

Av dicey's definition of parliamentary sovereignty



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Introduction

A. V. Dicey's traditional definition of parliamentary sovereignty cast Parliament as the supreme legislative force in the British constitution.[1] The verdict was given in 1885, prior to many of the pressing constitutional changes of the twentieth century. His definition had three aspects. First, Parliament is the supreme law-maker, entitled to formulate and pass any law that it wishes. Second, the supremacy of legislation means that no other constitutional body, including the courts, can question it. Third, no Parliament is able to bind its successors or alternatively been bound by its predecessors. This essay will assess the traditional Diceyan view in the context of modern developments.

Parliament as supreme law-maker

Parliament's status as the only body able to formulate and pass legislation has its roots in the conflict between the monarchy and the legislature in the seventeenth century, when the king attempted to rule by prerogative. The Bill of Rights that followed in 1689 subordinated the monarchy and the judiciary to Parliament's supreme law-making power.[2] Parliament can even go so far as to pass laws with retrospective force, as it did with the War Damage Act 1965 to deny compensation to an oil company whose installations had been damaged during the Second World War.[3]

In the recent landmark case of *R (Jackson) v AG*,[4] Parliament's ability to use the Parliament Act 1911 to amend the Parliament Act 1949 was questioned in the light of the controversial Hunting Act of 2004. This would have represented an existential challenge to parliamentary supremacy. However, the House of Lords concluded that in fact there were no limits to the type of <https://assignbuster.com/av-diceys-definition-of-parliamentary-sovereignty/>

laws that Parliament could pass using the Parliament Acts, except where Parliament had limited itself by limitations in the legislation.

It may be argued that the trend towards devolution does in fact serve to undermine Parliament's supreme position. However, it is perhaps truer to say that devolution limits Parliament's jurisdiction rather than its authority. The most powerful devolved body, the Scottish Parliament, has carved out powers over many areas including health policy and criminal justice, but can scarcely be regarded as a 'rival' to a Parliament whose authority delegated those powers in the first place.[5] In the light of the recent independence referendum the Scottish Parliament will expand its remit further, but will not be able to overrule Westminster where the UK Parliament retains jurisdiction. [6]

Deference to Acts of Parliament

The deference of the executive and judiciary to Parliament is underpinned by the Bill of Rights 1689, which drastically reduced monarchical power and prevented the courts from overruling statute with common law.[7]

The House of Lords in *Jackson* was keen to stress that while it was free to interpret the wording of the Hunting Act 2004, it could not question the standing of Parliament by challenging the law itself with reference to the earlier Parliament Acts. Although the case was controversial, the House of Lords' approach in fact neatly illustrated the supremacy of Acts of Parliament. Unlike the US system, there can be no recourse to a supreme court to plead on the 'unconstitutional' nature of legislation. Indeed, the traditional view of supremacy was confirmed in the case of *Pickin v British*

Railways Board,[8] in which the House of Lords had declared that the courts had no power to challenge the validity of an Act of Parliament (this is sometimes known as the 'enrolled bill rule').

Arguably, the only challenge to the validity of Acts of Parliament now emanates from the European Union, whose Court of Justice can strike down Member State legislation which does not accord with EU primary legislation. This was evident in the infamous Factortame case [9], in which it was held that the UK's Merchant Shipping Act 1988 - designed to prevent Spanish trawlers from fishing in British waters by registering their boats as British - was invalid because it derogated from EU law, which is supreme over national law. For the UK Parliament this painfully illustrated the vulnerability of Acts of Parliament to scrutiny by an outside body.[10]

However, it is doubtful that the episode presents an existential challenge to parliamentary supremacy because at any time Parliament could itself extricate itself from EU scrutiny by legislating to leave the European Union. Nor does the Human Rights Act 1998 pose a real challenge to supremacy. As one commentator points out, Parliament is free to choose not to amend a provision of the Act even when it has been declared incompatible with the European Convention on Human Rights by a judge.[11]

The principle of binding successive parliaments

It has been suggested on the basis of 'constitutional' nature of the European Communities Act 1972- which incorporates the law of the EU into the domestic law of the UK - that in practical terms Parliament is not free to repeal all the legislation of its predecessors.[12]

In *Thoburn v Sunderland City Council*,^[13] Lord Justice Laws suggested that there were a variety of so-called 'constitutional' statutes (including the ECA 1972) that Parliament could only expressly repeal, but not impliedly. On the face of it, this seemed to produce a measure of uncertainty both with regard to which statutes were in fact 'constitutional' statutes, and whether 'implied' repeal could be challenged in the courts.

In fact, given the established convention that the courts cannot question the validity of Acts of Parliament (including those that repeal previous Acts), it is doubtful that even implied repeal could give rise to conflict. In any event, Parliament could simply legislate to expressly repeal certain statutes such as the ECA 1972 that were regarded in *Thoburn* as 'constitutional'.

Further, it is doubtful that executive dominance (the so-called 'elective dictatorship') could compromise the principle of not binding successor Parliaments because the executive does not have statutory tools at its disposal that could override Acts of Parliament.

Conclusion

There is no doubt that certain constitutional developments of the twentieth and first part of the current century, particularly in relation to the UK's membership of the European Union and the tendency towards devolution in Scotland, Wales and Northern Ireland, have provided a series of challenges to the traditional Diceyan view of parliamentary supremacy. Nevertheless, in practice the three elements that Dicey espouses have held up remarkably well, and it will be intriguing to see if this continues.

Bibliography

Case Law

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- *Pickin v British Railways Board* [1974] AC 765 HL
- *R (Jackson) v AG* [2005] UKHL 56
- *R v Secretary of State for Transport ex p. Factortame* [1990] UKHL 7
- *Thoburn v Sunderland City Council* [2002] EWHC 195

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- Human Rights Act 1998
- Parliament Act 1911
- Parliament Act 1947
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Footnotes

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3. *Burmah Oil v Lord Advocate* [1965] AC 75 HL
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7. Michael Allen & Brian Thompson, Cases and Materials on Constitutional and Administrative Law (10th ed, OUP, 2011) 55
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9. *R v Secretary of State for Transport ex p. Factortame* [1990] UKHL 7
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11. Adam Tomkins, Public Law (2003, OUP) 122

12. Unauthored case comment, ' Constitutional law: status of the ECA' in Public Law (2002) June 351
13. [2002] EWHC 195