

Background Briefing: Votes for Prisoners

The Sovereignty of Parliament and People – as Dicey saw it.

The Human Rights Act of 1998 brought about an unprecedented increase in the power of judges compared with those of Parliament. The change has been welcomed by some academics, including Aileen Kavanagh in *Constitutional Review Under the UK Human Rights Act* and Professor Vernon Bogdanor in *The New British Constitution*. Some judges have also voiced approval, including Lord Steyn who, while he was a Law Lord in 2005 went so far as to say that the supremacy of Parliament was ‘out of place in the modern United Kingdom’.¹

The clearest statement of the longstanding view of the British people is still to be found in A.V. Dicey’s *The Law of the Constitution*.² Until our revolution in the seventeenth century, the King made the laws. Since 1689 Parliament has made them, but only as the representative voice of the people. According to Dicey, our constitution is the result of two guiding principles. The first is the sovereignty of Parliament, which had historically meant ‘in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation’. The personal authority of the King was turned into the sovereignty of the King in Parliament. This change ended the arbitrary power of the monarch but left intact the ‘rule of law’, or the ‘supremacy throughout all our institutions of the ordinary law of the land’. According to Dicey, the ‘rule of law’ or ‘the right of the Courts to punish any illegal act by whomsoever committed’, was ‘the very essence of English institutions’.³

Dicey emphasised the point by distinguishing between ‘legal’ sovereignty and ‘political’ sovereignty:

‘Parliament is, from a merely legal point of view, the absolute sovereign ... since every Act of Parliament is binding on every Court ... and no rule, whether of morality or of law, which contravenes an Act of Parliament binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation.’

Dicey described how our constitution was made up of both laws and conventions. There was ‘the law of the constitution’ – the enforceable laws that laid down constitutional principles – and the ‘conventions of the constitution’ – the habits and traditions that are

observed but not enforced. The conventions have one ultimate object: 'to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or ... the nation'.

Dicey strongly maintains that 'the electorate is in fact the sovereign of England'. The whole people act through a 'supreme legislature' whose conduct is 'regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation'.⁴

All the conventions that uphold the supremacy of the House of Commons in practice uphold the 'sovereignty of the people'.⁵ To prove the point, Dicey examines three conventions: the requirement that the powers of the Crown are exercised through ministers enjoying the confidence of Parliament; the convention that the Lords gives way to the Commons; and the right of kings to dissolve Parliament against the wishes of the majority of MPs.

The rule that the powers of the Crown must be exercised through Ministers who are members of the Commons or the Lords and who 'command the confidence of the House of Commons', in practice means that the elected part of the legislature appoints the executive. It also means that ministers must ultimately carry out 'or at any rate not contravene, the wishes of the House of Commons', which in turn means they must reflect the wishes of the electorate.

The same is true of the convention that the House of Lords is expected in every serious political controversy to give way to the will of the House of Commons. At what point should the Lords give way, or should the Crown use its prerogative to create new peers? The guiding principle, says Dicey, is that the Lords must yield or the Crown intervene when it is conclusively shown that 'the House of Commons represents on the matter in dispute the deliberate decision of the nation'. And if the deliberate decision of the electorate is the vital consideration, then conventions guiding the House of Lords and the Crown are rules 'meant to ensure the ultimate supremacy of the true political sovereign', the electorate.⁶

He also shows how the right of the Crown to dissolve parliament affirms the political sovereignty of the people: 'the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which

there is fair reason to suppose that the opinion of the House is not the opinion of the electors'. In such cases dissolution is in its essence 'an appeal from the legal to the political sovereign'. A dissolution is allowable 'whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation'.⁷

He gives the examples of the dissolutions of 1784 and 1834. In both cases the King dismissed a government that had the confidence of the House of Commons. In 1784 the election resulted in a verdict in favour of Pitt's administration, which established the precedent that the Cabinet, when supported by the King (who has the power of dissolution), can 'defy the will of a House of Commons if the House is not supported by the electors'. The fundamental principle was that 'the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation'.⁸

In 1834 the King also dissolved parliament, but the election went strongly against Peel's administration. According to Dicey, the essential point in both 1784 and 1834 was that 'it is the verdict of the political sovereign' or nation that ultimately determines the right of a Cabinet to retain office.⁹ All the conventions of the constitution, asserts Dicey, are 'intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State'. Constitutional maxims are 'subordinate and subservient to the fundamental principle of popular sovereignty'.¹⁰

It is this fundamental principle that is at stake in the dispute between Parliament and the ECtHR over votes for prisoners.

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Notes

¹ Jackson & Ors v. Her Majesty's Attorney General [2005] UKHL 56.

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (1915 Edition) Indianapolis: Liberty Fund, 1982.

³ Dicey, p. 314.

⁴ pp. 285-86.

⁵ p. 287.

⁶ pp. 286-87.

⁷ p. 288.

⁸ p. 302.

⁹ p. 288.

¹⁰ pp. 290-91.