The Doctrine of Parliamentary Sovereignty: Its Scope and Influence on the Australian Law System

หลักการอำนาจอธิปไตยเป็นของรัฐสภา: ขอบเขตและอิทธิพลในระบบกฎหมายออสเตรเลีย

*Tian-ngern Uttarachai**

The Office of the Administrative Courts of Thailand

Received 24 October 2022; Revised 23 December 2022; Accepted 23 December 2022

Abstract

This article conducts a study on the theory of parliamentary sovereignty which is a basic principle in the constitutional law of the former countries of the British Empire. This principle establishes that parliament has absolute sovereignty and is superior to the executive and judiciary. Therefore, Parliament has unrestrained legislative authority, and the Court cannot question the constitutionality of parliamentary acts. Australia being a British colony has undoubtedly been affected by this concept. However, Australia gained a written constitution from the Imperial Parliament; consequently, it is impossible to apply traditional parliamentary sovereignty in Australia. It has been demonstrated that the Commonwealth parliament's powers are constrained because it was founded by the federal constitution and was granted legislative authority according to the Constitution. The states' legislative powers are restricted by the Commonwealth Constitution, the state constitutions, and some of the Commonwealth's powers. Thus, neither the Commonwealth nor the state parliaments in Australia have the legislative supremacy to enact or alter laws without restriction.

* Administrative Case Official, Bureau of Research and Legal Studies, the Office of the Administrative Courts, Bachelor of Laws (LL.B., Second Class Honor), Chulalongkorn University, Master of Laws (LL.M). in Public Law, Chulalongkorn University, Master of Laws (LL.M), University of Melbourne, Australia.

E-mail: t.uttarachai@gmail.com

Regardless of the fact that parliaments in Australia are not truly sovereign, parliamentary sovereignty has continued to have a significant impact on the Australian legal system, particularly as it relates to legal interpretation and statutory human rights protection.

Keywords: Doctrine of Parliamentary Sovereignty, Constitutional Law, Australian Constitution, Legislative Power

บทคัดย่อ

บทความนี้ได้ศึกษาถึงหลักการอำนาจอธิปไตยเป็นของรัฐสภาซึ่งถือเป็นหลักการพื้นฐานในกฎหมายรัฐธรรมนูญของหลายประเทศที่เคยเป็นส่วนหนึ่งของจักรวรรดิอังกฤษ หลักการดังกล่าวมีแนวคิดว่ารัฐสภามีอำนาจอธิปไตยที่สมบูรณ์สูงสุด เหนือกว่าอำนาจของฝ่ายบริหารและฝ่ายตุลาการ ดังนั้น รัฐสภาจึงมีอำนาจในการตรากฎหมายอย่างไม่มีข้อจำกัด และองค์กรตุลาการไม่อาจตรวจสอบความชอบธรรมด้วยรัฐธรรมนูญของกฎหมายที่ตราขึ้นโดยรัฐสภาได้ ประเทศออสเตรเลียซึ่งเป็นหนึ่งในประเทศอาณานิคมของอังกฤษย่อมได้รับอิทธิพลจากแนวคิดนี้ด้วย อย่างไรก็ตาม ประเทศออสเตรเลียมีรัฐธรรมนูญที่เป็นลายลักษณ์อักษรซึ่งตราขึ้นโดยรัฐสภาอิมพีเรียล (รัฐสภาของจักรวรรดิอังกฤษ) ดังนั้น จึงเป็นไปไม่ได้ที่จะใช้รูปแบบดั้งเดิมของหลักการอำนาจอธิปไตยเป็นของรัฐสภาในประเทศออสเตรเลีย โดยจะเห็นได้ว่าเนื่องจากรัฐสภาได้รับการจัดตั้งจากรัฐธรรมนูญในระดับสหพันธรัฐและยังได้รับอำนาจทางนิติบัญญัติตามรัฐธรรมนูญ อำนาจรัฐสภาของเครือรัฐออสเตรเลียจึงต้องถูกจำกัดตามรัฐธรรมนูญ ส่วนอำนาจทางนิติบัญญัติของรัฐสภาในระดับมลรัฐก็ย่อมถูกจำกัดโดยรัฐธรรมนูญในระดับสหพันธรัฐ รัฐธรรมนูญในระดับมลรัฐ และอำนาจบางส่วนของเครือรัฐออสเตรเลียอีกด้วย ฉะนั้น ไม่ว่าจะเป็นรัฐสภาระดับสหพันธรัฐ หรือรัฐสภาระดับมลรัฐในประเทศออสเตรเลียต่างก็ไม่มีอำนาจทางนิติบัญญัติในการตรากฎหมายหรือแก้ไขเพิ่มเติมกฎหมายอย่างไม่มีข้อจำกัด อย่างไรก็ตาม ถึงแม้ว่ารัฐสภาในประเทศออสเตรเลียจะไม่ใช่ผู้มีอำนาจอธิปไตยสูงสุด แต่หลักการอำนาจอธิปไตยเป็นของรัฐสภายังส่งผลอย่างมีนัยสำคัญต่อระบบกฎหมายของประเทศออสเตรเลีย โดยเฉพาะอย่างยิ่งในด้านการตีความกฎหมายและการคุ้มครองสิทธิมนุษยชนตามบทบัญญัติที่ตราขึ้นโดยรัฐสภา

