CHAPTER TWO

SOVEREIGNTY OF PARLIAMENT DOMESTIC ISSUES

Constitutional and Administrative Law

SOVEREIGNTY OF PARLIAMENT

A Sovereign is "**The supreme ruler of the state**". Austin stated that "*If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent*".

A sovereign authority is according to Bryce "*The person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power either of laying down general rules or of issuing isolated rules or commands whose authority is that of the law itself".*

Sovereignty relates to the political and legal concept of ultimate authority in a state and to that state's freedom from external control.

The Doctrine of Sovereignty of Parliament

It has been claimed that 'The Doctrine of Parliamentary Sovereignty - or Supremacy' contains the most important fundamental law of the Constitution regarding the legislative supremacy of Parliament.

It is debatable whether or not legislative supremacy is a law, whether or not it exists and if so whether or not it is enforceable. Conclusions on this issue facilitate consideration as to whether or not legislative supremacy is fundamental to the Constitution and whether or not the Constitution has any fundamental laws of any sort whatsoever. This is not a staid 'old hat' issue. In the light of the developing status of European Union Law it is an important topical issue.

If Parliament is indeed supreme it is hard to establish historically when that supremacy came about. The crown's independent royal legislative power came to an end with the **Case of Proclamations,**[1] Per Coke C.J 'The King hath no prerogative save that the law allows him'. Royal powers to suspend and dispense ,with laws and the power to raise royal taxation were finally ended with the advent of the **Bill of Rights 1689**.[2] This does not explain why Parliament is Sovereign. Where did Parliament get it's authority from? In 1776 a group of people illegally, at least from the point of view of the Sovereign Power prior to the event, declared independence and purported to set up a new Constitution different from that of the U.K. Does this mean that the U.S.A. doesn't legally exist?

Similarly, in the 17th century James II dissolved Parliament in 1688 and fled the country. At that time he was the lawful monarch. William of Orange came to England by invitation. A 'Convention' of ex members of the Commons and of the Lords met him and in February 1689 they offered him with his wife Mary 'The Crown of our Kingdom'. The 'Convention' then passed an Act asserting that **'IT'** was Parliament. Clearly the 'Convention' was not a Parliament. Only a lawful monarch could call a Parliament. Therefore the Convention could not make itself lawful. William had no hereditary right and could not assent to Bills.

However, one cannot seriously argue that all legislation since then is a nullity and ineffective. A new system came into operation in the 17th century, though historians might argue about the actual date. Mitchell states that *'Constitutions and Constitutional doctrines are the result of history and what happened in 1688 was a practical rather than a legal solution.*' [3]

The Doctrine of Sovereignty of Parliament states that "*Parliament is the supreme power in the state and as such possesses unlimited legal power.*" Dicey stated that "*The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament 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*". This definition is worth learning. An analysis of this and other definitions of sovereignty is a valid method of dealing with questions that require candidates to consider the notion of Parliamentary Sovereignty.

De Smith, reiterating Dicey, stated that "*The Queen in Parliament is competent, according to U.K. law, to make or unmake any law whatsoever on any matter whatsoever; and no U.K court is competent to question the validity of an Act of Parliament. Every other law-making body within the realm either derives its authority from Parliament or exercises it at the sufferance of Parliament; it cannot be superior to or even coordinate with, but must be subordinate to Parliament*".

1 **Case of Proclamations** (1611) 12 Co Rep 74

2 Consider also **R v Hampden** (Case of Ship's Money) (1637) 3 St Tr 825 ; **Thomas v Sorrell** (l674) Vaughan 330 ; **Case of Impositions (Bate's Case)** 1606 2 St Tr 371

3 See also **Hall v Hall** [1944] 88 S.J. 383

Implicit in these definitions are four distinct concepts.

1). That Parliament is competent to legislate on any matter whatsoever, including matters regarding the Constitution of Parliament itself.
2). That Parliament is the sole and Supreme Law maker in the land and as such all other law making bodies derive their legislative powers from Parliament. Parliament is not subject to the law making powers of external bodies.
3). That no court can question the legislative competence of Parliament.
4). That each Parliament is born free and cannot be bound by prior legislative provisions of earlier Parliaments.

