

A CRITICAL ANALYSIS ON THE IMPACT OF R (ON THE APPLICATION OF JACKSON) Vs ATTORNEY GENERAL [2005] UKHL 56 ON PARLIAMENTARY SUPREMACY IN THE MODERN BRITISH CONSTITUTION.

SHIWANI SINGH

LLM CORPORATE AND COMMERCIAL LAW

SCHOOL OF LAW,

CHRIST (DEEMED TO BE UNIVERSITY), BENGALURU.

Abstract

In this paper the researcher shall highlight some of the major issues related to the concept of Parliamentary Sovereignty. The most widely known definition of Parliamentary supremacy is coined by Dicey, which presents the extent of the powers of Parliament. Yet, the concept of Parliamentary supremacy in practice is opposed to theory given by Dicey and raises many important issues. Perhaps the most important of those issues was raised in the case of R (Jackson) v Attorney General in which the validity of the Parliament Act 1949 was questioned. Although the judges decided that the Act was valid, the differing views offered by the judges suggested that the courts are yet to completely rule out the rigid theory of Dicey in favour of the non-orthodox approach. This study will examine the concept of Parliamentary supremacy considering recent advancements which seek to reduce the extent to which it can be deemed as supreme.

Keywords: - Parliamentary sovereignty, Dicey, Constitution, Parliamentary Supremacy.

Introduction

The Parliamentary Supremacy (sovereignty) is followed by the Dicey model and states that “The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”¹ A further understanding on the concept of parliamentary sovereignty is also been provided by other scholars such as Alex Carroll who in his writings have provided a more simplistic view of the Dicey principle which is as followed “Each parliament is absolutely sovereign in its own time and may legislate as it wishes on any topic and for any place. That which has been enacted by Parliament has supreme force and cannot be invalidated or changed by any other domestic or external authority.”²

Jackson v Attorney General³ is regarded as a major case of constitutional significance, in this case the House of Lords Judges were assigned the task of analysing whether the Hunting Act 2004 was a lawful Act of Parliament or not. Under the Act, hunting of wild mammals and dogs except under limited and certain conditions were considered to be an offence and the Bill was forced without consenting the House of Lords

¹ Dicey on Introduction to the study of the Law of the Constitution (1885)

² Carroll (2003), pg.79

³ R (Jackson) v Attorney General [2005] UKHL 56 [2006] 1 AC 262

by a process under the Parliament Acts of 1911 and 1949 due to which the appellants requested that the judges must state the Hunting Act as an invalid Act of the Parliament but the House of Lords refused to make such a consideration stating, that the 1949 Act was valid under the 1911 Act and that the Hunting Act was considered to be validly ratified using the appropriate amended process. The main issue in this case was the question which arose thus, making it debatable because it speaks about an expansive scope of issues related with Parliamentary supremacy. This discussion of the more extensive issues essentially, shows dissimilarity from standard perspectives on the basics of the UK's constitution. This article, therefore, seeks to analyse the broader dicta for the question in issue by addressing scholarly viewpoints on the character of law and lawful structures, so as to establish the effect of Jackson on Parliamentary Supremacy in the current era.

Significance of the Case with special reference to the opinions of Lord Bingham, Hope, Steyn and Baroness Hale in relation to the concept of Parliamentary Sovereignty in question

Jackson challenged the Hunting Act 2004, and the 1949 amendments stating that the Parliament Act 1949 was invalid since it had been passed utilizing the Parliament Act 1911, something which Jackson asserted was never in the aim of Parliament when they passed the 1911 act. In *R (Jackson) v Attorney General* Jackson's contention relied on the elucidation of Section 2(1) of the 1911 Act, which said that the Act may not be utilized to pass an Act to "expand the maximum length of Parliament past five years". He contended this included further, unwritten restrictions. It was because of two grounds firstly, that enactment under the 1911 Act had not been passed by parliament in its entirety (House of Commons, House of Lords and lastly, the Monarch) and by just a limited set of chambers, and excluded the House of Lords, and was considered to be a delegated legislation. Secondly, it was contended that Section 2(1) contained an unwritten provision which was dependent on the rule that a delegated body cannot broaden its own forces except if explicitly allowed the ability to do as such. Since the 1949 Act did broaden the forces of the House of Commons it was invalid. The House of Lords concurred with the past judgment in the Court of Appeal⁴ and the validity of the Hunting Act 2004 was affirmed. Anyway, the contention from Jackson revolved around the Parliament Act 1949 being delegated legislation thus, enabling it to be questioned as a primary issue. Besides, the Parliament Act 1911 is ought to be viewed in line with the principle of statutory interpretation which expresses: "that powers conferred by an enabling Act may not be enlarged by the body upon whom they are conferred unless there are express words authorising that"⁵. Both contentions were emphatically dismissed by their Lordships, and they gave two primary reasons which shall be stated below.