คำสำคัญ: หลักการอำนาจอธิปไตยเป็นของรัฐสภา, กฎหมายรัฐธรรมนูญ, รัฐธรรมนูญแห่งประเทศออสเตรเลีย, อำนาจนิติบัญญัติ

1. Introduction

In a country with a codified constitution or a largely written constitution,[1] generally, the constitution will set the rules to govern the state. The primary power of the constitution comes from the people within the country; the constitution, thus, is the supreme legal power in the state. If there is any legislation created that runs counter to the constitution, it will be declared null and void by the Supreme Court. In other words, the constitution is legally sovereign.[2] By contrast, the British constitution has gradually developed over the centuries and has never been committed to writing like the constitutions of other countries.[3] Although the UK lacks a codified constitution or a largely written constitution, the crucially core concept of 'the doctrine of parliamentary sovereignty' plays a significant role as the central principle of the country's constitutional arrangement.[4]

The doctrine of parliamentary sovereignty is a fundamental principle found in the constitutional law of some parliamentary democracies.[5] This rule that establishes that parliament is sovereign, or supreme, is a product of British constitutional history and derives

[1] A fundamental classification of a constitution is codification or non-codification. A codified constitution is one that includes most of its rules and principles in a single large written document, which is the sole source of constitutional law in a state, for example, the Constitution of the United States. An uncodified constitution, on the other hand, is one that is not contained in a single document and consists of several different sources, which may be written or unwritten. This uncodified constitution can be broadly divided into two categories: first, a partially written and wholly uncodified constitution, and second, a largely written constitution. For the first form, the constitution can be found in unwritten traditions and conventions and written statutes. The mentioned form of constitution is unique to British and New Zealand. This is in contrast to the second form, in which most, but not all, of the constitution is written in a single or few documents.

[2] Hiliaire Barnett, *Understanding Public Law* (Routledge-Cavendish 2010) 50.

[3] Ibid.

[4] Graeme Broadbent, *Public Law Directions* (Oxford University Press 2009) 50.

[5] Peter Leyland, *The Constitution of the United Kingdom* (2 nd edn, Hart Publishing 2011) 26.

from the common law. The principle of parliamentary supremacy holds that the legislature has absolute sovereignty and is superior to the executive and the judiciary. Parliament, therefore, has the right to legislate without restriction and the Court cannot challenge the validity of acts of parliament.[6]

Moreover, the doctrine of parliamentary sovereignty has also influenced many of the constitutional systems of the countries in the former British Empire, in which the operational context was entirely different. [7] Australia, a former British colony, was certainly influenced by the concept of parliamentary sovereignty despite of the presence its largely written constitution.[8] However, because of the country's distinctive political structure and institutions, the implications of parliamentary sovereignty in Australia are different from the UK. This paper will examine to what extent the doctrine of parliamentary sovereignty is manifested in Australian law.

Before studying the doctrine of parliamentary sovereignty in Australian law, it is first necessary to understand the definition, and practical roles, of the doctrine of parliamentary sovereignty. Secondly, it needs to be determined how the English common law influenced

[6] Broadbent (n 2) 50.

[7] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press 1999) 1.

[8] In Australia, most constitutional principles and core political ideas and regulations are written in a single document, the Commonwealth of Australia's Constitution. However, the presence of constitutionally significant statutes, namely the Statute of Westminster 1931 (as adopted by the Commonwealth in the Statute of Westminster Adoption Act 1942) and the Australia Act 1986, indicates that Australia's constitution is not contained in a single constitutional document. In this article, the author will, therefore, refer to the Australian constitution as a written constitution rather than a codified constitution.

Australian law. After that, the paper will delve into an explanation of the scope and influence of parliamentary sovereignty in the Australian legal system.

2. What is the Doctrine of Parliamentary Sovereignty?

2.1 Defining Parliamentary Sovereignty: Dicey's Conception

The tradition of defining and explaining sovereignty was explained by Albert Venn Dicey in his *Introduction to the Study of the Constitution*, 1885.