We will now examine these concepts to see whether the statements are true or false. If the statements are true then clearly Parliamentary Sovereignty or Supremacy is a reality. However, if they are not entirely proven the question then arises as to whether the effect of deviating from a strict application of the rules renders the doctrine obsolete, and if so, what is the effect of this obsolescence.

Questions on this area tend to be linked to a definition of Sovereignty with an invitation to discuss the validity of the definition. Students are advised to seek out as many definitions of Sovereignty as possible. Most definitions will concentrate on different aspects of Sovereignty, so that questions do not invite candidates to say everything they know about sovereignty, but rather invite them to concentrate on one or more specific aspects of the doctrine. Thus one might be asked to consider whether or not, in the light of UK membership of the EC a new Constitution has come into being which admits only of some of the facets of the above definitions or requires a more sophisticated definition of Sovereignty of Parliament. Alternatively questions may take the form of a problem.

The omni-competence of Parliament in legislative affairs

Can Parliament legislate on any matter what so ever? Jennings claimed that Parliament could legitimately pass a law forbidding Frenchmen from smoking on the streets of Paris. Whilst this emphasises that in the eyes of U.K. law Parliament can legislate on any matter it ignores the practical questions of enforcement and of the attitude of foreign sovereign states to such legislation.

Nonetheless extra-territorial legislation exists on such diverse topics as inter alia homicide, **The Hijacking Act 1971** and safety of life at sea legislation,[4] which seek to control the behaviour of legal personalities within foreign jurisdictions.[5]

Can the U.K. Parliament make law for independent nations?

S4 Statute of Westminster 1931 made provisions in relation to the granting of independence to Commonwealth countries. **S4 Statute of Westminster 1931** seems to preclude Parliament from legislating for a state granted independence, unless that State requests such legislation. This appears to amount to be a form of territorial restriction.

In **British Coal Corp v R Privy Council**.[6] the court adopted the view that Parliament cannot surrender its power to make law for any place. A further complication arises from statutes such as the **Mauritius Independence Act 1968**, which have granted independence to certain Commonwealth countries. "No act of the Parliament of the U.K. passed on or after the appointed day shall extend or be deemed to extend to Mauritius as part of its law". [7]

The Doctrine of Parliamentary Sovereignty places precedence on domestic law over foreign law. Thus in **Mortensen v Peters,**[8] the Danish master of a Norwegian fishing trawler was held by the U.K. courts to be subject to U.K. jurisdiction regarding the use of otter trawls in the Moray Firth under the **Herring Fishery (Scotland) Act 1889** despite a claim that the vessel was operating in international waters outside the jurisdiction of the U.K.

4 for example **The Merchant Shipping Acts**
5 See also **Joyce v D.P.P.** [1946] AC 347
6 **British Coal Corp v R** [1935] AC 500 Privy Council
7 See also **Blackburn v A.G.** [1971] 2 All E R 1380
8 **Mortensen v Peters** (1906) 14 S.L.T. 227

The courts however do seek to provide an interpretation of U.K. statutes that, as much as possible, is compatible with international law and treaty obligations. There is a 'rebutable' presumption that Parliament does not intend to legislate contrary to such obligations and so clear words are required within the legislation before the courts will recognise a conflict.

Any state that seeks to act contrary to Public International Law may however have to face international condemnation. In extreme situations the U.N may take measures to enforce international law, by means first of resolutions of the United Nations, embargoes etc and finally by armed intervention, as witnessed by the Kuwait affair and the Croatian / Bosnian / Serbian conflict.

If a state has undertaken International Law obligations by way of Treaty with other states the obligations are supervised by the international court, which can direct a state to fulfil its obligations. The directions cannot be enforced directly, but the concept of 'comité' of states' means that few states are prepared in normal circumstances (belligerence not being a normal circumstance) to ignore such a ruling. Compliance is usual since a blatant disregard would have adverse international implications. In exceptional circumstances the United Nations can make resolutions and enforce them by force where international peace and stability are threatened by the actions of a belligerent state.

A major modern problem for Public International Law today in the re-emergent Eastern European States concerns rival claims to Sovereignty. If the identity of the sovereign body is not clear who should the law support ?

