

Parliamentary derives  
from Dicey's, his  
perspectives of  
parliament



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Parliamentary sovereignty is the most critical piece of the UK constitution.

It was imagined amid the time of William III and Mary II who came to position of royalty through sacrificing their own power and giving it to parliament, as a result, the monarch's power of royal prerogative is right under parliament in the late 17th and early 18th century. <sup>1</sup> This condition can be found in the Bill of Rights 1688, which expressed laws must be made or revoked by Parliament and not by the Monarch alone <sup>2</sup>. Custom perspectives of parliamentary sovereignty derives from Dicey's, his perspectives of parliament are the following; the first being that parliament is the ultimate law-making institution and may sanction any law, the second being is that no parliament is to be bound by a forerunner nor bind a future successor and the remainder of Dicey's principles is that no individual or body may inquire the validity and legitimacy of law <sup>3</sup>. This essay will discuss whether these views remain accurate. In the R (on the application of Evans) v Attorney General 2015 UKSC 21, the Attorney General, whom is a Government Minister, exercised his entitlement to veto a Tribunal ruling under s. 53 (2) of the Freedom of information Act 2000.

Judicial review took place and it upheld the veto, <sup>4</sup> at this point the issue proceeded to the Supreme Court (SC) which overrode the judicial review <sup>5</sup>. It was then stated there was no grounds for the veto and that Section 53(2) was contrary with EU law. <sup>6</sup> The significance of the R v Attorney General is that this judgment gives an idea to the degree to which it is lawfully and legitimate for a court practicing forces of judicial review to strike down a Government Minister's decision made under the powers allowed by Parliament to overturn a tribunal's judgment. <sup>7</sup> Since the SC overrode the

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judicial review and decided that the Minister had no ground to exercise his power of veto, it means that it is illegitimate for a court to deny Parliament's will, this will be Parliament allowing this to use the power of veto. It can be argued that Dicey's doctrine is not accurate as the courts used their power to deny a government minister his power that was expressly given by an act of Parliament, and so the courts questioned the validity of an act of Parliament.

Furthermore, *Jackson v Attorney General* contained the thought from judges acting in their official capacity, that courts may have the power to strike down an Act of Parliament in the event of a violation of constitutional principles.<sup>8</sup> Therefore a body such as a court can question the legitimacy of laws passed by Parliament. In this case, three law lords suggested that the courts had the power to strike down legislation.<sup>9</sup> One example is Lord Steyn said "It (parliamentary supremacy) 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."

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts".<sup>10</sup> This suggests that the courts do have the ability to question Parliament and the laws it makes revolving around the Judiciary. And so both cases referenced above resulted in a challenge to the customary perspective of parliamentary sovereignty, this being that no person or body such as a court or institution may question the validity of law.

However, although it may seem as if the court decisions are going against sovereignty and the Dicey doctrine, the case *R (On the Application of Miller)* <https://assignbuster.com/parliamentary-derives-from-diceys-his-perspectives-of-parliament/>

v Secretary of State for Exiting the European Union 2017 UKSC 5 shows that the court's decision upheld the Diceyan Doctrine. In the R v Secretary of State for Exiting the European Union, there was an issue that the Government utilising prerogative powers to trigger article 50 and whether this could be utilised to trigger article 50. 11 The Supreme Court recognised that there was an essential guideline of the UK's constitution, this being that Parliament is sovereign and can make and unmake laws, and that, the ECA 1972 it is an entrenched rule that the government cannot supersede using prerogative powers.

It was held that Parliament must trigger article 50 as the ECA 1972 is an independent source of law, and so parliament may only choose when to reject this independent source of law. 12 In addition to this, it was held that the EU provided citizens with certain rights, and therefore only Parliament is authorised to revoke this. 13 This is a crucial case as this case is new, the Supreme Court making a decision in 2017 that upheld the Diceyan Doctrine, being that Parliament is the supreme law-making body and only it can make and unmake laws. However, we must consider the position of parliament before the EU referendum and R v Secretary of State for Exiting the European Union .

during this situation, the Diceyan Doctrine remained inaccurate through being the European Communities Act 1972 (ECA). The ECA allowed the United Kingdom to become a member of the European Union. It also gave way to EU law superseding UK and therefore, takes precedence over national law.

14 This means that parliament is no longer the supreme law-making body as the EU now makes law that Parliament cannot supersede. An example that <https://assignbuster.com/parliamentary-derives-from-diceys-his-perspectives-of-parliament/>

shows Diceyan doctrine being inaccurate, this account being that parliament is supreme law-making body and that no person or body such as a court can question the validity of law is the factor in the case. In *R (Factortame Ltd) v Secretary of State for Transport*, the European Court of Justice (ECJ) addressed the legitimacy of the Merchant Shipping Act (MSA) 1988, which was announced to protect British fishermen.