"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 recognized by the law of England as having a right to override or set aside the legislation of Parliament."[9]

From the above statement, the definition of the doctrine of parliamentary sovereignty can be split into three principles, as follows:

2.1.1 Parliament May Enact Laws on Any Subject Matter

This principle is the very keystone of the law of the British constitution that states that Parliament has the right to make or unmake any law whatsoever; moreover, no person or organization is recognized under English law to have the right to revoke or set aside the legislation made by Parliament.[10] In this sense, it implies that parliamentary sovereignty holds that Parliament, consisting of the House of Commons, the House of Lords, and the

[9] A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan 1915) 36, quoted in Cheryl Saunders and Anna Dziedzic, 'Parliamentary Sovereignty and Written Constitutions in Comparative Perspective' in A Welikala (ed), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives 2012) 479.

[10] Peter Leyland, *The Constitution of the United Kingdom* (2nd edn, Hart Publishing 2011) 47.

Sovereign, has unlimited legislative competence to pass or repeal any law.[11] Parliament holds this absolute authority because, in the absence of a codified constitution, it represents all of the people and acts as a law-maker, and thus it assumes a role of special importance.[12] Blackstone mentioned that 'Parliament can do everything that is not naturally impossible.'[13]

However, it has been commented that, in practice, Parliament cannot actually enact any law since there are many pressures to restrain its sovereignty. For example, if an act passed by Parliament is not proper, it will incite public condemnation and the threat of civil disobedience.[14]

2.1.2 Parliament Cannot Be Restricted by a Previous Parliament or Restrict a Future Parliament

The justification for the second rule comes from the basic concept of sovereignty in that sovereignty is ultimate and unlimited power. Hence, Parliament cannot be restricted by either an earlier or later parliament; if Parliament could be restricted by another, then the restricted parliament would not actually be 'sovereign'.[15] From this statement, it can be said that a crucial aspect of the sovereignty of Parliament is that it can change the legislation passed by preceding parliaments. In other words, any pre-existing law can be replaced by an act passed by a subsequent parliament.[16] Furthermore, Parliament also cannot bind its

[11] Nick Howard, *Beginning Constitutional Law* (Routledge 2013) 68.

[12] Leyland (n 8) 47.

[13] Ibid.

[14] Saunders and Dziedzic (n 7) 479.

[15] Barnett (n 1) 52.

[16] Leyland (n 8) 48.

successors or any future parliament.[17] The fact that the later parliament can legislate without the limited provision from the previous parliament demonstrates the complete sovereignty of parliament.[18]

2.1.3 No Body May Question the Validity of an Act of Parliament

In the third rule, the sovereignty of parliament means that once a bill has passed through its stages of consideration in Parliament, and has been granted royal assent, it becomes a valid Act of Parliament.[19] Moreover, there is no other body that has the power to challenge the validity of an act made by Parliament. This principle is clearly illustrated in the *Bill of Rights of 1689*, in Article 9 which states: 'proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'[20] Furthermore, *British Railways Broad v Pickin* was a distinguished case that emphasizes this principle.[21] In this case, Lord Morris affirmed that 'When an enactment is passed there is finality unless and until it is amended or repealed by parliament.'[22] It can be seen from this case that the court cannot question how the statute is passed. However, in *Jackson v Attorney General*,[23] it was held that the court had jurisdiction to consider whether the disputed Act was a valid Act of Parliament. Even if the court had determined that the statute was not valid; it would not have been able to override this Act of Parliament. From this case, it can be said that the Act

[17] Howard (n 9) 68.

[18] Barnett (n 1) 52.

[19] Ibid 52.

[20] Leyland (n 8) 49.

[21] *British Railways Broad v Pickin* [1974] AC 765.

[22] Leyland (n 8) 50.

[23] *Jackson v Attorney-General* [2005] All ER (D) 136.

would remain in force, but that the court had the power to ascertain the validity of the disputed legislation.[24]

2.2 Express Repeal and Implied Repeal

From the second principle mentioned above, it can be observed that since Parliament is truly sovereign, it can pass legislation to repeal earlier statutes either wholly or in part. An Act of Parliament can be repealed expressly or impliedly. In an expressed repeal, a later statute will declare explicitly that the whole or a part of a previous statute is being amended or repealed by the provision stated in the latter statute.[25] Sometimes, Parliament passes legislation that conflicts with an earlier act. The courts will preliminarily attempt to interpret both acts together to ascertain their compatibility.[26] However, if they cannot be reconciled then the two statutes are divergent and the doctrine of implied repeal will apply to this condition. According to the implied repeal concept, the latter legislation will always prevail over the former even though this is not expressly declared in the latter act.[27] These points may be demonstrated by a seminal case, *Ellen Street Estates v Minister of Health*.[28] In this case, Maughan LJ mentioned that 'it is impossible for the Parliament to enact that in a subsequent statute dealing with the same subject - matter there can be no implied repeal.'[29]

---

[24] Leyland (n 8) 50.

[25] Ibid 51.

[26] Broadbent (n 3) 51.

[27] Ibid.