What is clear is that the enforceability of Public International Law is often, for practical reasons, very limited and it is unlikely that the U.K. Parliament would find it's legislative as opposed to its political power challenged in this forum.

Practical limitations on Parliamentary Sovereignty

It has been claimed that Parliament could declare that in the eyes of the law a man is a woman or vice-versa. Clearly, it is impossible, by a legislative measure, to effect a physical change such as this. The European Court of Justice has upheld a U.K. decision that a person who was born a man, but who had undergone a sex change operation, was still a man and could not therefore legally marry a man, even though to all intents and purposes 'she' is a now a woman capable (if not of child bearing) of at least consummating a marriage. Whilst this particular issue has arguable merits to it, none the less whilst Parliament may legally change the laws of nature the reality cannot be so easily changed.

Moral limitations on the Sovereignty of Parliament.

Are there any moral restraints on the legislative competence of Parliament ? Coke.J. and Hobbes argued that there are basic tenets of 'natural law' which could not be disturbed, invoking the concept of natural rights inherent in man. In **Dr. Bonham's Case**[9] Coke J said 'there could be a law of nature or reason superior even to an Act of Parliament'. Blackstone provided tacit acceptance of the possibility of natural law prevailing over statute.

Whilst this is essentially a jurisprudential question, it should be realised that there is no universal definition of what is morally right or wrong. Without a clear method of determining what does and does not accord with natural law no mechanism, outside the courts, exists for deciding whether or not Parliament has or has not complied with natural law. As we shall see, there are problems in the U.K. regarding the role of the courts in supervising the validity of and the contents of Acts of Parliament.

In 1996 a jury found four protesters who broke into an aircraft factory and caused 1.5 million pounds worth of damage to a trainer jet that was due to be sold to the Government of Indonesia not guilty of criminal damage. Their defence was that the Government of Indonesia was committing crimes against humanity and the defendant's believed that the Government of Indonesia intended to use the aircraft to continue committing crimes against the peoples of East Timor. As such they believed that their acts of destruction against the aircraft amounted to legitimate actions to prevent a crime and were not therefore an offence. This raises the question, to what extent does this set a precedent which defeats the purpose of an Act of Parliament and therefore undermines the Sovereignty of Parliament ?

9 **Bonham's Case** (1610) Co Rep 113b

It appears that this case has not been appealed by the Crown Prosecution Service. Clearly as a decision based on the facts of the case it should not create a legally binding precedent. If it were to do so the implications are considerable. The alleged crime to be prevented is one against International Law not UK law. The British Courts are not competent to determine whether or not the Indonesian Government is or is not committing crimes against humanity and the Indonesian Government has not been indicted or convicted before an International Tribunal. The allegation of Indonesian Government guilt was merely a moral judgement of the protesters.

Such a defence could be used by practically any protest organisation asserting its moral values over those of others in society. In such situations the protestors essentially set themselves up as judge and jury over others. If they are allowed to continue to do so they could effectively override statutes designed to protect persons and property simply by convincing a jury of the morality of their cause.

A possible way of dealing with this could be to limit the defence of a reasonable belief that the defendant was acting to prevent a crime to the prevention of crimes recognised by the laws of England and Wales. Since, for instance, anti road protesters will be aware that whilst they claim the road builders may be acting contrary to their moral or environmental beliefs nonetheless the construction project is perfectly legal under our law. Therefore the defence would not be available to them for acts of criminal damage or violence against the person.

Retrospective Legislation.

Retrospective legislation is seen to be a particularly abhorrent form of legislation since it can render illegal conduct of persons which they were quite entitled to believe was legitimate at the time that they carried out the act, and may therefore be seen as being 'morally wrong.' Nonetheless Parliament has demonstrated that it is prepared to legislate retrospectively in appropriate circumstances. Thus the **War Damage Act 1965** retrospective reversed the law as declared in **Burmah Oil v Lord Advocate**[10] regarding compensation for property destroyed by the crown under the royal prerogative during the Second World War.