The issue of Parliamentary Supremacy was considered greatly by each of the judges in turn in the case of Jackson which is discussed as followed.

1. Lord Bingham's views on Jackson case: -

As stated above that the above made contentions were rejected by the lordships because of the following reasons,

1. Firstly Lord Bingham stated that under the First, ss 1(1) and 2(1) of the 1911 Act it was provided that the legislation shall be made in accordance with those provisions respectively and it shall become an Act of Parliament once the Royal Assent would be signified. Lord Bingham also states that the meaning of the expression "Act of Parliament" is not doubtful, ambiguous or obscure and is clear and well understood as any expression in the lexicon of the law "⁶

⁴ 2005 QB 579

⁵ Mullen, Tom on "Reflections on Jackson and Attorney General: questioning sovereignty" 2007

⁶ [2005] UKHL 56 [2006] 1AC 262 at [24] as per Lord Bingham

2. Secondly, Lord Bingham also states that Jackson's case as baseless stating "it was not plausible to describe what the 1911 Act did as a delegation of power to the House of Commons. The object of the Act was not to delegate power, rather it was to restrict the power of the Lords to defeat measures supported by the Commons."⁷

3. Lord Bingham also highlights the scope of section 2(1) of the Parliament Act 1911 referred under the appellant's case and states it as follows, "the only limitations on the use of the 1911 Act procedure were those expressly stated in s 2(1), namely Money Bills and Bills to extend the life of Parliament"⁸ with respect to the Act Lord Bingham further stated that if the literal rule of interpretation is considered then dismemberment of Jackson's argument stands finished, "Subject to those exceptions, s 2(1) applies to 'any Public Bill'⁹. "As stated by Lord Bingham the term being interpreted must be in "its colloquial and dictionary sense"¹⁰

4. Lord Bingham's also compared Jackson case with the "Pickin case"¹¹ and stated that Pickin, unlike the present case, focuses to investigate the internal workings and procedures of Parliament so as to demonstrate that it had been misled and has been preceded on a false basis. Which on the contrary clearly isn't the case in Jackson, it is more concerned about the effects of such legislation being passed, which becomes a case for the courts to interpret it and ultimately decide upon it and considered the Pickin case as legitimate and valid unlike the Jackson case.

Lord Bingham, in his Lordships conclusion though, remained impartial on the matter in issue but did comment on specified areas such as Firstly, Lord Bingham acknowledged that there exist limitations under the Act, thus affecting the Parliamentary Supremacy with the enactment of the Human Rights Act 1998, but states, "this is not before the house"¹² and the Lordship remains impartial. As per the subject of questioning the Acts is concerned, Lord Bingham keeps with his original views and this seems to be the only reason Lord Bingham can conceive to give reason to challenge the Parliamentary Supremacy, he further backs his view by considering the use of Hansard notes as in *Pepper v Hart*¹³ to clarify that the intentions of parliament is to ensure that the legislation is interpreted as it was intended and the constitution is concerned, Lord Bingham again takes a neutral stance but comments on the invoking the two separate Parliaments Acts and considers the Parliament Act 1911 for major constitutional purposes and the 1949 Act is to be used in relation to minor or no constitutional import.