[28] *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

[29] Ibid 597, quoted in Leyland (n 8) 52.

2.3 Practical Limitations of Parliament's Powers

In theory, Parliament can enact whatever legislation that it wishes, including the repeal of any previous statutes, and Dicey also noted that there is an absence of legal limitations on Parliament's capacity to legislate.[30] However, there are some explicitly practical limitations on the legislative authority of Parliament, as follows:

2.3.1 The Effectiveness of Law

The legislation passed by Parliament must be acceptable to the people. If an act is not obeyed or recognized by anyone as law, then the act will be ineffective. Thus, Parliament needs to enact proper legislation. For example, if the parliament legislates that dogs can only be taken for walks lawfully at 2 a.m.,[31] then this provision in the Act will certainly be unacceptable; people will be against it and also refuse to obey it, thus making such an act ineffective. Therefore, it can be said that Parliament cannot enact any practically ineffective legislation.

2.3.2 Grants of Independence and Devolution of Law-Making Powers

Lord Denning MR mentioned that 'freedom once given cannot be taken away.' This concept applies to formally dependent territories.[32] To illustrate, once the Westminster Parliament passed the *Zimbabwe Independence Act 1979*, no longer could Parliament revoke the grant of sovereignty to Zimbabwe, which was an independent country. Moreover, in the case that the UK Parliament confers law-making powers to the parliaments of the individual nations of the UK, namely Northern Ireland, Scotland, and Wales, in theory, the UK

---

[30] Broadbent (n 3) 52.

[31] Ibid 57.

[32] Ibid.

Parliament could cancel the powers conferred with the approval of the people in those nations.[33]

2.3.3 International Obligation

When countries enter into international society by making agreements or treaties, it conduces that the countries hold an obligation either to do something or avoid doing something. Thus, Parliament should not breach or damage international relationships by passing any act that conflicts with international law.[34] There is a judicial presumption that

[33] Ibid 58.

[34] For example, the European Convention on Human Rights (ECHR) provisions are implemented into British law by the Human Rights Act of 1998 (HRA). This resulted in significant revisions to the UK's constitutional legislation, and the HRA granted courts unprecedented powers. On the one hand, others argue that the HRA is not destructive to parliamentary sovereignty. The justification for parliamentary sovereignty remains unchanged, which is based on the democratic mandate of Parliament. Parliament, elected by the electorate and hence responsible and accountable to the electorate, should be the highest authority in the nation. Ultimately, in the HRA, courts have no official authority to strike down laws. Therefore, parliamentary supremacy remains. On the other hand, experts consider that the HRA, directly and indirectly, restricts Parliament's sovereignty. Parliamentary sovereignty post-HRA is simply not the same as pre-HRA, and an appreciation of this is imperative for the success of the new institutional human rights compact. Three aspects of the HRA confine parliamentary sovereignty: Firstly, the Government and Parliament are no longer free to enact any legislation without first considering its effect on ECHR under section 19(1). Second, the interpretive obligation imposed on courts by section 3 assures judicial supervision of exercises of parliamentary sovereignty for human rights concerns. Judges have been granted the authority to interpret legislative language adopted by the Parliament in order to prevent inconsistency between legislative words and the ECHR. It is fair to conclude that judges have been granted broad and substantial authority over the ultimate interpretation of legislative words. Thirdly, judicial declarations of incompatibility may indirectly affect parliamentary and governmental decisions over whether or not to respond. Confronted with a declaration of incompatibility, public opinion may exert pressure to alter a law. (*see* Julie Debeljak, *The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection*, 9 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 183 (2003).

judges will interpret domestic law by its compatibility with international law.[35]

2.3.4 The Judiciary

It cannot be denied that the work of judges through the development of the common law or the interpretation of legislation does not affect, in practice, acts of Parliament. Parliament usually allows a judicial decision to stand and this judicial decision is also an essential source of law, whether it is extending, restricting, or modifying a statute. For example, at the time of *R v R,*[36] husbands were granted immunity from the law of rape in relation to their wives. The House of Lords (Judicial Committee) overturned that immunity. Subsequently, Parliament approved this decision by amending the definition of rape in the *Criminal Justice and Public Order Act 1994*.[37] Moreover, as seen above in the case *Jackson v Attorney General,* the court stated unanimously that it was within the court's jurisdiction to determine whether the disputed legislation was a valid Act of Parliament.[38] From the *Jackson* case, thus, it can be said that the courts have affirmed the highly controversial suggestion that a primary statute *in extremis* might be challenged by the courts.[39]

[35] Broadbent (n 3) 58-9.

[36] *R v R* [1992] 3 WLR 767.

[37] Broadbent (n 3) 59-60.

[38] Leyland (n 8) 50.

[39] Ibid 49.

