Dicey And Parliament Sovereignty In Modern United Kingdom

According to Albert Dicey, Parliament “has under the English constitution the right to make and unmake any law whatever; and further, that no person or body is recognized by the law of England as having as having the right to override or set aside the legislation of Parliament” [1]. This is known as the classic definition of the orthodox doctrine of parliamentary sovereignty. Parliamentary sovereignty essentially means that there is no legal limit to the laws Parliament may enact. In other words, any restraints it may face come from multiple political factors and not legal ones. However, since the UK is currently going through a constitutional crisis with the ramifications of Brexit (leaving the EU) I will argue that although parliamentary sovereignty will remain to be a general principle recent political and case development challenges Dicey’s statement-making it out of touch with the modern United Kingdom. [1: AV Dicey, An Introduction to the Study of Law of the Constitution (8th Ed, 1915) Chapter 1]

The UK is one of the few industrialized countries in the world with an uncodified constitution. There is no written document anywhere outlining citizens’ rights and obligations. However, when it comes to passing laws Parliament is still considered to be the ultimate supreme authority. Dicey maintained the traditional view of parliamentary sovereignty that states that politics will always proceed over law [2]. This falls under the first model in terms of sovereignty and the constitution and it is this one that is the most supportive of Dicey’s view. This model goes on to explain that the courts support the idea of express and implied repeal. Express repeal is when a recent Act of Parliament states that an earlier Act must be repealed. This represents that Parliament cannot bind itself as it can basically repeal any act they originally created. On the other hand, implied repeal is where an Act of Parliament contradicts an earlier Act. The two Acts are incompatible with one another, but it does not expressly repeal the earlier Act. This demonstrates that Parliament’s repealing powers are not limited to express repeals [3]. [2: Mark Elliott and Robert Thomas, Public Law (3rd Ed OUP, 2017) Chapter 5] [3: Elliot and Thomas (n 2) 356]

On the contrary, this model is problematic and challenges Dicey’s assertion in relation to parliamentary sovereignty. Firstly, it is riddled with limitations since it does not bode well with absolute and contingent entrenchment terms of the preservation of its special status. Repealing various acts such as the European Communities Act 1972, Parliament Acts 1911-1949, and the Human Rights Acts 1988 would have dire political consequences in the way the UK operates. Furthermore, the model that aligns with Dicey’s view is significantly undermined in case of law regarding Jackson v Attorney General [4]. [4: [2005] 1 AC 262]

In this case, the appellant claimed that the Hunting Act 2004 was made unlawfully as it was not passed by the House of Lords. He further claimed that the Parliament Act 1949 was passed unlawfully as it was also without their approval to allow bills to be automatically passed after one year of no approval. The primary issue in the Jackson case was whether the Parliament Act 1949 and the Hunting Act 2004 were lawful. Counsel for Jackson stated that it was invalid law. The validity of the 1949 Act turned to the interpretation of s 2. (1) of the 1911 Act which allowed that all legislation can become Acts of Parliament without consent of the House of Lords. Counsel for Jackson had argued that s. 2(1) did prevent the use of the Parliament Act 1911 to

pass the Parliament Act 1949. All legislation that was previously passed was delegated rather than primary. As a result, counsel for Jackson argued that s 2. (1) had a further implied limit [5]. However, it was argued in the House of Lords that the subsequent pieces of legislation followed the provisions of the 1911 Act. Lord Bingham in the lead judgment argued that it was lawful and that the Hunting Act 2004 was also passed lawfully and thus became valid. It followed the provisions of the 1911 Act. Legislation passed under the mechanisms of the Parliament Act was primary and not subordinate legislation [6]. The Jackson case represents that there may be limits to parliamentary sovereignty which greatly undermines the traditional orthodox doctrine that Dicey advocated for that it is unlimited in the UK. [5: Alison Young, 'Hunting sovereignty: Jackson v Her Majesty's Attorney-General' P.L., 2006, Sum 189] [6: [2005] 1 AC 262]