However, the European Court of Human Rights held in 1995 that the UK Courts had acted unlawfully in confiscating the proceeds of a drug dealer in relation to crimes committed by him before the Act of Parliament permitting the confiscation of the proceeds of crime had been passed. The European Convention on Human Rights forbids the imposition of penalties not sanctioned by law. A retrospective change in the law is not considered to be a lawful sanction in this respect. There is nothing to prevent the confiscation of proceeds of crimes committed after the Act was passed.

Democracy. Who is Sovereign, Parliament or the Electorate ?

Is Parliament restricted to a program dictated by its electoral mandate or not ? From the practical point of view, the government must keep a weather eye on public opinion since it has to face the electorate at regular intervals. This would not however affect the validity of any Act of Parliament, only its popularity.

The practical implications of enforcement also need to be considered. The Poll Tax issue is an example where the Government feared that unless an alternative was offered to the electorate the 1992 election would be lost. If sufficient people disobey a law, that law could in practical, if not in legal terms, become unenforceable. A sufficiently contentious law might even force a revolution - an issue widely debated during the miner's strike.

The more likely scenario however is that the government would lose support in the House of Commons, forcing a vote of confidence. The government would then have to decide on a 'U Turn' or on the dissolution of Parliament and a general election if a new government could not be appointed immediately. The departure of Mrs Thatcher, ostensibly over her Anti-European policies is an example of these forces at work.

[10] **Burmah Oil v Lord Advocate** [1965] AC 75

Parliament as Sole and Supreme Law Maker. This involves three distinct issues.

1) The role of the judiciary and the common law in law making.
2) The relationship of delegated legislation to Acts of Parliament.
3) The European Union.

The Role of the Courts in Law Making.

This revolves around the topic of Judicial Precedent. It involves asking whether or not the common law is in fact judge made law, or whether or not the judges are 'merely' rediscovering legal concepts which have always existed since time immemorial. The advent of such momentous decisions as **Donoghue v Stevenson,**[11] and the common law crimes of Public Indecency may leave us to doubt this.

Domestic Delegated Legislation.

This is legislation created by bodies given a limited legislative power by Parliament, such as local authorities, government ministers etc in respect of By-Laws and Statutory Instruments. Clearly the power emanates from Parliament and as such poses no great threat to Parliamentary Legislative Supremacy. The only question is to what extent Parliament looses the opportunity to publicly scrutinize such legislation. The major problem here will be regarding Statutory Instruments, which are passed in accordance with European Union Directives.

The European Union.

If the European Union has powers of legislation independent of and beyond the supervisory powers of the UK Parliament and without the power of veto by the U.K. Parliament then, to the extent, if at all, that the European Union can generate such legislation, the Doctrine of Parliamentary Supremacy in the legislative field is breached.

Can the Courts question Acts of Parliament ?

As we have seen Coke CJ stated in **Dr. Bonham's Case**,[12] that the courts were competent to question the validity of the contents of Acts of Parliament. Parliamentary rules exist regarding the proper form and the procedures involved in creating an Act of Parliament though these rules are not themselves the subject of an Act of Parliament and are not therefore laws as such. What is clear is that once an Act has been entered upon the electoral role the courts are not prepared to consider whether or not the correct procedures have been followed.

In **Edinburg & Dalkeith Railway v Wauchope,**[13] a standing order stated that where a proposed private bill would adversely affect the private interests of a subject he should be given notice of the intention to promote such a bill. He claimed that since he was not so notified regarding a certain Act, it was invalid. The court rejected this claim. See Lord Campbell's dicta.

In **Lee v Bude & Torrington Junction Railway Co.**[14] a claim that Parliament was duped into passing a Private Act due to fraudulent information did not affect the validity of the Act. Similarly it was claimed in **Pickin v British Railways Board,**[15] that B.R. deceived Parliament during the passage of the British Railways Act 1968 and so the Act was invalid. The contention was again rejected by the court.[16]

The attitude of the courts is what makes Parliamentary Sovereignty a legal fact. Decisions by the courts in which they have accepted the idea of the Sovereignty of Parliament have made this concept a principle of the common law. They have done this despite challenges towards the idea of the Sovereignty of Parliament, where litigants have argued that principles of international law should prevail over or be preferred to the provisions in a statute. Thus in **Cheney v Conn,**[17] the defendant claimed his taxes would be used for nuclear weapons which he claimed were illegal under international law. He sought to show therefore that the gathering of taxes for such purposes was also

