

**(UK-5): 'The doctrine of Parliamentary sovereignty has been undermined by numerous factors'. Discuss.**

### **Introduction**

'Parliament' has many definitions, some of which being the 'government', 'the three branches', 'both Houses' or just 'the House of Commons' in some circumstances. There are many reasons why this can be the case but I will refer to 'Parliament' throughout this essay as being all three branches, the House of Commons, the House of Lords and finally the Monarchy. It is the supreme law-making body within the UK. Its main roles are representation and redress of grievances, legislating, scrutiny and deliberation. The House of Commons also has the role of recruiting ministers.

The House of Commons is the most democratic institute, whereby most of the work is taken place. It is made up 646 Members (MPs) who are all elected by a simple majority, using the First-Past-The-Post (FPTP) voting system. At the next election there will be 650. This ensures that constituents are governed by the representative they wish. There are three possible approaches of who they are accountable to. Firstly, him/herself, expressed by Burke, when he stated, "An MP owes you his judgement only"; his/her party under the Mandate Theory; or thirdly, and the most important in my view is the electorate under the Representational Theory.

The House of Lords is a very different institution. It is made up of heredity peers, life peers, law lords, and senior bishops of the Church of England, all of which are not elected. It has far less power than the House of Commons in many areas such as legitimation, but especially within the legislative process. This was stated in the Parliament Acts of 1911 and 1949, each decreasing its power consecutively, beginning at two years and resulting in it only being able to delay a bill for a year, and not withdrawing it. Furthermore, the Lords cannot reject economic bills. The *Salisbury Convention*, which came about from the working arrangements reached during the Labour Government of 1945-51<sup>1</sup>, ensured that Lords cannot oppose manifesto promises, although these points have never officially been written down.

The Monarchy is an important part of the legislation process, although today the monarch technically does not do anything and will always give assent to a bill. The Royal Assent Act 1961 stated that the monarch has the short title of the Bill that she is assenting<sup>2</sup>. This is legitimate and must proceed or laws would not exist, resulting in a chaotic environment. This idea is fundamentally a convention, meaning it is just tradition and is not written down anywhere.

Parliamentary Sovereignty is therefore a doctrine where no one can tell Parliament what to do. In other words, it is the 'boss', which can make any law it wants. Furthermore, it is not bound by previous Acts or Parliaments and likewise, not binding with future decisions or Parliaments, it has democratic legitimacy as defined by Dicey, but this will be discussed further below.

Although there are many factors that may make the discussion topic seem realistic and true, I believe Parliament is still sovereign, even with there being a few conflicts that will be discussed later in the essay. My reasoning includes it has overall power to annul, amend or withdraw previous acts and make the rules and laws the country must follow.

### **Parliament and Parliamentary Sovereignty**

Parliament today is no longer expressed by the *Westminster Model* or *Whitehall Model* of parliamentary power, but the *Transformative Model*. The first point to consider is that Parliament delivers a representative government<sup>3</sup>, which conveys democracy, where the people can choose representatives or who will make decisions on their behalf<sup>4</sup>. The second and probably the most relevant to this model is that Parliament is not a policy-making body. It therefore transforms policy but only by acknowledging the fact of eager executives<sup>5</sup>.

Today, Parliament is governed by the doctrine of the separation of powers, therefore proposing the three main functions. These are the Legislature, who makes the law; the executive, who interprets and carry out laws; and finally, the judiciary, who in turn interpret and apply the law. Some laws and Acts include the issues of abortion, drinking, smoking and marriage etcetera. Some are more independent and effective than others, such as 2006 complete smoking ban in public places and 2003 anti-hunting legislation<sup>6</sup>. Legislation forms precedent and is therefore binding throughout the country and applies to everyone inclusive. This identifies the sovereign idea of Parliament.

The idea of Parliamentary Sovereignty was defined by A.V. Dicey in his book, *Law of the Constitution*, (1885), where he stated, "In theory Parliament has total power. It is sovereign."<sup>7</sup> As briefly stated above, there are three main points to consider when looking at Dicey's view. The first is Parliament can make any law it wishes, and consequently, cannot be challenged or questioned by anyone, especially the courts. The second is that Parliament cannot be restricted by a predecessor or bound by its successor<sup>8</sup>. The last point to bear in mind is that Parliament is not binding on any future Parliaments. This means that Parliament Acts and decisions do not have to rely on previous ones. An Act of Parliament can be completely overruled at any time by Parliament itself. Although these rules seem pretty self-explanatory, they are indeed uncodified within the constitutional law. This basically means that they may be written down, but not in a single document, referring to how Parliament should work. Documents they can be scripted down include books, Acts or Conventions etc.

