

As the sovereignty of parliament



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The doctrine of precedent plays a vital role in the English law because of common law tradition which is the main source for English law. However, British people believe that there is nothing important than Westminster Parliament, because Parliament can decide anything with a simple majority and it is the supreme legal authority which creates or ends any law. The idea of Parliament sovereignty is very powerful in creating the democratic society and is more complete in England than practically else in the world. However, in this essay I will discuss the role of the doctrine of precedent in the English law where the idea of Parliament sovereignty confronts to the traditions of common law system. Moreover, I will show how European Union law does affect the Parliament sovereignty in England. Finally the conclusion of the whole topic will be provided and summarized.

The doctrine of precedent

The doctrine of precedent term is used in common law tradition countries. Common law is a system of law that prevails in England. The name is derived from the medieval theory that the law administered by the king's courts represented the common system of the realm, as opposed to the custom of local jurisdiction that was applied in local or manorial courts. (Malika M. 2010) Later as a result of British colonization, common law was adopted in many countries such as Australia, India, Hong Kong, and East Asia. In common tradition countries the cases are resolved according to the previous cases – precedents, which show the principle of stare decisis, or also known as the doctrine of precedents which means decide similar cases similarly. Moreover, cases are the primary sources of English law in decision making

process; hence the courts will resolve problems quicker because they can just apply precedents to matter by using this database.

The principle of the doctrine of precedent wasn't always applied strictly. In medieval England, courts investigate earlier cases for assistance but they could reject those which were considered a bad law. Moreover, due to the fact that there was a lack of reliable written reports of cases, courts pay less attention on the previous decisions. Only in early 1800s in the United States official reports of cases began to be available, but until 1865 semiofficial reports were not produced in England at all. When, finally reports became available for lawyers and judges in England, they could more accurately interpret prior decisions.

For the doctrine of precedent to be effective, each jurisdiction must have one highest court to declare what the law is in a precedent-setting case.

Whatever courts decide becomes judicial precedent or it is also known as judge made law. According to Wisegeek this term developed from the fact whereas legislation is passed in the majority of the countries by a separate legislative branch, when the courts are able " to exercise a moderate amount of quasi-legislative power through the use of precedent and case law" (Wisegeek, 2008). Sometimes, a judge may purposely act against established case law in an effort to begin the process of re-examining a precedent and maybe totally changing it. However, the judge will face with problem of rigidity in common law system; because he or she has to push the case into higher courts where the old established precedents should be re-examined in favor of a new outlook. According to Legal-Directory. net, internet resource, " the possibility that case-law will be abrogated or

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modified by legislation alleviates the disadvantage of rigidity to some degree, but in practice it is rare for the legislation to interfere with case-law.” However, according to my opinion, rigidity will promote the quickness of decision making process.

Parliament Sovereignty according to the Diceyan theory

The concept of Parliament sovereignty can be drawn from the “ glorious revolution” with the Bill of Rights in 1689. The principal provisions of the “ Bill of Rights” are the following; 1) the Crown is not allowed to suspend or execute laws without parliamentary consent 2) the use of money by the Crown without parliamentary consent is illegal 3) the elections of members of Parliament have to be free 4) jury trial must be available 5) raising or keeping an army in peacetime without parliamentary consent are illegal. However, we can see the promotion of Parliament power in every part of the England life.

The constitutional structure in modern England is not complex. Moreover UK doesn't have written or codified single document which is called constitution. Main principle of the British constitution can be expressed in a bald and fair manner. According to source, “ A statute, that is a piece of legislation produced by Parliament, is generally regarded as the highest form of law within the British constitutional structure.” The Westminster Parliament is considered as a sovereign law-maker.

In order to describe the concept of parliamentary sovereignty, we will use the Orthodox theory.

In the late XIX century this legal theory was developed by an Oxford law professor, A. V. Dicey, in the first edition of his textbook, An introduction to the study of the law of the constitution. Dicey exerted great influence on British constitutional law, but many legal scholars thought that it was untrue because Dicey could not express the concept of democracy as it is now understood. For instance, Dicey thought that during Parliamentary elections women and working class people can not vote. However, it is important to understand the basic features of his theory. Dicey suggested that the parliamentary sovereignty has two features - a positive and a negative one.

The positive and negative points of Dicey's theory

Positive point of Diceyan's theory of parliamentary sovereignty is well expressed in the following concept that Parliament can produce or abolish any law they want with a simple majority of votes of the House of Commons' members. In addition any particular bill is then approved by both members in the House of Lords and by the Monarch, thereafter the bill becomes an Act, irrespective of its contents.

There are no limits used to the substance of statute law in technical legal terms; " Parliament can make law that it wishes". Surprisingly it doesn't matter how big the majority in Parliament it is for particular measure; " an Act passed by a majority of one in both the House of Commons and the parliamentary sovereignty House of Lords is an authoritative as legislation which receives unanimous support." In this case we can measure that there is no distinction between ' ordinary' and ' constitutional' (or ' fundamental') law. Parliament may behave itself just in the same way while it deals with

ordinary issues or of no particular importance issue, or in case of vitally important matters.

The negative point proposition can be expressed in the following way that an Act of Westminster Parliament cannot be abolished or changed by any British courts. There is no special procedure in British constitution which states that an Act of Parliament can be legally invalid. However if the statute was established and approved by Parliament, nobody can change it, even constitution of UK, because we face here with the pure Parliament sovereignty conception. According to the Diceyan theory “ there is no higher form of law than the will of Parliament”.

European Union law and its effect on the Parliament Sovereignty

The Law of EU is very unique and special system in the world. Any legal acts, directives, decisions or regulations which are made by European Parliament have a binding force for all Members of Union. It is obvious that if Court of Justice of the European Union made any decision on a particular case, henceforth it becomes a judicial precedent for those members who follow the common law traditions including England.

The parliament sovereignty in the England system is strongly affected by UK's membership of the European Union. As we discussed that the laws of the EU has a binding force on all member states it is logical to say that it takes precedent over English domestic law. Moreover, EU legislation automatically becomes law in UK including England irrespective of the opinion of Westminster Parliament. However, parliament could agree to

abolish previous legislation or quit the EU to demonstrate the existence of parliament sovereignty.

English sovereignty has lost its power since the 1986 when the Single European Act and the Maastricht Treaty was adopted where the range of policy areas was extended on which EU can legislate. Thereafter many British Conservative members of the European Parliament think that they should be dealt with at a national level and they continually vote against many proposals and it is not because of members' disagreements they just want to show the national coherence.

Conclusion