11 **Donoghue v Stevenson** [1932] AC 562
12 **Dr.Bonham's Case** (1610) 8 Co Rep 114a cf **The Case of Ship's Money** [1637] 3 St Tr
13 **Edinburg & Dalkeith Railway v Wauchope** (1842).8 Cl & F 710
14 **Lee v Bude & Torrington Junction Railway Co** (1871). LR 6 CP 577 See Willes J's dicta.
15 **Pickin v British Railways Board** (1974) AC 765
16 See also **Hall v Hall** [1944] 88 S.J. 383 regarding the validity of the succession..
17 **Cheney v Conn** [1968] 1 All E R 779

illegal and so he did not have to pay. His claim failed.[18]

Under the **European Assembly Elections Act 1978** no treaty increasing the powers of the European Parliament should be ratified unless approved by Act of Parliament. In 1993 Lord Rees-Mogg sought by way of Judicial Review to challenge the power of the Crown to ratify the **Maastricht Treaty**. Madame Speaker issued dire warnings to the judiciary, from her seat in the House of Commons, not to interfere with the Doctrine of the Supremacy of Parliament. The Court duly dispatched the Rees-Mogg challenge to the dustbin since Parliament had just passed the authorising Act entitling the Crown to ratify the Treaty (albeit without the portion relating to the social charter). The Court's ability to control the exercise of the Royal Prerogative especially in foreign affairs is very limited.

Clearly here as in the 1971 challenges to the exercise of the Royal Prerogative by **Blackburn**[19] and **Ross McWhirter**[20] which were rebuffed by Lord Denning the court was neither willing nor able to interfere in a legitimate exercise of that power.

Each Parliament is born free and cannot be bound by earlier Parliaments.
The legislative provisions of Parliament cannot bind subsequent Parliaments who can simply remove an earlier statute, including the provisions which claim to bind it and prevent it from so doing. It is however arguable that this statement is too simplistic.

The Doctrine of Express Repeal
Parliament has from time to time stated that the provisions of an Act are intended to last forever and that future Parliaments cannot change the Act. Will such a device have any effect whatsoever? Examples are the Acts of Union with Scotland and Ireland, which were stated to be a permanent feature. However, Ireland has since been separated into two countries and the Irish church has gone its own way.

The **Act of Union with Scotland 1707** was based on a treaty between the two kingdoms of Scotland and England & Wales. The legislation offered certain protections to the established church in Scotland and for a separate legal system amongst other protections. These protective measures were meant to last forever so that a future Parliament could not alter them. The Scottish view is that no future Parliament would be legally competent to alter the provisions.

MacCormack v Lord Advocate,[21] Per Lord Cooper (obiter) "*The principle of the unlimited sovereignty of parliament is a distinctly English principle which is no part of Scottish Constitutional Law. I have difficulty seeing why it should have been supposed that the new Parliament of Great Britain should inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England*". The most persuasive element in favour of Lord Cooper is the fact that the vast majority of the protections are still in force.

Act of Union with Ireland 1800. This involved a similar attempt to the above. The fundamental unalterable principle was that there should be a merging of the two existing churches into a united church. The merger lasted until 1869. In 1922 Eire was created.

The conclusion regarding the Acts of Union must be that if Westminster changes it mind then it can do so. Labour Party proposals to create a Parliament in Scotland clearly demonstrate that the Constitution may well be changed.

If one Parliament cannot bind a future Parliament does this mean that Parliament's law making power is limited or restricted, or is it merely a necessary feature of its lack of limitation?

[18] See also **Mortensen v Peters** [1906] 8 F (J) 93 discussed above and see further **R v Secretary of State for the Home Department ex parte Thakrar** [1974] QB 684 where it was claimed that contrary to the provisions of the **Immigration Act 1971** international law stated that countries must receive back any of their nationals expelled from other countries (in this case British protected persons expelled illegally from Uganda by Idi Amin). The courts rejected this challenge as to the validity of the Act.