One particular case that lays out these distinct rules is that of *Cheney v Conn* (1968), which states that if two acts conflict, then the most recent one should be applied. One Judge said, "It is not for the Court to say that a Parliamentary enactment, the highest law in this country, is illegal"<sup>9</sup>. Though this can be counter-argued by saying, 'Judges create law'. This can be seen as the case because Judges decide how the law is interpreted using four approaches, the *literal*, *golden*, *mischief* and *purposive*, using their *obiter dicta* and *ratio decidendi*, therefore creating the precedence on the future cases.

Below I will establish other criticisms and counter-arguments that may actually undermine Parliamentary Sovereignty.

### **European Parliament**

The first, and probably the most recognised and important factor is the European Parliament. This plays a huge role that is seen to have reduced the powers of the UK Parliament as the UK joined the EU or 'EEC' (the European Economic Community), which was what it was known at the time, in 1973 after signing the Treaty of Rome. The original members were Germany, France, Italy, Belgium, the Netherlands & Luxembourg, who all joined in 1957. The idea of a joint European Community was first introduced in 1948, after the Second World War. Its main purpose was to establish long-lasting peace amongst countries such as Germany and France and to prevent future wars in Europe<sup>10</sup>.

As a result, the European Parliament has supremacy and sovereignty over UK law and in turn, UK Parliament. Its role is to ensure that law is applied uniformly in all 27 Member States. Europe tells the UK what to do. It does this in two ways. The first is that it carries out cases to decide whether Member States have failed to fulfil obligations under the Treaties. The second is by hearing references from National Courts for preliminary rulings on points of European law. It is therefore binding.

One example of the EU Parliament telling the UK what to do was the case of *Re Tachographs*, 1979. This is where the European Parliament told the UK they had to implement a regulation on the use of Tachographs, a recording piece of equipment used to measure health and safety regulations in vehicles used for carrying goods. Thatcher disapproved of this regulation, but could not do anything about it. The legislation had to be put into practice.

Another example is the *Factortame* case, 1990. This is where a Spanish fishing company, Factortame, appealed against an act, Merchant Shipping Act 1988. It enforced in the UK by Thatcher's government, which aimed to prevent foreign fishing vessels from fishing in British territorial waters. Factortame argued that they could fish under the EEC. The House of Lords, the highest appeal court in the UK, voted against the Merchant Shipping Act as it contradicted the EU Law.

Being part of the European Union establishes that the UK can also trade or fish, for example, within any of the 27 European countries they wish in order to increase its profit and achieve shared objectives<sup>11</sup>, this shows that the UK may have indeed gained some power. This is an example of 'pooled sovereignty', which is the idea of sharing decision-making powers between states or countries in systems of international cooperation. Although the UK is part of the EU and need to follow Europe's points of law, the Parliament of the United Kingdom has the power to depart from the EU at any time, by implementing an Act.

### **Human Rights**

The second most important point to consider in my eyes is that of Human Rights. Under this particular category there are two sub-categories. The first being the Human Rights Act and the second being the European Court of Human Rights.

All Acts must include a short statement declaring whether it is compatible with Human Rights or not. Judges can also declare a State of Affair or Parliament incompatible, consequently making it unique within British Law. He/she may refer the matter to a Minister and he/she can then seek to change the law, if it is seen to be appropriate. This shows that Parliament still has the overall power.

Human Rights are the basic rights and freedoms which all humans are entitled to, because they are 'human'. If there is an issue that it is not compatible with human rights, there are several options Parliament can take. The first is they can overrule any Act at any time. This includes the overruling of the Human Rights Act, if indeed they wish to pass one that is inconsistent with the rights. If they decide to take this particular action they would be going against the European Court of Human Rights. The second option may be that they can indeed withdraw this current Bill.

The European Court of Human Rights was set up in 1959, as an international court. It has jurisdiction to rule, through binding judgments, on applications claiming accusations of the Convention<sup>12</sup>. It has operated on a full-time basis since 1998. As it is seen to have supremacy over UK law, it may declare an Act against 'Human Rights' and can ultimately *persuade* the UK to withdraw or amend the Act. Though this may be the case, the European Court of Human Rights is not the European Union and not the European Parliament, so therefore it is not binding. Parliament can override any of their decisions and still commence with the Act if they wish.