2. Lord Hope's opinion on Jackson case: -

1. Lord Hope while presenting his views on the Jackson case stated that he agreed with the views of his learned colleague i.e. Lord Bingham, however, investigates a more detailed review of the matter that why the Attorney General did not challenge the justiciability. Lord Hope considers the issue of justiciability with the position of the Attorney General by stating that, "The Attorney General said that it was for the elected legislature to have the final say in all matters of legislation. But he has not disputed that the courts can properly adjudicate on the issue raised".¹⁴

⁷ [2005] UKHL 56 [2006] 1AC 262 at [25] as per Lord Bingham

⁸ [2005] UKHL 56 [2006] 1AC 262 at [29] as per Lord Bingham

⁹ Ibid

¹⁰ Ibid

¹¹ *British Railways Board v Pickin* 1974 AC 765

¹² [2005] UKHL 56 [2006] 1AC 262 at [39] as per Lord Bingham

¹³ (1993) AC 593

¹⁴ [2005] UKHL 56 [2006] 1AC 262 at [110] as per Lord Hope

2.It was once again affirmed that Parliamentary Supremacy will not be questioned but when it comes to the interpretation of the enacted legislature the courts shall have the ability and the duty to do so. This position was reinforced in the Divisional Court hearing with Maurice Kay LJ stating, “he was wise not to do so”.¹⁵ The Court of Appeal after hearing Attorney General’s reason for not challenging justiciability did cast their doubts over the answer given by the Attorney General, thus stated “that the Attorney General had given no convincing answer to its question whether the issue was justiciable”¹⁶ Hope considers that the basis of the actual answer was that of statutory interpretation which did mean the courts had the jurisdiction to consider the case. Although these points were not contested in the Jackson case, and the decision that was undertaken by the House of Lords were of a view that they must act as, as a constitutional court. This was ambiguous and vague and arose a question as to how can any future challenge of validity be nullified under the grounds of the litigants lacking the correct legal standing or that it is out of the court’s jurisdiction? Due to which the government themselves seem to have, weakened the position of Parliamentary Supremacy in the modern British constitution.

3.Lord Hope seems to be agreeing on many of his views with Lord Steyn and in his opening statements his Lordship states, “But Parliamentary sovereignty is no longer”¹⁷ and by stating this statement it considers the limitations that is placed upon the legislation in making process in Britain, is considered to be true. Lord Hope further, emphasises the importance of the European Communities Act 1972, which in effect forces the Parliament to make sure that all enacted legislation is coincided with sections 2(1) and 2(4) of the Act.

4. Lord Hope also acknowledges, similarly, to Lord Steyn, the qualifications imposed by the Human Rights Act 1998 and states that when these European limitations that are coupled with the Act of Union 1707, which Lord Hope viewed as, “so fundamental that they lie beyond Parliament’s power to legislate”¹⁸ provides a clear difference between the modern standing of Parliamentary Supremacy than laid forth by Dicey.

5.Finally, Lord Hope provides that there exists one limitation that is placed upon the Parliament, which is judicial review. As his Lordship states, “The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament’s legislative sovereignty.”¹⁹ This process is undertaken in order to ensure the parliament’s true intention as to see how the act is interpreted and also to allow some form of regulatory process thus, allowing the enacted bills to be subject to some form of review so as to ensure they are not fundamentally opposing any of the constitutional provisions or any of the imposed limitations from the EU.

3. Lord Steyn and Baroness Hale’s opinion on the Jackson case: -

1.Lord Steyn took a more damning stance regarding the principle of Parliamentary Supremacy in question in the Jackson case. His Lordship considered the views of the Attorney General regarding the uncontrolled constitution the United Kingdom as incorrect. As highlighted by Lord Steyn in the Factortame cases²⁰, it basically is seen as a “point to divided sovereignty”²¹.With the inclusion of the European Convention on Human Rights into the legislation covering each of the European Union member states, the traditional Dicey doctrine of Supremacy is seen to be out-dated or according to Lord Steyn “out of place in the modern United Kingdom”²². However, Lord Steyn agrees that Parliamentary Supremacy “is still the general principle of our constitution” and states that if this not be the case then the British Constitution would be thrown into disrepute.

