Essay – Constitutional Law

If Parliamentary sovereignty exists, should we now think of it as a constitutional archaism and no longer as a defining feature of the British constitution?

Introduction

The traditional view of Parliamentary sovereignty, as defined by Dicey, prescribes that ‘Parliament has [...] the right to make or unmake any law whatever’ and ‘no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament’.

This essay will argue that Parliamentary sovereignty indeed still exists, as the doctrine clearly influences Parliamentary and judicial conduct, however Dicey’s definition of sovereignty as entirely unlimited is an inaccurate reflection of modern constitutionalism. In order to understand this fully, we cannot view sovereignty through a purely ‘legal lens’\(^1\), and must take a more realistic approach when analyzing the presented evidence.

EU membership

The European Communities Act 1972 provided a mechanism through which European Union (‘EU’) law could be incorporated into British law without further legislation from Parliament; specifically, s2(1) and s2(4) give effect to EU law in the UK\(^2\). The EU expects a high level of deference from its Members States, and this is reflected by Section 3 of the Act, which allows the judiciary to take into account European Court of Justice (‘ECJ’) rulings, and could be presented as authorizing a transfer of judicial alliance from the UK Parliament to the ECJ.

Section 18 of the European Union Act 2011 reinforces the idea that Parliament is legally acknowledged as sovereign. However, Barber asserts that the post-1991 constraints on sovereignty are greater than before 1991\(^3\). It is interesting that his distinction is based on Factortame, and not between a pre-1972 Act and post-1972. This supports Salmond’s idea that ‘if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute’\(^4\). Therefore, we must consider sovereignty beyond its statutory prescriptions.

Factortame confirmed the supremacy of Community law, and granted interim relief to appellants claiming that Parliament’s Merchant Shipping Act 1998 infringed on their rights under the EU Treaties. This was based on the ECJ’s preliminary ruling that “Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule”\(^5\). S2(4) and s3(1) of the 1972 Act thus had the combined effect of obliging courts to dis-apply legislation which is inconsistent with EU law.

\(^1\) Elliott: ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’
\(^2\) European Communities Act 1972 gives effect to all ‘rights, powers, liabilities, obligations and restrictions’ arising under EU law.
\(^3\) N W Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011)
\(^4\) Turpin and Tomkins, p. 58-96
\(^5\) R v Secretary of State for Transport ex p Factortame (No.2) [1991] AC 603 page 644
Lord Bridge stated that ‘whatever limitation of its sovereignty Parliament accepted when it enacted the ECA1972 was entirely voluntary’. Wade considers that this idea of voluntary acceptance goes deeply into the ‘foundations of the constitution’, and amounted to a revolutionary action by the judiciary which fettered Parliament’s sovereignty. If, as Elliott recommends we divorce the definition of constitution and law, Wade’s point may, contrary to his main argument, support the conclusion that the doctrine has not undergone a revolutionary change on the part of the judges. Instead, as Allan contends, it is merely an evolutionary change; Parliament’s constitutional limits have been revised, as is allowed by the uncodified nature of our constitution, but their legal powers are unchanged— they are still able to legislate contrary to judicial decisions, and repeal legislation enacted by previous Parliaments, should they so choose.

Craig asserts that the fact that National courts have general jurisdiction over matters of EU law increases the impact of EU law over national constitutional law. Following on from Craig, whilst this principle has been confirmed in cases such as HS2, it is particularly important to turn our considerations towards Thoburn v Sunderland City Council, as this reflects a limitation on parliament not merely through declarations of the EU but also principles inherent to the British common law system irrespective of EU membership.

In Thoburn, the constitutional nature of the 1972 Act was confirmed; of course, this principle was established in Simms, however Thoburn acknowledged specifically that ‘The 1972 Act is a constitutional statute: that is, it cannot be impliedly repealed’. This illustrates the fetter on Parliament resulting from the 1972 Act, as well as the general fetter that has been established within the common law.

Furthermore, Barber and Young discuss the impact on sovereignty of prospective Henry VIII clauses. In Thoburn, ‘s.2(2), read alongside s.2(4), empowers the executive to alter statutes in order to bring UK law into line with Community obligations’, thus allowing a ‘limited fetter to be placed on future Parliaments, though it remains open to the legislature to alter the empowering Act. Such limitations imposed by the judiciary modify Dicey’s statement, seeming to imply that Parliament can only ‘make or unmake’ any constitutional law whatever if they do so expressly.