[19] **Blackburn v A.G.** [1971] 2 All E R 1380

[20] **Ross McWhirter**

[21] **MacCormack v Lord Advocate** [1953].SC 396

Are there any other methods by which Parliament may limit its future legislative power? Clearly the discussion above regarding the granting of independence of commonwealth states is relevant in this context.

What if Parliament attempted to limit its future legislative authority by passing a Bill of Rights embodied in a Written Constitution (as opposed the model adopted in the Human Rights Act 1999) and introduced some limitations based on the U.S. model granting authority to a court to strike down any provision which offended against the written Constitution?

Regarding such a possibility Lord Lloyd of Hampstead said *'I do not relish the prospect of the judiciary being invested with the ultimate power to declare invalid the laws emanating from the will of Parliament on any subject at all and certainly not on human rights ... I would prefer it should not be given tasks beyond its scope which are more properly left to other organs of the Constitution*." Lord Scarman as a signatory to Charter '88 would fundamentally disagree with such a view.

An Act might seek to stipulate some form of majority that had to be achieved before any amending Bill could become law, including any attempt to alter that law making formula e.g. an 80% majority of both Houses as occurs in the U.S.A. This has been attempted by **s1(2) Ireland Act 1949** which states that Northern Ireland cannot cease to be part of the U.K. without the consent of the Parliament of Northern Ireland thus imposing a legislative formula on the U.K. Parliament regarding succession of Northern Ireland. [22] Such formulas are called entrenched provisions. The mechanism in action can be seen from the passing of the **British North America Act 1982,** which was delayed for several years until the appropriate political climate prevailed in Canada to permit the changing of the Canadian Constitution.[23]

Consider also the effects of **The Parliament Act 1911** and **The Parliament Act 1949,** which discuss formulas for passing financial laws and regarding the delaying powers of the Lords, which mean that as far as such measures are concerned the Queen in Parliament is the Queen and the Commons alone. If such a measure can work to facilitate legislation why couldn't such a measure work to make legislation more difficult?

The most recent legislation to have an impact on the Doctrine of the Sovereignty of Parliament is the **Human Rights Act 1998**, which it should be noted does not automatically strike down an Act of Parliament but requires the legislature to consider addressing problems with compatibility between the Act and an "offending" Act. However, the interpretive mechanisms / presumptions mean that the courts can virtually "rewrite" the meaning of an Act of Parliament in a manner which quite clearly was not intended by Parliament.

The Doctrine of Implied Repeal.

This states that if the provisions of a later statute conflict with the provisions of a prior statute, the provisions of the latter statute prevail. Leading cases in this area are **Vauxhall Estates Ltd v Liverpool Corporation,**[24] which discussed **s7(1) of Acquisition of Land (Assessment of Compensation) Act 1919** which stated that "The provisions of ... any Act Incorporated therewith, shall in relation to matters dealt with in this Act have no effect subject to this Act and so far as inconsistent with this Act those provisions shall ... not have effect ..." - implying that latter conflicting provisions in the **Housing Act 1925** were of no avail, and **Ellen Street Estates Ltd v Minister of Health**.[25]

It was held in **Vauxhall v Liverpool Corporation** that the 1925 provisions prevailed. In **Ellen Street v Minister of Health** an argument was put forward that whilst express repeal is always possible the

22 On this topic see Chapter 1 of R.F.V.Heuston, "*Essays in Constitutional Law*". Stevens.

23 See **Bribery Commissioner v Ranasinghe** [1965] AC 172, **R (O'Brien) v Military Governor N.D.U. Internment Camp** [1924] 1 I.R. 32, **Attorney-General for New South Wales v Trethowan** [1932 A.C. 526 (regarding the requirement of a referendum) and **Harris v Minister of the Interior** [1952] T.L.R. 1245 (regarding the development of apartheid in South Africa) which provide interesting Commonwealth precedents for the limitation of Sovereign Parliaments by constitutional settlements.

24 **Vauxhall Estates Ltd v Liverpool Corporation** [1932] 1 KB 733

25 **Ellen Street Estates Ltd v Minister of Health** [1934] 1 KB 590

formula would be adequate against repeal by mere implication. This was also rejected. Scrutton L.J. stated that a mere inconsistency was sufficient to repeal a prior legislative provision. Maughan L.J. stated that provisions against implied repeal are ineffective.