3. The Influence of English Common Law on Australian Law

3.1 An English Influence on the Australian Constitution

After their loss of the American colonies in 1783, the British looked for a new destination for their penal colonies. In 1787, the Imperial Parliament (Imp)[40] passed the *New South Wales Act 1787* to establish a new colony in the area of New South Wales on the east coast of Australia. It was decided that the statutory and common law of England would be used as the legislation of the colony and that this convict colony would also be subject to imperial acts. Then, other colonies were settled separately around Australia, namely in Tasmania, Brisbane, Melbourne, Perth, and Adelaide, respectively.[41] In the earliest stages, each colony established its own constitution based on the English model; however, unlike England's, the colonies' constitutions were written. Afterward, there was a strong public push for federation. Consequently, a federation of the colonies led to the drafting of constitutional conventions, which required the approval of the people of the Australian colonies. Eventually, after a series of referendums held over the period 1898-1900, the Imperial Parliament passed the *Commonwealth of Australia Constitution Act 1900* (Imp) for the creation of the new Dominion.[42]

It can be seen that even though the Constitution had been approved by referendum in all of the Australian states, it still had to be passed as an Act of the Imperial Parliament. Finally, Australia was conferred with legal independence from the Imperial Parliament by the

---

[40] The English Parliament that exercise power over its colonies and empires.

[41] Andrew J. Cannon, *Lessons from the Australian Constitution,* Worlds of Law : Foundations and Intersections (Lit-verlag 2008) 1-3.

[42] Ibid 4-6.

Australia Act 1986 which was passed both by the Imperial Parliament and the Australian Parliament.[43] Thus, it was expressed by the fact that in the first instance, the Australian Constitution had to be passed by the Imperial Parliament, that the Constitution could theoretically be amended or repealed by the British parliament. The *Australia Act 1986*, which was the legislation that removed the residual imperial authority from Australia, still had to be approved by the Imperial Parliament. Consequently, the British parliament, in the form of the Imperial Parliament, had a significant influence on the formation of the Australian Constitution.

3.2 Parliamentary Sovereignty in the Former British Colonies

From the above statement, there have been immense English influences on the Australian Constitution, which is the supreme law of Australia. Furthermore, the English common law was imported as the law of Australia as well. The doctrine of parliamentary sovereignty, which is itself a feature of English common law, was also applied in varying degrees in all of Britain's colonies during the colonial or independence periods. Before independence, each colony acquired the authority to self-govern; therefore, written constitutions were required to create the institutional framework that self-governance needed. Even after independence, a written constitution was still essential because it was the document that confirmed that the new country held independent sovereignty.[44]

However, by definition, it was impossible to harmonize the traditional form of parliamentary sovereignty with written constitutions. On the other hand, there was an

[43] Ibid 7-8.

[44] Saunders and Dziedzic (n 7) 481-2.

attempt to implement a possible measure of parliamentary sovereignty with the independent country. Moreover, it was argued that parliamentary sovereignty was assumed to underpin the process of the Australian Dominion's move toward independence and to release it from the authority of the British parliament.[45] This notion was expressed by two important acts of the British parliament, which were the *Colonial Laws Validity Act 1865* (CLVA) and the *Statute of Westminster 1931*. These two Acts combined worked to progressively release the Dominion from the primacy of the British parliament, which eventually led to Australia becoming a fully independent country.

The CLVA conferred the power to the colonial legislatures to amend their own constituent legislation, as stated in Section 5 of the Act that 'Every colonial legislature shall have...full power to make laws respecting the constitution, power, and procedure of its legislature'.[46] Then, the *Statute of Westminster 1931* cancelled the CLVA in its application to the parliaments of Dominions. It provided that no law made by the parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the existing or future law of England and also granted the power to the Dominion parliaments to repeal or amend any such legislation that is part of the law of the Dominion.[47] Thus, it can be seen that the two statutes above demonstrate that generally, the Dominion parliaments had the power to enact or repeal any laws in their countries; and this is certainly one of the principles of parliamentary sovereignty. It should be noted that such provisions in these

[45] Ibid 482-3.

[46] However, the provision from this Act also required that 'such laws shall have been passed in such manner and form as shall from time to time be required by any Act of Parliament, letter patent, order in council, or colonial law...'.

[47] The *statute of Westminster* 1931 (Imp), s 2 was not applied to the Australian States.

statutes had the effect of allowing the Dominions to govern themselves more liberally. Hence, it can be said that parliamentary sovereignty supported the process of granting independence to Dominions.

4. The Doctrine of Parliamentary Sovereignty in Australian Law

Australia, one of the British Empire's former colonies, certainly inherited the British constitutional concept of the doctrine of parliamentary sovereignty and integrated it into its legal system. However, parliamentary sovereignty could not be reconciled with its written constitution which was established on both a federal and state level. Thus, it is impossible to apply this doctrine in its full English sense in Australia.[48] It has been argued that the doctrine of parliamentary sovereignty has left a subtle mark on the Commonwealth's Constitution, yet it has held a greater influence on the states' constitutions.[49] The scope of the application of parliamentary sovereignty will be explained below.