An interesting point of note, which will not be discussed in the same level of detail is the maintenance of the principle the ECJ decisions are binding on national courts, in Davis, despite the political unrest regarding EU membership that arose around this time (which is reflected by the passing of the 2015 Referendum Act less than one month after the judgement was published); this illustrates strength of the constitutional fetter on Parliament, a body intended to represent the public will, despite their maintenance of legislative capability.

The Human Rights Act 1998 will not be discussed as it can be considered an extension of EU law, and suffers the same challenges of constitutional nature and limitation as the 1972 statute.

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6 Wade: ‘Sovereignty- Revolution or Evolution?’ [1996]
7 Elliott: ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’
9 Wade: ‘Sovereignty- Revolution or Evolution?’ [1996]
10 Thoburn Sunderland District Council [2002] EWHC 195 p.69
11 Barber and Young, ‘The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty’ (2003) page 3
12 R (Davis) Secretary of State for the Home Department [2015]
Devolution

Blair’s constitutional reforms of 1998 included a process of devolution, which established the Scottish Parliament, and the Assemblies of Northern Ireland and Wales. These devolved legislatures have their own competences, on which Westminster, by convention, will not infringe without a legislative consent motion. This is an obvious source of doubt over the sovereignty of Parliament, especially since the Sewel Convention has gained statutory recognition via the Scotland Act 2016. However, Elliott’s submission that this should be considered a sharing, rather than a sacrifice, of legislative power seems an accurate analysis. Lord Hope’s statement in *AXA*, that ‘Devolution is an exercise of its law-making power by the United Kingdom Parliament at Westminster’, supports this conclusion. The devolved bodies’ authority is dependent on authorization of Parliament via the Acts which established the bodies, and Parliament is legally entitled to repeal whatever legislation it wishes (albeit expressly, not impliedly). However, Elliott’s assertion that legal entitlement does not mean that Parliament is constitutionally entitled is particularly relevant here, as it is not unthinkable that any attempts by Parliament to act as such could result in, for example, a second and far more convincing cry for Scottish independence.

Interestingly, the majority ruling in *Miller* on the Sewel Convention could be seen as confirming Parliament’s maintenance of legal sovereignty despite devolution, as well as in regard to EU membership. Whilst the court refused to adjudicate on the matter, as the statutory acknowledgement of the convention did not alter the fact that it was a political convention, the judgement did indicate an opinion against the submissions of the devolved legislatures in *Miller*. This was evident during reference to the lack of legislative consent motions in regard to ‘legislation which implements changes to the competences of EU institutions and thereby affects devolved competences’. This further supports the conclusions already drawn- it is reflective of a Parliament which is legally entitled in accordance with Dicey’s doctrine, but in reality, is more limited than the doctrine would allow.

Parliament Acts 1911 and 1949

The Parliament Act 1911 conferred power on the Commons to pass legislation without approval of the Lords, and the Parliament Act 1949 further limited the Lords’ power to frustrate the passing of legislation with Commons approval by reducing their delay power to one year. The influence of the Parliament Acts on sovereignty was an issue discussed in *Jackson*, which upheld the validity of the 1949 Act and the 2004 Hunting Act, on the basis that section 2(1) of the 1911 Act indicated its scope and allowed its use for expansion of its own powers.

Young asserts that the result of *Jackson* could be considered an indication that the Parliament of 1911 bound its successors in manner and form, and that ‘Parliament wishing to overturn’ the provisions of section 2(1) of the Act can only ‘do so by adopting a specific manner and form-legislation that has the consent of the House of Lords as opposed to legislation passed without its consent’, and thus departs from Dicey’s conception of sovereignty. This seems like a bizarre conclusion, as whilst Parliament is technically bound in manner in form in regard to section 2(1)’s provisions, that manner is merely the original procedure for passing legislation. Therefore, it appears that Young considers that Dicey’s conception of sovereignty is potentially violated by a mandatory

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13 Elliott: ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’
14 *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 p.45
15 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 p.140
16 *Jackson v HM Attorney-General* [2005] UKHL 56
17 Young ‘Hunting Sovereignty: Jackson v A-G’ (2006) page 4
reversion to the standard manner and form implemented by Parliament at the time of Dicey’s writing.