Another recent case that further challenges Dicey's propositions are Thoburn v Sunderland City Council [7]. In this case, the Weights and Measures Act 1985 s.1 was originally enacted for the continued use of the imperial or the metric measures; however, it was not impliedly repealed by the European Communities Act 1972 s. 2(2). The appellants argued at the Divisional Court that the above conditions were unlawful as s. 1 of the 1985 Act impliedly repealed s. 2 (2) of the 1972 Act as it has proceeded with subordinate legislation [8]. The courts ruled while dismissing the appeals that the 1985 Act has not impliedly repealed s. 2(2) of the 1972 Act. The judges in the majority ruling argued that there is a hierarchy of statutes that consists of regular that can be impliedly repealed and constitutional which can be expressly repealed. The EC Act 1972 was classified as a "constitutional" statute [9]. It can also be said to have taken a constructivist approach where interpretation will be used to ensure that later statutes are interpreted in a way that does not conflict with an earlier one [10]. [7: [2003] QB 151] [8: Ibid] [9: Ibid 45] [10: Young (n 6) 182]

The Jackson and Thoburn cases demonstrated some of the issues with Dicey's first two propositions. These cases exemplify how sovereignty is no longer absolute. It is conditional and falls under political ramifications as is greatly evident with the UK leaving the EU. The impact of Brexit has posed further additional challenges to the notion of parliamentary sovereignty. In 2016, the UK underwent a great political shift in the referendum by voting unanimously to leave the European Union. Since then the UK has begun the process to withdraw its membership as a member of the EU state. The notion of parliamentary sovereignty in this phase is at its highest yet controversial state. It is the aspect of the domestic authority for notifying the European Council the decision to leave the EU based off the terms of Article 50 on the Treaty of European Union [11]. [11: Michael Gordan, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (Vol 27, No 3, King's Law Journal 2016) 338]

Essentially, the Article 50 challenge is about the government's ability to conduct foreign affairs and to sustain international relations as well as its royal prerogatives. There is a constitutional interaction in relation to the prerogative power that is enforced by the government in international and domestic affairs. In order for this to occur, it must be written down in statute [12]. Secondly, the post-Brexit effects has left the UK divided with Scotland and Northern Ireland voting to remain, and England and Wales voting to leave. This presents an opportunity for these countries to a veto over Brexit; however, with the scheme of devolution (Parliament transferring its powers to a subordinate body) countries like Scotland may pursue alternative constitutional engagements by exploiting their positions in obtaining an influence in the Brexit negotiations. In other words, the devolution schema presents further opportunities and influence for the remain and leave nations in the era of Brexit which goes against Dicey's propositions. [12: Ibid 338]

Overall, Dicey made a significant statement about the rule of Parliament and how it legislates its power across the UK. However, recent case and political ramifications like Jackson, Thoburn, and Brexit suggests that his propositions maybe out of touch with a modern UK despite how large his influence is to constitutional lawyers. He disregarded basic human rights for citizens which hindered the development of a rights-based jurisprudence for nearly a century. He ignored Scotland's unique legal position and wrote off women's ability to vote in Ireland. The Gina Miller case is an example on the limitation of the prorogation of Parliament. The PM sought to rely on power that never came from Parliament and the courts struck down that prorogation was not from statute either. The ramifications of that case demonstrated that it really had nothing to do with an all-powerful Parliament as Dicey first claimed [13]. Due to all of this, the UK is unrecognizable than what Dicey first stated. [13: David Allen Green, 'Escaping the shadow of AV Dicey and putting Parliament in its place' (2019) accessed November 19, 2019]

Works Cited

1. AV Dicey, "An Introduction to the Study of the Law of the Constitution" (8th ed, 1915) Chapter 1
2. A Young, "Hunting sovereignty: Jackson v Her Majesty's Attorney-General" P.L. 2006, Sum 189
3. D Allen Greene, "Escaping the shadow of AV Dicey and putting Parliament in its place" 12 Nov 2019 https://www.prospectmagazine.co.uk/magazine/escaping-the-shadow-of-av-dicey-and-putting-parliament-in-its-place-constitution-law-david-allen-green
4. Jackson v Attorney General [2006] 1 AC 262
5. M Elliot & R Thomas, "Public Law" (3rd ed OUP, 2017) Chapter 5
6. M Gordan, "The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (Vol 27, No 3, King's Law Journal 2016) 338
7. Thoburn v Sunderland City Council [2003] QB 151