4.1 The Scope of the Doctrine of Parliamentary Sovereignty

In Australia, there was a significant distribution of legislative power between the Commonwealth and the states, with limitations being placed on the sovereignty of Parliament as a consequence.[50] Furthermore, it has been argued that the idea of parliamentary sovereignty in Australia must be explained in the context of the strict limits

[48] David Clark, *Principles of Australian Public Law* (LexisNexis Butterworths, 2nd ed, 2007) 18 [1.28].

[49] Saunders and Dziedzic (n 7) 485.

[50] Tony Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory : Commentary and Materials* (The Fedaration Press, 5th ed, 2010) 384-5.

and boundaries that were introduced by the Commonwealth Constitution, and to some extent, by the state constitutions.[51]

4.1.1 The Scope in the Commonwealth Constitution

The *Commonwealth of Australia Constitution Act 1900* divides legislative power between the Commonwealth parliament and the state parliaments. For the Commonwealth parliament, the federal Constitution confers legislative power to the 39 heads of power listed in section 51. Nevertheless, it can be said that the federal Constitution circumscribes the Commonwealth legislature by confining such lists of legislative power. Furthermore, the authority of the Commonwealth parliament to amend the Commonwealth Constitution is bounded by section 128 of the federal Constitution. Thus, in order to alter the Constitution, the distinctive procedure prescribed in section 128 must be followed, which further restricts the legislative capacity of the Commonwealth parliament.[52]

The limitations of the legislative power of the Australian state parliaments prescribed in the Commonwealth Constitution can be seen. At the earlier stage, the British parliament provided each colony with the legislative authority stated in the Colonial Laws Validity Act 1865, section 5. This Act expressed clearly that each colonial legislature had the full power to enact laws respecting their own constitutions, powers, and procedures. When the federal Constitution was enforced, the state legislatures' powers were saved by sections 106 and 107 of the federal Constitution. Section 107 expressed explicitly that with the exception of

[51] Ibid 89.

[52] Clark (n 45) 18 [1.28].

the power granted exclusively to the Commonwealth parliament, the states' legislative powers were to continue.[53]

The Commonwealth Constitution, however, also restricts the state parliaments' capacities. For example, when there is a concurrent area in which the law-making power may be exercised by both the federation and the state, the statutes on both the state and Commonwealth levels could be enforced. Yet, if any conflicts arise from the presence of such laws, the Commonwealth legislation will prevail over the state law.[54] Hence, it can be seen that the state's legislative power is restricted when the federation has concurrent legislative power.

Furthermore, some provisions of the Constitution indicate expressly that the federal legislature has exclusive authority over the certain subject matter; examples of which are mentioned in sections 52 and 92. Thus, it can be implied that the state cannot enact any legislation in these areas. Such provisions can be considered as setting the bounds of the states' law-making powers.[55]

As mentioned above, the concept of parliamentary sovereignty can be explained in terms of the ability of Parliament to restrict legislative powers. It can be seen that the Commonwealth Constitution provides the proviso to limit both Commonwealth and state parliaments. Thus, from the content found in the Commonwealth Constitution, it can be argued that the primary legislative bodies in Australia are not truly sovereign.

---

[53] Blackshield and Williams (n 47) 426.

[54] *The Constitution of Commonwealth of Australia Act 1900*, S 109.

[55] Blackshield and Williams (n 47) 426.

4.1.2 The Scope in the State Constitutions

Regarding the Australian states, apart from the limitations imposed on the state legislative powers as provided by the federal Constitution (as mentioned above), the state parliaments' powers of alteration and of repeal with respect to any such laws have continued to be enforced.[56] However, it can be seen from the Australian state constitutions that the state legislatures have not had the absolute authority to enact or amend any laws without limitation; there are still provisions to do so. The rigid limits and boundaries of the legislative power set by the Australian state constitutions can be discussed from two perspectives: first, *'Peace, Welfare and Good Government,'* and second, *'Manner and Form Requirement.'* These two points are considered to be the constitutional entrenchment of respective legislative procedures.[57]

Regarding 'Peace, Welfare, and Good Government,' it can be described that generally, the state constitution grants legislative power to the parliament of that state. To illustrate, the *Constitution Act 1902* (NSW) section 5 provides that the legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have the power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

Even though the grant of legislative authority in some other state constitutions may differ in wording, they have the same effect in offering legislative power. Nevertheless, for all

[56] Ibid.