It is arguable that new principles regarding the effect of the doctrines of implied and express repeal have developed with the advent of E.U. law, which are of general application and have mortally wounded the doctrine of Parliamentary Sovereignty to such an extent that it can no longer be considered as a fundamental rule of the U.K. Constitution.[26] Equally it may be argued that E.U. Law has no general effect and that on issues unaffected by European Union Law the Doctrine of Parliamentary Sovereignty survives intact.

Be prepared to discuss issues in relation to the Sovereignty of Parliament in essay form or to apply the legal principles to a problem where Parliament legislates regarding an issue which is stated to be protected by a prior statute either by content or by the form and manner required to make such an alteration. In particular proposed forms of Bill of Right and the approach of the Privy Council in **A.G Hong Kong v Lee Kwong-Kut**[27] are apposite here regarding application of provisions of **The Hong Kong Bill of Rights Ordinance.** It was provided under **s8 of the Ordinance** and **Article 11(1) Hong Kong Bill of Rights** that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Article 3(1) stated that 'All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

Article 3(2) further stated that 'All pre-existing legislation that does not admit of a construction consistent with this Ordnance is, to the extent of the inconsistency, repealed."

Article 4 ***'Interpretation of subsequent legislation.***" Provided that "All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong."

Lee Kwong-kut was charged under **s30 Summary Offences Ordinance** with 'having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained' - and since he was *'unable to give an account, to the satisfaction of a magistrate how he came by it'* was liable to be found guilty of the offence, which appeared to be contrary to the **s8, Article 11(1)** presumption of innocence without proof of guilt. However, the magistrate held the offence was amended by **Article 3(2)** to repeal the section relating to an inability to give an account.

The second defendant was charged contrary to **s25(1) Drug Trafficking Ordinance** as a person who 'knowing or having reasonable grounds to believe that ... a person who carries on or has carried on drug trafficking or has benefited from drug trafficking' made an agreement which would place the proceeds of such trafficking in the hands of the drug trafficker. Whilst the defence of not knowing or suspecting the person supplied with the proceeds was a trafficker the trial judge felt the Ordinance did not ensure the principle of innocence without proof of guilt - having applied a two tier test developed in Canada.

The Privy Council held that **s8 Article 11(1)** does permit strict liability cases since there is a degree of flexibility built in to the Bill of Rights, because a balance must be struck between the interests of the citizen and the State. Strict liability offences would only survive **s8 Bill of Rights** where there is sufficient importance to warrant overriding the Constitutionally protected right of freedom : the means of achieving the state's objective must pass the test of proportionality : the means must be rationally connected to the objective, not arbitrary, unfair or based on irrational considerations and must have impaired freedom as little as possible and the effects on the limitation of rights must be proportional to the objectives.

The court held that the provision offended s8 Bill of Rights and was therefore repealed by the Bill of Rights since all the prosecution had to prove was possession and a reasonable ground for suspicion i.e. no mens rea required.

[26] For more detail see 003 The European Union.

[27] **A.G Hong Kongv Lee Kwong Kut** Privy Council

s30 Drug Trafficking Ordinance by contrast required the prosecution to prove the defendant knew or had reasonable grounds to believe the relevant state of affairs and therefore did not offend s8 Bill of Rights.

Lord Woolf starts out by stating that the appeals illustrate the effect on existing legislation of adopting a Bill of Rights. He then conducts a wide ranging examination of cases from Canada, the European Convention on Human Rights and the U.K. before reaching his conclusions. The judgement does not consider the effect of the Bill of Rights on later legislation though the Canadian cases considered do involve striking down later legislation and Woolf does not adversely comment on the notion that implied and express repeal do not apply to a Bill of Rights.

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Constitutional and Administrative Law

DEVOLUTION AND THE SOVEREIGNTY OF PARLIAMENT

Introduction

Until 1997, the United Kingdom consisted of a unitary system of government with a single Parliament and a single centrally based executive consisting of the Prime Minister and the Cabinet. The arrival into power of the Labour Government in 1997 signified a new dawn of constitutional change with the introduction of their mandate to reform the constitutional structure of the United Kingdom.

