Discuss the doctrine of Parliamentary Sovereignty

Dicey advocated parliamentary supremacy as the ‘Queen in Parliament’ meaning that Parliament has a right to make and unmake any law which cannot be overridden by any other body.

Absolute supremacy

The Bill of Rights 1689 states that Parliamentary proceedings cannot not be ‘impeached or questioned in any court or place out of Parliament’. Parliament can legislate outside the UK and contrary to international law (Mortensen v Peters). There is a rebuttable presumption that Parliament intends not to do so. However, in s.134 of the Criminal Justice Act 1988 expressly prohibits torture by state officials outside the UK and therefore is effective. Statute may override constitutional conventions (Madzimbamuto). Acts may also have retrospective effect for example the War Damages Act 1965 reversed the House of Lords decision in Burmah Oil v Lord Advocate.

The Crown has no common law power to legislate (Case of Proclamations) or set aside Acts (Bill of Rights 1689) and the Courts have no general power to review Acts (Pickin v British Railways Board). In the MPs expenses freedom of information case, it was noted that it is a: ‘fundamental principle of our constitutional structures that Parliament should not normally be subject to judicial scrutiny or supervision’ (Corporate Officer of the House of Commons v The Information Commissioner). However, Parliament can confer specific powers on the courts to allow them to do so (European Communities Act 1972).

Dicey accepted there were some practical limits to the absolute supremacy in the form of internal and external restraints.
Rule of Law

It is unconstitutional for Parliament to undermine the Rule of Law but not illegal. Dicey saw both doctrines as underpinning the constitution and that there was no conflict due to the practical limits on Parliamentary Supremacy. He thought there was a necessary link and that 'the sovereignty of Parliament favours the supremacy of the law' because as a composite body, Parliament's will must be formally expressed in words and so relied upon laws being enacted and followed.

Parliamentary Sovereignty has received some judicial criticism and has been suggested that it is 'a construct of the common law' which judges can qualify to uphold Rule of Law (Jackson v AG). Lord Hope, speaking obiter, suggested Parliamentary Supremacy is not absolute and that 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based' (Jackson v AG).

Enrolled Bill

The enrolled bill doctrine means that a Bill listed in the roll of Parliament with consent of both Houses and Royal Assent cannot be questioned by a Court (Wauchope), even if there has been a miscount of votes. HLA Hart said this was an important 'ultimate rule of recognition' that what 'Queen in Parliament enacts is law'.

In Pickin v British Railways Board, Lord Denning disagreed and argued courts should check procedure is not abused. However, the majority held that Parliament should apply its own procedures, it is not the role of the courts to investigate the proceedings and that they should try to avoid conflict between the branches of State. The Parliament Acts 1911 and 1949 undermine the rule as they provide that Bills may receive Royal Assent without consent of the House of Lords, with a with Speaker's certificate being conclusive.

Bind Successors

Dicey stated Parliament cannot bind its successors. The doctrine of implied repeal applies where there is a clear inconsistency the later Act supersedes a previous one (Ellen Street Estates). A distinction has been made between 'ordinary' and 'constitutional' statutes, with the latter being immune to implied repeal (Thoburn v Sunderland City Council). Parliament can bind successors to the 'manner and form' of future enactments Trethewan.

Limitations

The traditional Diceyan view of Parliamentary Supremacy has been challenged by three more recent developments: the expansion of human rights law, devolution and EU law.

Human Rights

Dicey regarded Parliament as guardian of fundamental rights and as democratically elected representatives of citizens best placed to balance individual rights with the public interest. Traditionally the courts found that fundamental rights could be 'abridged' by Parliament in the public interest (Entick v Carrington).

The Human Rights Act 1998 (HRA) incorporates the European Convention on Human Rights (ECHR) and is a constitutional source. Section 3 of the HRA requires courts 'so far as possible' to construe domestic law as compatible with Convention rights. The courts take a purposive approach to do so (Shaidan v Godin-Mendoza) however, sometimes this is not possible (Doherty v Birmingham City Council).
Section 4 of the HRA allows the High Court and higher courts to declare legislation incompatible with Convention rights. A declaration of compatibility does not affect validity, continuing operation or enforcement of the provision or bind the parties. In a case where detention of terror suspects interfered with their Article 5(1) rights the House of Lords issue a declaration of incompatibility against s23 of the Anti-terrorism Crime & Security Act 2011 and quashed the Human Rights Act (Designated Derogation) Order 2001, a piece of delegated legislation, as it was inconsistent with the enabling Act (A v Home Department [2005]). This lead to the Government passing the Prevention of Terrorism Act 2005 and introducing control orders.