15 It was said by the High court and later raised to the ECJ, that MSA dishonoured the Treaty of Rome 1957 which created the European Economic Community. 16 Here is a case of how the EU prevented a parliamentary act from having an impact, and so it demonstrates that parliament is not the preeminent law making body as the MSA was announced incompatible with EU law, thus the MSA should be negated. It indicates how a court, in this case, the European court of justice, can question the validity of an MSA act introduced by Parliament.

Therefore, this shows Dicey's account of parliament being inaccurate.

However, one may argue that Parliament consented to this dominion and could easily repeal the ECA 1972, and so Parliament's sovereignty is not lost and Dicey's account would thereafter be accurate. This is currently happening, the European Union (Withdrawal) Bill which would repeal the ECA.

17 Once this Bill receives royal assent, the UK will no longer be subjugated to EU law and the European court of justice and so, parliament will once more be the supreme law making body and no institution can question the validity of law. Therefore, Dicey's doctrine remains accurate. The Human Rights Act 1988 does not have an entrenched status and, can be amended or repealed

based on a parliamentary majority, thus it can be considered not to be destructive to Parliamentary sovereignty.

18 However, Section 4 of the Act, allows the issuing of a declaration of incompatibility to an act of Parliament in relation to human rights from the higher courts. 19 This allows courts to consider that the terms of a statute, acts of public authority that Parliament has passed, and decide whether it is incompatible with the UK's commitments under the Human Rights Act 1998. 20 So this suggests that the Diceyan Doctrine is not accurate as it goes against the idea that no person or body such as a court can question the validity of an act of Parliament.

However in terms of declaration of incompatibility, it simply demonstrates the act of Parliament is contrary with the European Convention of Human Rights, it does not negate the statute as Parliament must decide whether it wishes to amend the act. 21 To illustrate this point further, under Section 10 of the Human Rights Act, a Minister of the Crown may make such an amendment to primary legislation as are viewed as important to withdraw the incompatibility. 22 Therefore it can be argued that the courts cannot strike down an Act of Parliament as Parliament has a legal right to fix the issue and so the Diceyan doctrine is still accurate. As indicated by the Diceyan Doctrine, Parliament may not be bound by its predecessors or bind its successors. This is mostly shown through the Doctrine of implied Repeal. This is when an Act of Parliament conflicts with an earlier act, the later Act takes precedence, it is judges who give effect to this.

. Through this, it has guaranteed that no parliament is bound or binds. In *Vauxhall Homes Ltd v Liverpool Corporation*, the court held that the Housing Act 1925 impliedly repealed the conflicting provision in the Acquisition of Land Act 1919. This shows the supremacy of parliament, this being that no parliament can bind a future parliament. Therefore, the Diceyan Doctrine remains accurate. In conclusion, the doctrine of Parliamentary sovereignty appears to have come full circle since Dicey first characterised it. The Diceyan doctrine has been a series of challenges such as the EU. However, there has also been a series of acceptance of the Diceyan Doctrine, such as the Miller case.

Yet, in practice the three elements that Diceyan doctrine have held up extraordinarily well. 1 Alisdair Gillespie and Siobahn Weare, *The English legal System*, (6th Edn, OUP 2015) 2 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (first ed 1999) 3 Ibid 14 Teresa Lucaelli "The Constitutional Aspect" in *Evans v Attorney General* 5 Alison Young, 'R (Evans) v Attorney General 2015 UKSC 21 - the Anisminic of the 21st Century?' U. K. Const.

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the European Union 2017 UKSC 512<sup>13</sup><sup>14</sup> Alisdair Gillespie and Siobahn Weare, *The English legal System*, (6th Edn, OUP 2015) 15 Nick Barber *International Journal of Constitutional Law*, The afterlife of Parliamentary sovereignty, Volume 9, Issue 1, 1 January 2011, 16 *R (Factortame Ltd) v Secretary of State for Transport* 2003 Q.

B. 381 2002 3W. L. R.

1104 17 William James, Michael Holden, 'Charming Bastard' David Davis to lead Brexit talks, Reuters 2017<sup>18</sup> Mark Elliot & Robert Thomas, *Public law* (3rd Edn, OUP, 2017) 19 Nick Barber *International Journal of Constitutional Law*, The afterlife of Parliamentary sovereignty, Volume 9, Issue 1, 1 January 2011<sup>20</sup><sup>21</sup> Humberto Ávila, *Certainty in Law*, 1st ed, 22<sup>22</sup><sup>23</sup> *ibid* n 19