of William Hague when he suggested that further treaties might not be approved shows the strength of the Heseltine-Blair axis, a kind of sad Greek chorus throwing up their hands as one in horror. Re-negotiation will require teeth, because there will be no support amongst the other 14 member statesⁱ to abandon the progress so far towards the United States of Europe.

About the only thing that may make the 14 think again is the threat that Britain may, indeed, withdraw from the whole enterprise. The shock-wave from such withdrawal would threaten the whole project, and that would never do.

It is in this connection that it is disturbing to discover that many Euro-realists do not believe in the possibility of withdrawal. One leading example is Sir Teddy Taylor, who wrote in the *Guardian* that:

“I am sure that there will be many Eurosceptics who, having read this article

thus far, will proclaim that such arguments are utter nonsense, that no British parliament can bind its successors, and that a decision to repeal the treaties would have a binding effect. Having spent my political life arguing against and voting against the Euro treaties, I wish that they were right and I was wrong. However, sadly, the right to repeal is simply not there.” (9th June 1999)

Sir Teddy uses Greenland to demonstrate this point, pointing out that their withdrawal was only possible through the permission of each of the Member States including the United Kingdom. Now, Greenland may best be described as an internally self-governing part of Denmark. The association between Denmark and Greenland dates back to 1721, culminating in full integration from May 1953. Following a referendum in January 1979, Greenland attained home rule, with elections in April 1979 to the Landsting, the Greenlanders’ new parliament. In the February 1982 referendum, the Greenlanders voted – albeit by a narrow margin – to withdraw from the European Community. Their withdrawal was completed by early 1985.

What was at stake here was the change in status of an integral part of one of the Member States. Greenland still sends two representatives to the Danish Folketing, and the political caste in Denmark, despite the misgivings of many of the people it purports to represent, remains committed to EC membership. It was the reverse of the move presently being discussed by the Channel Islanders, some of whom are giving inexplicable yet serious consideration to moving to full membership of the EC through their connections with the United Kingdom. It is no great surprise that Greenland required a Treaty amendment, just as the Channel Islanders will require a Treaty amendment, if they cannot be persuaded to see the error of their ways.

Neither Greenland nor the Channel Islands are full actors on the international stage. It follows that the Greenland experience does not provide an authoritative precedent to a Member State seeking the way outⁱⁱ.

Sir Teddy rightly points to the provisions of Article 312 of the Treaty of Rome (“This Treaty is concluded for an unlimited period”) which appears to suggest “once in, always in.” To have this effect, Article 312 must be read in conjunction with Articles 42 (2) and 56 of the Vienna Convention on the Law of Treaties 1969 (Cmnd. 4818).

Article 42 (2) provides:

“The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention ...”

Article 56 of the Vienna Convention provides, so far as is material:

“A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty...”

As none of the Treaty of Rome, the Treaty of Accession nor the European Communities Act 1972 purport on their face to revoke parliamentary sovereignty, at least one party to the Treaty (the United Kingdom) might be taken to have admitted the possibility of denunciation or withdrawalⁱⁱⁱ.

In any event, Article 312 might be interpreted as indicating nothing more than a free parking sign: no time limit, but no compulsion either.^{iv}

Of greater importance, perhaps, to the survival of Britain is the statement of international law found in Article 1 of the Charter of the United Nations. This records that, *inter alia*, the purposes of the United Nations are:

“... to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples ...”

The right to self-determination was further defined in Article 1 of the International Covenant on Economic, Social and Cultural Rights (1966):

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

This creates a conflict between norms at international law: no withdrawal set against the right to self-determination. In these circumstances, the United Kingdom Parliament may pursue whichever option is most desired. The only caveat to this proposition is that there must have been no abrogation of the power to choose as a matter of English law.^v

The traditional view of parliamentary sovereignty embraces Parliament’s ability to reverse the European Communities Act 1972. No 1972 Act means no EC membership. If the alternative view is taken, that the self-embracing sovereignty of Parliament means that one Parliament may bind a successor, then the question is whether the 1972 Act has the effect of altering permanently the constitutional standing of the United Kingdom Parliament. Lord Hoffman has discussed the effect of the 1972 Act in two interesting cases. In *Stoke on Trent City Council -v- B & Q Plc [1991]* he noted that:

“The EEC treaty is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the European Economic Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on matters of social and economic policy which it regulated.”

He put flesh on the meaning of this statement in *R -v- Secretary of State for Employment, ex parte Seymour Smith (13th March 1997)*. He noted that:

“Section 2(1) of the European Communities Act 1972 says: ‘All such rights, powers, liabilities, obligations and restrictions from time to time created or arising 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; ...’”

