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Parliamentary Sovereignty – Parliament has ‘the **right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.**’

Historical Origins

Historically the reigning monarch was ‘sovereign’, with once near limitless power to rule by decree; Magna Carta in 1215 was one of the first significant acts to curtail the monarch’s power.

The Tudor Monarchs were the last truly sovereign. Parliament twice overthrew Stuart Monarchs with the execution of Charles I in 1649 and the expulsion of James II in 1688. The Revolution Settlement of 1689 ‘vested sovereignty not in the king alone, but in the king in Parliament, the balance of power lying... with the two Houses,’ thus establishing the concept of Parliamentary Sovereignty.

Throughout the 18th Century monarch increasingly retreated from exercising a once comprehensive set of executive powers – i.e. the Royal Prerogative. Instead ministers ‘came to exercise executive authority on the monarch’s behalf’ and by the 19th Century Queen Victoria’s influence ‘was confined to the marginalia of public affairs.’

The Balance of Power

The definition by Dicey at note 1 was written in the late 19th Century. It is important to note that whilst Parliament can make or unmake any law, the process of doing so is by way of an Act of the Queen in Parliament, thus retaining the involvement of the monarch.

The final stage of passing an Act of Parliament is for the monarch to give Royal Assent. Whilst in theory a monarch could veto a particular law by refusing to give the same, her exercise of such powers are governed by constitutional convention which dictates that assent is always given to a bill which successfully passes through Parliament.

However, courts have consistently found that constitutional conventions are not legally binding.

The last time a monarch refused to grant royal assent was by Queen Anne in 1708, although King George V almost caused constitutional crisis in the early 20th Century by threatening to refuse assent over Irish Home Rule.

Nevertheless, the balance of power clearly lies with Parliament, as the monarch no longer has any sovereign power to create, amend or repeal law.

20th Century Developments

A succession of cases reveals the near unlimited scope of Parliament's law-making powers.

Cheney v Conn (Inspector of Taxes) concerned a challenge to legislation on the grounds of its alleged incompatibility with international law. Regardless of any such incompatibility, the court stated that **'what the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country.'**

Madzimbamuto v Lardner Burke concerned the enactment of legislation in circumstances where constitutional convention instructed that no such legislation would be established. The case demonstrates the supremacy of an Act of Parliament over conflicting constitutional conventions, whilst further affirming the non-legally binding nature of conventions as stated in Jonathan Cape.

In *Burmah Oil Co v Lord Advocate* the House of Lords gave a ruling requiring the government to pay significant compensation for damage to private property caused during wartime. Concerned of the number of subsequent cases to which this may give rise, the War Damage Act 1965 was passed to reverse the decision. This not only demonstrates Parliament's sovereignty over the common law, but furthermore its ability to legislate retrospectively.

The case of *Pickin v British Railways Board* further reflects the Dicean view of Parliamentary Sovereignty in the House of Lords refusal to review either the validity of an Act of Parliament or the validity of the manner in which it was enacted.

As is evident, each of these cases holds the strict Dicean interpretation of Parliamentary Sovereignty, each time affirming Parliament's ability to act as it wishes.

Modern Developments

The UK's membership of the EU has posed significant challenges to the principle of Parliamentary Sovereignty, as it is EU law which takes precedence over conflicting domestic law according to the principle of primacy of EU law.

The Court of Justice of the European Union ('CJEU') asserted in *Van Gend en Loos* that EU law constituted a 'new legal order' under which Member States had 'limited their sovereign rights.'

The CJEU further stated in *Costa v ENEL* that the force of EU law could not vary between Member States, with the necessary conclusion that it is 'impossible for the States... to accord precedence to a unilateral and subsequent [domestic] measure over a legal system accepted by them on a basis of reciprocity.'

In the latter case of *Simmenthal* the CJEU required that national courts must give full effect to EU law, including **'if necessary refusing of its own motion to apply any conflicting provisions of national legislation.'**

The principle in *Simmenthal* found its application within the UK following the *Factortame* series of litigation between the House of Lords and CJEU. The ultimate result was that the House of Lords disregarded provisions of the Merchant Shipping Act 1988 following instruction from the CJEU that it was required to do so on account of conflict with EU law.

The Human Rights Act 1998 gave courts both the obligation to interpret UK legislation in accordance with convention rights 'so far as it is possible', and the power to issue a declaration of incompatibility against conflicting legislation.

However, as was made clear in *A v Secretary of State for the Home Department*, a declaration does not invalidate the conflicting law, which must still be applied by the courts.

Thus the declaration of incompatibility places only political pressure upon Parliament to amend offending legislation, although in practice Parliament almost always acquiesces, and there is to date 'only one outstanding declaration... where the Government has yet to remedy the incompatibility.'

Decisions of the European Court of Justice are binding on the States to which they are issued, presenting a further challenge to the orthodox view of Parliamentary Sovereignty.