¹⁵ [2005] EWHC 94 [Admin] at [12] as per Maurice Kay LJ

¹⁶ [2005] QB 579 at [11]

¹⁷ [2005] UKHL 56 [2006] 1AC 262 at [104] as per Lord Hope

¹⁸ [2005] UKHL 56 [2006] 1AC 262 at [106] as per Lord Hope

¹⁹ [2005] UKHL 56 [2006] 1AC at [107] as per Lord Hope

²⁰ [1991] 1AC 603

²¹ [2005] UKHL 56 [2006] 1AC at [102] as per Lord Steyn

²² Ibid

2. Baroness Hale's opinion on the case shares several characteristics of Lord Hope and Lord Steyn. Baroness Hale as others also notes the fundamental importance of Parliamentary Supremacy, and similar to Lord Hope, Baroness Hale notices that how the courts will undertake the role of a mediator, "The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear"²³. However, the self-inflicted limitations imposed by the European Communities Act 1972, in Baroness Hale's opinion, are "political and diplomatic rather than constitutional"²⁴, which basically suggests that parliament has limited their sovereignty for other purposes which it deems to be of higher importance due to which the future of Parliamentary Supremacy is at best questionable and several scholars have expressed their views and a mutual willingness is seen to establish a redefined meaning of Parliamentary Supremacy in taking into consideration the modern government rather than following the orthodox approach given by Dicey.

4. Other relevant opinions about the Jackson case: -

Other two of the more prominent views were outlined by N.W Barber which stated that "First, a number of scholars have taken sovereignty to mean that Parliament has the final say, the last legal word in the event of a constitutional crisis; second, some have reinterpreted sovereignty as a discrete area of law making power, with Parliament enjoying sovereign authority in one area, even if limited in other respects."²⁵

Both above views by N.W Barber can be applied in the Jackson case in order to assume that the parliament has the final say in the legislation making process making it easily implementable. If it is viewed that the parliament has a duty to prevent a possible conventional crisis then, Jackson case would still have the same outcome and would allow parliament to remain sovereign on UK constitutional matters. Again, if the second approach is followed then if the parliament concedes its supremacy on several areas but remains supreme in others, then it shall also result in similar scenarios as the first one.

One other approach is the "manner and form" argument, which holds that there shall be no limits on the subject matter upon which parliament may legislate, the manner and form in which parliament may legislate may be circumscribed. Hence, special procedures would be needed to be implemented such as referendums or a specified majority must be presented in the corresponding Houses of Parliament. In relation to the Jackson case the outcome would have been the same but if this view is implemented before the case, and the required majority was not present then Jackson's challenge may have resulted in being declared as void by the courts. Finally, one procedure which seems to be workable and capable of being considered is Judicial Review and focuses on including the courts in the process of legislature review.

There is no denial in the fact that "A successful statute requires that the legislature crafts the law with care and that the courts interpret and apply it skilfully."²⁶, so to allow the courts with the ability to comment upon and potentially alter certain legislature when a constitutional error has occurred and is inevitable because this would be a much needed advancement from the ultimate Supremacy of Parliament. In relation to Jackson the courts were continually seen attempting to find the true intention of Parliament in relation to the used of the Parliament Act 1911, should this review process have been allowed previously then, the courts could have immediately avoided any constitutional problems and focused upon the matter of the validity of the acts in question. Finally, this potential move would have allowed both Parliament and the courts a role in the legislation, yet it would not be considered as a part of the Court's function to place limits on the legislature.

²³ [2005] UKHL 56 [2006] 1AC at [159] as per Baroness Hale

²⁴ Ibid

²⁵ Barber N.W, "The afterlife of Parliamentary Sovereignty" [2011]

²⁶ Ibid

Conclusion

In conclusion, the Jackson case did challenge the principle of Parliamentary Supremacy. However, its main success was to confirm the validity of the Parliament Act 1949. Jackson as a case did provide the courts with a window of opportunity to comment on the current standing of Parliamentary Supremacy and provide some much-needed judicial review to the situation. With the limitations imposed by the European Communities Act 1972, Human Rights Act 1998 and the Act of Union 1707 Dicey's principle has not been in favour for a vast period. The ideology that Parliament has the power to enact any as it sees fit or necessary to is no longer the case with the current political ties and this is not to mention any future qualifications which may be imposed.