That, in a nut-shell, is the extent of supremacy of EC law. It is supreme because section 2 (1) says so, bolstered by section 3, which gives legal effect to the often demented ramblings of the European Court of Justice.^{vi} But what of section 2 (4), which provides in full that:

“The provision that may be made under subsection (2) above includes, subject to schedule 2 to this Act, any such provision (of any such extent) as may be made by Act of Parliament, and 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 but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in

connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.”

Taking the argument step by step, the words: “the provision that may be made under subsection (2) above includes, subject to schedule 2 to this Act, any such provision (of any such extent) as may be made by Act of Parliament” simply confirm the method by which any Community obligation can be enacted into United Kingdom law. Subsection (2) allows for this to be done by Statutory Instrument (subject to limitations in Schedule 2 to the Act concerning, *inter alia*, proposals to impose or increase taxation or to legislate retrospectively, which must be done by Act of Parliament). In other words, subsection (4) thus far underlines that, such exceptions aside, a Statutory Instrument made under the 1972 Act will suffice to enact Community law.

Moving on to the critical words “... and 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; ...” the leading constitutional experts de Smith and Brasier pose this question:

“Surely this is not a mere rule of construction, to be displaced if the Act and the regulation cannot be harmonised,” (de Smith & Brazier, *Constitutional and Administrative Law*, Penguin (6th Ed) at p 80).

In the *Seymour-Smith* case, Lord Hoffman suggests exactly that. It is a mere rule of construction, meaning no more than:

“ ... domestic legislation is to have effect subject to such European rights or restrictions ‘as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom.’ In other respects, the validity of domestic legislation is unaffected.”

The de Smith and Brasier argument was that the “passed or to be passed” phrase referred to all subsequent Acts of Parliament, which must take effect subject to the 1972 Act. Lord Hoffman shows the limit to this proposition, and the closing words of the sub-section give the lie to the claim that the words have the additional effect of entrenching any of these things in the sense that the Act itself cannot be repealed:

“ ... but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.”

In other words, the power to make regulations is governed by Schedule 2, which may itself be amended. Now, either the 1972 Act is capable of amendment (and *ex hypothesi*, repeal) by a subsequent Parliament or it is not. As the concluding words of subsection (4) clearly envisage that Schedule 2 can be amended, there seems to be little reason to suppose that the whole of the Act could not be so amended or repealed. Repeal is simply an extreme form of amendment.

Even if the view of Lord Hoffman, and the plainest meaning of section 2 (4) read in its entirety are not enough, the meaning of s 2 (4) is at best obscure. There is clear authority for the proposition that constitutional change cannot happen by accident or through ambiguity. In *Chorlton -v- Lings (1868) LR 4 CP 374*, it was argued that, had Parliament intended to make a ‘drastic’ change to the constitution (allowing women to vote), it “... would have said so plainly and distinctly.”

Again, in *Nairn -v- University of St Andrews [1909] AC 147 H/L*, it was held that there would have to be the most explicit of statutory language to create a change to the constitution. Lord Loreburn LC observed:

“It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.”

The judicial condemnation of making ‘drastic’ constitutional change without acting “plainly and distinctly,” or attempting to do so “by so furtive a process” is clear.

There are strong arguments to suggest that, as a matter of law, the legal position as to the sovereignty of Parliament is secure at both national and international levels. The “teeth” have not – yet – decayed beyond use.

The sole question is whether the successors to the present government will have the bite to use them.

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ⁱ Now 27 in number (excluding the UK).

ⁱⁱ This is the current position of Scotland, also. It is the government at Westminster which is responsible for the representation of Scotland in international law. See Sch. 5 para 7 Scotland Act 1998 (as amended): “International relations, including relations with territories outside the United Kingdom, the [European Union](and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters”.

ⁱⁱⁱ Denunciation or withdrawal is now explicitly recognised in Article 50 Treaty on European Union (as amended). Worth remembering in the context of current (June 2016) discussions that the two-

year period mentioned in Article 50 is a maximum period, not a minimum one.

^{iv} The better position is probably that old Article 312 simply served to distinguish the initial EEC Treaty 1957 from, for example, the European Coal and Steel Community Treaty 1952, which was concluded for a period of 50 years.

^v The self-determination argument remains of interest as a riposte to those who are currently (June 2016) seeking to ignore the wish of the people of the United Kingdom as expressed in the referendum held on 23rd June 2016.

^{vi} This point (the contingency of EU law on ECA 1972) has since been expressly confirmed by Sir John Laws in *Thoburn v Sunderland City Council* [2003] Q.B. 151.