### **Executive Dominance**

Another point to consider is executive dominance. This is the fundamental control from whips of Parliament. Whips are dominated by Government Heads. Whips are appointed by each party to help organise Parliament's contribution. One of their responsibilities is making sure the maximum number of their party members vote, and vote the way their party wants so have the decisive control over elections<sup>13</sup>. Events of parliamentary business are sent around to each member, points that need special attention are ranked in order. The highest ranking is known as the 'three line whip', which must be attended to. Government Ministers also have the role to encourage and promote government policy. They can change government policy accordingly.

This shows that Parliament as a whole is passing its power onto whips and ministers, undermining its sovereignty but Parliament does still appoint each, having the overall responsibility and power.

### **Delegated Legislation**

Delegated Legislation is a major point to look at. This is basically Parliament handing power *down* to other bodies. These bodies include local and District Councils, the Privy Council and Government ministers. By-laws involve making laws for local areas or in turn, areas that involve the public. Example of by-laws may include parking restrictions or the London Underground smoking ban. Statutory Instruments are rules and regulations made by government ministers, which can be seen as to be still part of Parliament. They allow legislations to be passed without the lengthy process of scrutinising in both Houses, or debating on whether it is appropriate or not. Finally, the Privy Council, including senior MPs and ex-Prime Ministers, have the power to make Orders in the Council. These are usually passed in emergency situations, such as the outbreak of war. They are also made in situations involving European Law.

Parliament does have ultimate control over the powers given to each body, through the Enabling or 'Parent' Act, making sure they do not make any unnecessary laws. They control the legislations by Affirmative Resolution, Negative Resolutions and the Scrutiny Committee, which was set up in 1937. Although Parliament passes its power along to other bodies, it does have a valid reason. The main reason is that Parliament does not have the appropriate time to consider all Acts, mainly because over 3000 Statutory Instruments are passed every year. Parliament does not specialise in every area and Ministers can benefit from the further consultation. If Delegated Legislation did not exist, the whole legislative process would fall apart.

### **Referendums**

There is an argument that referendums may be seen as an example that undermines Parliamentary Sovereignty of the UK. A referendum is a popular vote in which the electorate decides and issue by answering a simple 'yes' or 'no' to a question and are seen as more world-widely used rather than being solely UK based. There are two types of referenda, the first is 'advisory' and the second is 'binding'. They allow the government to focus on a particular issue. Governments have the ultimate power to decide when one can be held. Referendums are a form of direct democracy and representation, whereby the public have the 'final' word on how the country is governed. This shows that Parliament is undermined. Although this may be the case, Parliament does seem to phrase the question in such a way to encourage or even manipulate the public into stating the answer they really want. An example of this was held in June 1975, where Parliament asked 'should the UK remain the EEC?'.

## **Conclusion**

Looking back at the above points, it clear that there are several factors, European Parliament, Human Rights, Executive Dominance, Delegated Legislation and Referendums, that all seem to undermine the doctrine of Parliamentary Sovereignty. Considering all these and summing up the overall arguments on why Parliamentary Sovereignty cannot possibly be undermined, and in conclusion, UK Parliament still has supremacy. It can depart from Europe at any stage, it has overall power on other bodies and how they word referendums and can overrule any past Act when necessary and appropriate.

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<sup>1</sup> [http://www.parliament.uk/about/glossary.cfm?ref=salisbu\\_7642](http://www.parliament.uk/about/glossary.cfm?ref=salisbu_7642)

<sup>2</sup> PDF Slides (UK8a) – Dr. P Jepson (slide 16)

<sup>3</sup> Essentials of UK Politics – Andrew Heywood – page 206

<sup>4</sup> Essentials of UK Politics – Andrew Heywood – page 31

<sup>5</sup> Essentials of UK Politics – Andrew Heywood – page 207

<sup>6</sup> <http://www.peterjepson.com/law/politics/effective%20examples.pdf>

<sup>7</sup> <http://www.lawteacher.net/Parlsoveriegn.php>

<sup>8</sup> <http://mavrkylawcenter.blogspot.com/2006/10/parliamentary-sovereignty-public-law.html>

<sup>9</sup> PDF Slides (UK8a) – Dr. P Jepson (slide 19)

<sup>10</sup> <http://www.cewcni.org.uk/projects/european-parliament/notice-board/european-union-facts-last-updated-15-04-05.php>

<sup>11</sup> <http://www.euromove.org.uk/index.php?id=6505>

<sup>12</sup> <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf>

<sup>13</sup> <http://www.parliament.uk/about/how/principal/whips.cfm>