

W201 The Individual and the State

Study notes on Parliamentary Sovereignty

“The bedrock of the British constitution is ... the supremacy of the Crown in Parliament”
Lord Bingham in **R (Jackson) v AG** 2005 Lords.

In the beginning

In feudal times sovereignty resided undisputedly with the monarch but the 17th century saw a period of upheaval as parliament encroached on the crown's authority and religious differences added to the intensity of the disputes which resulted in the Civil War.

Thomas Hobbes discussed “sovereignty” in 1651 in the “Leviathan”. He saw “sovereignty” **not** vested in Parliament (whose army had just executed Charles 1) but as vested in the monarch who was not legally answerable to his subjects. He thought that the subjects owed obedience to the monarch as the monarch offered them security through his laws. In his words “life is solitary poor nasty brutish and short” so the protection and stability which a strong monarchy provided was a real advantage.

Thomas Hobbes was the tutor to the king's son (later Charles II) so his views are not entirely surprising.

The important thing to note is that in England “sovereignty” was **not** always vested in parliament.

Later on

After the Glorious Revolution in 1688 parliament gained the upper hand over the Stuart Kings and Queens.

The constitutional settlement which followed the ‘abdication’ of the Roman Catholic King James II took the form of an Act of Parliament known as the Bill of Rights of 1689. Protestant William II and Mary (a daughter of James II) were really taking over the throne as a result of a successful rebellion. They depended on the support of parliament and of leading opponents of James II autocratic style of rule. They therefore had no alternative but to accept the crown on the new constitutional terms offered to them.

Parliament continued to gather strength in the 18th century when the crown passed from the Stuarts to the protestant House of Hanover and Great Britain was ruled by kings who were initially German speaking and simultaneously trying to rule Hanover. “Sovereignty” was now moving in practice as well as in theory from the monarch to parliament.

Locke writing in 1689 sets out the view that “sovereignty” rests with the people - “the people have a right to act as supreme”. Locke said that the government held power on trust for the people who could take the power away.

This doctrine was important to justify the transfer of power from James II to William and Mary which in reality was a seizure of power by armed invasion and popular uprising rather than by the fiction of ‘abdication’.

The key provisions of the Bill of Rights represent one of England’s most important and lasting constitutional sources. Looked at from one perspective it marks a watershed in the transfer of political sovereignty from King to parliament. Looked at from another perspective it shows how constitutional principles such as the rule of law and the separation of powers as well as parliamentary sovereignty are emerging embryonically.

The rule of law

The abolition of the crown’s suspending and dispensing powers removed the exercise of an arbitrary power available to the executive and established a measure of equality before the law as the King was no longer above the law.

The separation of powers

By removing the prerogative power to tax this role was in future reserved to parliament or the legislature and not the executive. Parliament also claimed freedom of speech in its own proceedings which could not be questioned in court or elsewhere. This limited the role of the executive and judiciary in favour of the legislature.

Parliamentary sovereignty

The Bill established that elections should be free and parliament should meet frequently which together with the sole power to impose taxes and the right not to have its laws interfered with by the King tilted the balance in parliament’s favour permanently.

Political Sovereignty and Legal Sovereignty

Up till now we are talking about political sovereignty.

Then in the 19th century in 1886 Dicey (a legal writer) drew a distinction between political and legal sovereignty.

-Political sovereignty rested with the people.

-Legal sovereignty rested with the Queen in Parliament (Lords and Commons).

By this he meant that a Court in England (where there was no written constitution to say where sovereignty or power lay) would only recognise and enforce an Act of Parliament passed by both Lords and Commons and with Royal Assent.

This is what modern writers mean by parliamentary sovereignty. Dicey's definition of parliamentary sovereignty is crucial to an understanding of the UK constitution. He identified three aspects:

- **Parliament has the right to make any law whatever**
- **legislation by Parliament can not be overridden by any other body**
- **Parliament can not bind its successors**

Modern Times

Dicey's doctrine of parliamentary sovereignty reflected the reality when Britain was at the height of its power and at the head of an empire. Modern constitutional law involves an examination of how far this doctrine (couched in absolute terms by Dicey) has remained intact or has had to adjust to 20th and 21st century developments.

Examples of how Dicey's theory now has to be modified are:

1. Legal sovereignty is geographically limited by the granting of independence to former colonies. Further limitations have now arisen in practical terms as a result of devolution within the UK.
2. Legal sovereignty is limited by the European Communities Act 1972 which requires UK Courts to apply EU Law in accordance with principles laid down by the ECJ. The doctrine of implied repeal does not apply to EU Law.
3. The Human Rights Act 1998 has resulted in further change. Whilst a system of statutory interpretation has been devised to preserve the principle of parliamentary supremacy the status of the European Convention on Human Rights is now increased and English Courts will be implementing a code of human rights and adopting the jurisprudence of the Convention which have their origin outside the UK. The Act introduces a system of 'statements of compatibility' which puts government and parliament under political pressure to legislate compatibly with the Convention.

And finally

Dicey's doctrine was until recently still quoted in the courts. Examples are Lord Reid in **Madzimbamuto v Lardner-Burke** 1968 Lords:

“It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.”

And Lord Reid again in **Pickin v British Railways Board** 1974 Lords:

“In earlier times many learned lawyers seemed to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.”

However other lawyers have argued that limits on parliamentary sovereignty should be recognised and that courts should not uphold statutes which for example attacked

- democracy (by abolishing elections) TRS Allen
- the rule of law (by abolishing judicial review) Lord Woolf
- fundamental freedoms (by abolishing freedom of expression) Sir John Laws

This trend of arguing for limits to parliamentary sovereignty has now received judicial recognition (albeit in obiter comments) in **R (Jackson) v A G** 2005 Lords (upholding the Hunting Act 2004) when Lord Hope said:

“...parliamentary sovereignty is no longer, if it ever was, absolute. ...It is no longer right to say that (parliament’s) freedom to legislate admits of no qualification whatever...The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”

Lord Steyn in the same case added:

“The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

Links

Parliamentary Sovereignty plays a central role in Britain’s unwritten constitution. As a result it links with other important constitutional topics. These are set out in Units 3 and

4 in Manual 1. Explore how the theory of Parliamentary Sovereignty works in practice. See if you can find the answers to these questions:

- 1) Can Parliament bind its successors? This topic covers implied repeal and the 'manner and form' argument raised in **Trethowan** and discussed in **R (Jackson) v A G** 2005 Lords (upholding the Hunting Act 2004).
- 2) Are Parliamentary Sovereignty and the Human Rights Act 1998 compatible?
- 3) Can Parliament give up sovereignty? (ie through devolution).
- 4) What is the relationship between Parliamentary Sovereignty and European Union Law? (**Factortame No 2**).