[57] Ibid 428.

states, the 'peace, welfare and good government' formula is now set according to section 2(1) of the *Australia Act 1986*.[58]

There is an assumption that, in offering legislative power, the formula 'peace, welfare, and good government' might be judicially interpreted as a limitation on parliamentary sovereignty. To determine whether such disputed legislation follows this formula, the court will consider whether the disputed statute is really intended for the *peace*, for the *welfare*, or for the *good government* of NSW. The disputed legislation would be unconstitutional if the answer to these questions were 'no'.[59] In *Building Construction Employees and Builders' Laborers Federation v Minister for Industrial Relations (NSW)*,[60] Street CJ said that '...[L]aws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy...will be struck down by the courts as unconstitutional.'[61]

When comes to the 'Manner and Form Requirement', there is a restrictive legislative procedure that stipulates that if the enactment of a law does not follow a particular law-making process, the law shall be invalid. It has been argued that this phrasing of the 'Manner and Form Requirement' has challenged the conception of parliamentary sovereignty, as introduced by Dicey because the state parliaments can limit the power of future parliaments.[62]

---

[58] Ibid.

[59] Ibid.

[60] *Building Construction Employees and Builders' Laborers Federation v Minister for Industrial Relations (NSW)* 7 NSWLR 372.

[61] Ibid 387.

[62] Blackshield and Williams (n 47) 440.

This phrase is derived from the *Colonial Laws Validity Act 1865*, which imposed the provision that the law of the colonies must be passed in such a manner and form as may from time to time be required by any imperial or colonial legislation in force at that time.[63] In order to understand the manner and form clearly, it is useful to consider a case that appeared in New South Wales, which was *Attorney General for New South Wales v Trethowan*.[64]

In this case, the government of NSW anticipated that an incumbent government led by a rival party would pass a statute revoking the legislative council. Thus, the *Constitution of New South Wales 1902* was amended in 1929 by the addition of section 7A which stated that if there was an attempt to enact any bill that had the intention of abolishing the legislative council, that bill would have to be passed by a special procedure requiring it to be approved by both the lower and upper houses with a two-thirds majority. It would also have to be approved by a referendum of the people. Furthermore, section 7A also included a proviso to prevent the new government from repealing section 7A itself, by stating that the same procedure must be followed if the 1929 Constitution Act were to be repealed.[65] Afterward, the new government was elected and it decided to revoke the legislative council by drafting a bill that ignored the provision set in the 1929 Constitution Act. In the process of acquiring the governor's royal assent, it was argued that the bill had not been passed according to the constitutional legislative process, so royal assent should not be granted.

---

[63] the *Colonial Laws Validity Act 1865* (Imp), s 5.

[64] *Attorney General for New South Wales v Threthowan* [1932] AC 526.

[65] Broadbent (n 3) 55.

Both the Australian High Court and the Privy Council held that section 5 of the *Colonial Laws Validity Act 1865* allowed a colonial legislature to enact or amend any law; however, the enactment process had to follow the procedural requirement that was legally in force at the time. In this case, therefore, the New South Wales Parliament was required to follow the entrenched procedures provided in the 1929 Constitution Act. The state parliament did not possess the sovereignty to ignore it. It can be seen that the new government failed to follow the legislative procedural requirement, meaning that such a bill would not be given royal assent.[66]

A similar proviso to section 5 of the *Colonial Laws Validity Act 1865* was enacted in section 6 of the *Australia Act 1986.* Thereby, when any question regarding the power of Parliament to legislate the Act arises, the courts appear to accept the constitutional entrenchment of legislative procedure found in the *Australia Act 1986*. This has the effect that state parliaments do not have full power to make or alter their statutes without unconstrained limitations.[67] Moreover, it can be said that the 'Manner and Form Requirement' in the *Australia Act 1986*, section 6, is the provision that confers the capacity of the parliament to bind its successor, which is inconsistent with Dicey's definition of parliamentary sovereignty. [68]

From the aforementioned statement, it appears that the concept of parliamentary sovereignty in Australian states has to be explained in terms of the limitation of the

[66] Ibid.

[67] Ibid.

[68] Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *QLD. University of Technology Law Journey* 69, 95.

legislatures' powers. As is apparent from what has been said, the state constitutions also encircle the limitations of the legislative authority of their parliaments. Thus, the state parliament is not sovereign and these kinds of restrictions are not consistent with parliamentary sovereignty.

4.2 The Influence of the Doctrine of Parliamentary Sovereignty

As previously discussed, the Australian parliament's absolute legislative power is denied. However, parliamentary sovereignty is not without influence.[69] In particular, parliamentary sovereignty determines the contours of legal interpretation. For example, when a question arises before the court regarding the legislative competence of the state parliament, the Privy Council held, in the opinion in *R v Burah,*[70] that each colonial parliament has plenary power of legislation that is the same as the Imperial Parliament itself. Thus, to construe how the provision of the *State Constitution Act* confers legislative power to the state parliament, the principles that are exercised in England as part of the rule of parliamentary sovereignty have to be applied.[71]

Parliamentary sovereignty continues to influence the interpretation of Australian constitutional law.[72] In *Kable v Director of Public Prosecutions (NSW)*, Dawson J mentioned that the doctrine of parliamentary supremacy is the basic principle of English common law,

---

[69] Patrick Keyzer and Jennifer Clake Peter Hanks, *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 312 [5.4.7].