In the alternative, Young submits that the same practical effect of entrenchment as described previously can be achieved whilst preserving supremacy, through modifications of the rule of recognition\(^\text{18}\). This seems unconvincing in light of *Miller*, whereby a point of contention between the majority and dissent opinions was the effect of the ruling on the rule of recognition, with the majority stating that they ‘would not accept that the fundamental rule had been varied by the 1972 Act, as parliamentary sovereignty prevails’ \(^\text{19}\). It seems unlikely that the rule of recognition was not varied by the 1972 Act, but was varied by the 1911 Act; the original authority of both statutes draws from Parliament in its three-part form, allowing the admission of different forms of legislation to the statute book without wavering sovereignty. *Jackson* refused the submission that the 1911 Act created a delegated legislative body, however the same was denied in *Miller*. In fact, this is of even greater significance in *Miller*, as whilst the legislation enacted via the Parliament Acts 1911 and 1949 is equal to an Act of Parliament, those laws drawn into UK law via the 1972 Act are considered to be superior to Acts of Parliament.

Whilst I submit that Young’s analysis does not seem overwhelmingly convincing, neither in favor of dismantled or preserved sovereignty, that is not to say that *Jackson* shows no support for the limited conception of sovereignty supported in this essay. In particular, the *dicta* of Lord Steyn and Lord Hope indicate the rule of law’s limit on sovereignty; this will be discussed in the following paragraph.

### The rule of law (and legality/rights...)

In *Jackson*, Lord Hope states that ‘Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute.’ And that ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution has based’ \(^\text{20}\).

I submit that Dicey’s definition of sovereignty could never have been accepted in isolation, as the rule of law is an equally defining feature of the British constitution which ensures that Parliament’s sovereign power could never have been considered truly unlimited. As Dicey considered the rule of law and sovereignty the twin pillars of the constitution, it can be assumed that Dicey’s definition of sovereignty operated within the sphere of the rule of law, and it would be an overly ambitious criticism of Dicey’s doctrine to conclude otherwise.

However, developments in the rule of law, such as the need to ‘afford adequate protection of fundamental human rights’ \(^\text{21}\), illustrate the way in which the principle is departing from Dicey’s conception. Just as we have seen a departure from Dicey’s rule of law, it is understandable that we so too can see a departure from his ideas about sovereignty. Alterations to sovereignty on this basis cannot be overstated, as sovereignty has always operated within the ambit allowed to it by the rule of law; therefore, we can observe a narrowing, but not fundamental change, to the doctrine. However, in conjunction with the other points made in this essay, we can clearly see a significant alteration to Parliament’s powers.

It may be considered that as parliamentary sovereignty comes from the common law, these changes may be constituted as ‘common law radicalism’ \(^\text{22}\); however, it seems more accurate to consider this

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\(^{18}\) Young ‘Hunting Sovereignty: Jackson v A-G’ (2006) page 5  
\(^{19}\) R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 p.60  
\(^{20}\) *Jackson* v *HM Attorney-General* (2005) UKHL 56 [104]-[107]  
\(^{21}\) Lord Bingham ‘The Rule of Law’ [2007] 66 CLJ 67  
\(^{22}\) Turpin and Tomkins, p. 58-96
another such evolutionary change as proposed by Allan. *Pickin* evidences the court’s understanding of their own limitations, as do the justifications of the court’s adjudication in *Jackson*. Therefore, whilst the courts have control over sovereignty, any such change is indicative of a more general trend which could (according to the previously analyzed legislation) be considered self-imposed by Parliament.

**Conclusion**

This has by no means been an exhaustive account of the potential limits on sovereignty that have arisen since 1972, however are reflective of the greatest points of contention for Dicey’s traditional conception. It can be concluded that Parliament is limited, due to emersion of ideas such as a hierarchy of statute, and the political entrenchment that many statutes possess. This may support an idea of a self-embracing sovereignty24; however, this would be an inaccurate conclusion on the basis of this essay. The limits placed by Parliament on its own sovereignty arise not from the specific provision of the legislation it passed, but rather the subject-matter and far reaching effects of such legislation, as well as changes in attitude that are reflected within the common law. Parliament’s ability to make or unmake any law it wants is thus most limited by factors external to Parliament, not limitations found within Westminster itself.

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23 *Pickin v British Railways Board* [1974] AC 745 and *Jackson v HM Attorney-General* [2005] UKHL 56