Section 10 of the HRA allows the Government to make delegated legislation 'remedial orders', which Parliament must approve, if a Section 4 declaration has been made. There is no obligation to do so but the political pressure to do so has lead to some arguing it has become a constitutional convention for issues to be remedied when identified in this way. Section 19 of the HRA requires a Minister to make statement of compatibility for new legislation this allows court to presume the Act should be read a compatible. A Government may also decide to proceed with legislation which is not compatible. Section 6 of the HRA makes it unlawful for public authority act in way incompatible with Convention rights, this may be overridden by an Act and does not include a 'person exercising functions in connection with proceedings in Parliament'.

Devolution

Devolution has a minimal effect on Parliamentary Supremacy. The Scotland Act 1998 allows the Scottish Parliament to legislate on non-reserved areas (eg. education, health) but not on reserved areas such as foreign policy, defence, the constitution. It works in a similar way to a federal constitution, where the Scottish Parliament is a subordinate legislature and cannot legislate for England & Wales (s29). The Government of Wales Act 1998 gives powers to the Welsh Assembly to make delegated legislation, not Acts and the Government of Wales Act 2006 Act extends these to slightly enhanced law-making powers named 'Assembly Measures'.

European Union

The European Court of Justice (ECJ) noted 'Member States have limited their sovereign rights, albeit within limited fields' (Costa v ENEL). If the UK breaches treaty obligations it breaches international law and faces action in the ECJ. If a treaty requires a change in law, Parliament must authorise the implementing legislation and courts will only enforce if the treaty obligation has been enacted in domestic law (Blackburn v Attorney-General).

The European Communities Act 1972 (ECA) implemented the Treaty of Accession 1972. S2(1) of the ECA gives effect in UK to directly applicable and directly effective EU law and s2(4) requires UK courts to give priority to directly effective EU law. EU law may be directly effective if is 'clear, precise and unconditional' (Van Gend en Loos). In Litster v Forth Dry Docks, where the domestic legislation had been implemented to give effect to an EU Directive it was interpreted using the purposive approach, despite the ruling being contrary to the literal meaning of the Act. However, the courts will not take a purposive approach if it creates a 'distortion' of national law (Webb v EMO Air Cargo). If it is Parliament's intention to be inconsistent with EU law then the Act prevails (Macarthys v Smith).

State liability may arise from failure to pass Act giving effect to EU law or defective implementation and can lead to the courts awarding damages for loss (Francovich), as applied in the Factortame case. EU law may also undermine Parliament's role as the guardian of rights as the ECJ have found that German Basic Law could be overridden by EU law (Handelsgesellschaft). In an attempt to reassert Parliament's supremacy, the European Union Act 2011 requires a referendum before the UK agrees treaty amendments or further transfer of power to the EU. The Act also makes Parliamentary Supremacy a statutory principle.
Conclusion

Parliamentary Sovereignty is well established and limitations seem to be self-imposed and revocable. The HRA is not entrenched so can be repealed like other Acts. It provides weaker protection than the US written constitution, which must be amended by special procedure and allows the Supreme Court to set aside unconstitutional law (Marbury v Madison). Similarly, the devolution Acts could be repealed, although it may be politically difficult to do so. Parliament passed the ECA so voluntarily submitted to EU law including developments such as state liability and direct effect. Arguably EU law has proved to be the greatest limitation although it is worth noting that no court has nullified or quashed UK Acts for incompatibility with EU law so Parliamentary Supremacy is maintained as the courts merely interpret on basis of s.2(4) of the ECA.

Of course the constitutional doctrine of Parliamentary Sovereignty has always worked alongside the principle of the Rule of Law but perhaps the judiciary have become more willing to recognise the importance of the Rule of Law especially since Jackson v AG. However, it seems that Parliament remains supreme subject to limitations arising from obligations provided for by Acts of Parliament.

This article can be found online at www.bitsoflaw.org/public/parliamentary-supremacy/model-answer/degree/discuss-doctrine-overview where links to further resources are available.