[70] *R v Burah* (1878) 3 App Cas 889.

[71] Keyzer, Hanks and Clake, above n 66, 312-3 [5.4.7].

[72] Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57, 58.

which was inherited by Australian law, therefore the court should give effect to it accordingly.[73] In *Kartinyeri v Commonwealth*,[74] Brennan CJ and McHugh L cited the traditional explanation of parliamentary sovereignty in relation to the Commonwealth Parliament, when referencing its legislative power to make or repeal laws.[75]

Moreover, it was suggested that the decision to exclude a bill of rights from the Commonwealth Constitution in 1901 can reinforce the assumption related to parliamentary sovereignty that rights are protected properly by Parliament and the common law.[76] Furthermore, there was the introduction of legislative rights instruments in a form that was designed to preserve parliamentary sovereignty; this instrument is known as the 'interpretation provisions.'[77] In Australia, several bills have applied interpretation provisions to protect human rights. An example law passed by the Commonwealth Parliament is the *Human Rights Act 2004* (ACT). This lays down the provisions for interpretation in section 30 by stating that 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.'

Section 30 suggests that the courts should interpret territory law, insofar as it is possible, in a manner that is compatible with human rights law. It has been argued that the interpretation provisions are consistent with the concept of parliamentary sovereignty because they involve the legislature making an instrument for the court regarding how the

---

[73] *Kable v Direction of Public Prosecutions (NSW)* (1996) 189 CLR 51, 74.

[74] *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[75] Taylor (n 69) 59.

[76] Saunders and Dziedzic (n 7) 489.

[77] Ibid.

laws are meant to be interpreted, while at the same time, they also retain the power for Parliament to override the interpretation of the court.[78]

However, there is also the controversial argument that states that the interpretation provisions go against the doctrine of implied repeal, which is one of the concepts of parliamentary sovereignty because the interpretation provisions imply that only an expressed repeal from parliament can abolish a previous human rights statute. Or, in other words, the interpretation provisions exclude the implied repeal of human rights statutes. Yet, this argument can be resolved by using the principle of statutory interpretation which states that 'there is the assumption that Parliament does not generally intend to repeal statutory human rights protection except by the clearest of words.'[79]

From the previous principle, it can be said that only clear and unambiguous statements are required to abrogate human rights. Thus, interpretation provisions are not necessary to exclude an implied repeal of human rights legislation because it naturally requires a clear indication from the Act if Parliament wants to revoke a human rights statute. This assumption also supports the proposition that interpretation provisions that protect human rights are not inconsistent with parliamentary sovereignty.[80] Moreover, the interpretation provisions are not like the manner and form provisions because they do not bind a successor parliament; future parliaments are free to repeal them expressly through legislation.[81]

---

[78] Taylor (n 69) 72.

[79] Ibid 73.

[80] Ibid.

[81] Ibid 75.

It can clearly be seen that the ‘interpretation provisions’ enacted in a human rights statute would be consistent with the parliamentary sovereignty because they would expressly allow Parliament to repeal the statutory protection of human rights or the interpretation provisions themselves. Finally, from the above explanation, it can be seen explicitly that parliamentary sovereignty has thus influenced statutory interpretation and human rights protection in Australia.

5. Conclusion

In the UK, there is an absence of a codified constitution or a largely written constitution; however, the doctrine of parliamentary sovereignty, created through judicial acceptance under English common law, is the core principle of its constitutional apparatus. Parliamentary sovereignty was likewise implemented to differing degrees in all former British Dominions; undoubtedly, this doctrine has also impacted Australia, as one of Britain's colonies. However, because Australia acquired a written constitution from the Imperial Parliament, it is impossible to apply the complete notion of parliamentary sovereignty in Australia, according to Dicey's definition.

As was mentioned, Commonwealth and state parliaments in Australia do not have true parliamentary sovereignty. It has been demonstrated that the Commonwealth parliament’s powers are limited because it was established by the federal constitution and was granted legislative power as prescribed by the Constitution. The states’ legislative powers are restricted by the Commonwealth Constitution, the state constitutions, and some of the Commonwealth’s powers. Thus, neither the Commonwealth nor the state parliaments

in Australia have the necessary legislative supremacy to enact or amend laws without limitation. Nonetheless, although the parliaments in Australia are not fully sovereign, parliamentary sovereignty has continued to influence the Australian legal system, particularly in how it applies to legal interpretation and statutory human rights protection.