That being said, the UK's rate of defeat before the Strasbourg court is 'extremely low' and the country maintains a 'comparatively strong record in implementing its judgments.' Nevertheless, there are a number of cases which continue to experience 'unacceptable delays in implementation', most notably concerning the right of convicted prisoners to vote.

Theoretical Challenges to Orthodoxy

In light of the more modern developments discussed, a number of theoretical challenges to the orthodox Dicean conception of Sovereignty in the UK constitution have emerged in both jurisprudence and academia.

Writing extra-judicially in 1995, Sir John Laws commented how a number of judges had assumed the truth of the idea that Parliamentary Sovereignty is a principle of the common law as discovered by the judiciary. He proceeds to suggest that this may enable the courts to temper Parliament's sovereignty such as where it legislated 'inconsistent[ly] with a fundamental rights or... democracy itself.'

Also writing extra-judicially, Lord Woolf viewed both the courts and Parliament as 'partners both upholding the rule of law,' continuing that 'if Parliament did the unthinkable' – for example by legislating contrary to core fundamental principles, or attempting to abolish judicial review – 'the courts would also be required to act in a manner which would be without precedent.'

In *Jackson v Attorney-General* Lady Hale and Lord Steyn each discussed the potential for courts to reject extreme legislation, again citing the removal of judicial review as the prime example. Lord Hope further discussed the possibility that the rule of law is in fact that controlling constitutional principle over Parliamentary Sovereignty. These discussions were some of the first theoretical challenges to the orthodox view of Parliamentary Sovereignty from the highest tier of the judiciary, suggesting that Parliament may not be able to legislate contrary to the foundations of the rule of law.

In a second explicit attempt to challenge Parliamentary Sovereignty, several members of the Supreme Court in *AXA General Insurance Ltd v HM Advocate* again expressed views regarding the potential imbalance between Parliamentary Sovereignty on the one hand, and the rule of law on the other. In particular, Lord Hope echoed Lord Woolf's comments above, considering that if Parliament attempted something like the abolishment of judicial review, 'the rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'

Academics such as Griffith posit a now dual conception of sovereignty, with Parliament retaining legislative sovereignty but the courts enjoying sovereignty over interpretation of the law.

Alternatively, Bowen proposes that jurisprudence is entering a 'renaissance of common law constitutionalism, with common law rights "on the march".' He proceeds to suggest that government threats to repeal the Human Rights Act and withdraw from the European Convention on Human Rights may be driving this resurgence, and the potential for rights to be lost during the Brexit process presents a further argument in support.

Brexit – Rescuing Dicey?

Picking up on the EU implications to Parliamentary Sovereignty, there are two key challenges to the Dicean conception which in turn fuelled with argument that leaving the EU would result in a return of sovereignty to the UK:

Parliament may not legislate as it wishes i.e. contrary to EU law; and

Courts may set aside legislation which conflicts with EU law.

In *R (HS2 Action Alliance) v Secretary of State for Transport* the Supreme Court expressed that the UK's relationship with the EU exists as a result of the European Communities Act 1972, and ultimately falls to be considered according to the UK's constitution. In particular, the supremacy of EU over domestic law is correspondingly dependent upon the 1972 Act.

In *R (on the application of Miller) v Secretary of State for Exiting the European Union* the reasoning from HS2 was followed and the Supreme Court gave the clearest pronouncement of sovereignty within the UK constitution vis-à-vis the EU. Referring to the court's ability to disregard legislation in conflict with EU law, the court stated '**consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute.**'

Elliott argues that this judgment placed Parliamentary Sovereignty 'firmly in the driving seat, free from competing claims.' This goes beyond implying any return to sovereignty after Brexit; rather, both the current impact of EU law within the UK constitution and its subsequent removal occur because of the operation of Parliamentary Sovereignty.

In more direct phrasing, Young writes 'the [1972] Act plumbs the UK into EU law because the Queen in Parliament wished it to be so,' similarly asserting the central role of Parliamentary Sovereignty governing the UK's relationship with the EU and the extraordinary powers enjoyed by the courts as a result.

Upon conclusion of Brexit, it may rightly be stated both that Parliament may again legislate unconstrained by the limitations of EU law and the 1972 Act, and further that the courts will no longer have any power to disregard provisions of an Act of Parliament.

The arguments concerning the EU may similarly be applied to any constraint on Parliamentary Sovereignty claimed as a result of the Human Rights Act, i.e. the said constraint only exists by virtue of powers already conferred by a sovereign Parliament. Parliament could equally withdraw from any obligations under that Act or its counterpart measures in the European Convention on Human Rights.

It is therefore concluded in accordance with Dicey's formulation that Parliament continues to be sovereign, able to legislate at will and, notwithstanding statements made obiter dictum in *Jackson* and *Axa*, there is no body or court which has as yet tested power to disregard an Act of Parliament.

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