On 31 July 1997 the Referendums (Scotland and Wales) Act 1997 received Royal Assent to authorise the holding of referenda in Scotland and Wales along with the publication of White Papers outlining the governments proposals. [28] In 1998, considerable legislative power was devolved to the Scottish Parliament, [29] and the National Assembly in Wales [30] to take over executive responsibilities discharged by the Secretary of State. Further devolution was achieved by the establishment of the Northern Ireland Assembly[31] as one of the central pillars of the Belfast Agreement[32] concluded on 10 April 1998.

History

The concept of devolution of power within the United Kingdom is not a new radical phenomenon introduced by the present government, rather it is an issue that is entrenched in constitutional history. The last attempt at devolution occurred less than 30 years ago after the publication of the report of the Royal Commission on the Constitution 1973, with the enactment of devolution statutes for both Scotland and Wales in 1978. These statutes however were subsequently repealed due to a lack of sufficient support in referendums.

It has always been apparent that devolution was an issue that was not going to disappear and the events of 1997 were not unexpected.

The concept of devolution

Definition

The report of the Royal Commission on the Constitution 1973 defined devolution as `the delegation of central government powers without the relinquishment of sovereignty'.[33]

Devolution of power often takes one of two forms - either full legislative and executive powers are transferred (Scotland) or only executive powers (Wales).

Two of the main reasons often cited for the enactment of devolution are as follows:

- Decentralising political authority ensures that the Government is more responsive to the needs of local communities
- Devolution occurs as a response to political pressure from nationalist groups and parties

Wales

Devolution Process

- Publication of White Paper -A Voice for Wales (Cm3718) outlining proposals for devolution
- Referendums (Scotland and Wales) Act 1997 - gave authorisation for holding referenda
- Referendum held on 18 September 1997- 50% turnout of which 50.3% voted in favour of the Assembly
- The Government of Wales Act 1998
- National Assembly for Wales (Transfer of Functions) Order 1999, which enabled the transfer of the devolved powers and responsibilities from the Secretary of State for Wales to the Assembly
- 6 May 1999 - first National Assembly elections held (future elections will be held every four years)
- 12 May 1999 - the first plenary meeting of the Assembly took place with members electing the first Presiding Officer, Deputy Presiding Officer and First Minister of the Assembly

28 Scotland's Parliament, Cm 3658 (1997); and A Voice for Wales, Cm 3718 (1997).
29 The statutory framework is provided by the Scotland Act 1998
30 The statutory framework is provided by the Government of Wales Act 1998.
31 The statutory framework is provided by the Northern Ireland Act 1998.
32 The Belfast Agreement. An Agreement Reached at the Multi-Party Talks on Northern Ireland Cm 3883 (1998)
33 Kilbrandon Report para 543

The National Assembly for Wales

- The Government of Wales Act 1998 was aimed at achieving the creation of an elected Assembly for Wales to which are to be transferred most of their administrative functions of the Secretary of State for Wales.
- In December 1997 the Secretary of State for Wales established the National Assembly Advisory Group. Its remit was to assist the Secretary of State in the preparation of guidance to the Standing Orders, to respond to requests for advice from the Secretary of State on other matters relating to the Assembly, and to contribute to the establishment of the Assembly.
- The Assembly, like the Scottish Parliament, sits for a fixed term of four years. The Assembly has sixty members, but has no power to dissolve itself before the end of the four-year term of office. The Assembly runs under a committee system. An Executive Committee provides the overall direction for the Assembly and comprises members of the majority party alone. Regional Committees have been established to ensure that the needs of each area of Wales are properly considered.
- The United Kingdom Parliament at Westminster continues to legislate for Wales. The White Paper stated that the government intended that the Assembly should be able to seek to influence legislation that is considered at Westminster (section 58). The Secretary of State for Wales is under a statutory duty to consult the Assembly about the government's legislative programme, after it has been announced in the Queen's Speech, and the Assembly, following debate, may draft its response. The Secretary of State is able to attend Assembly debates, but not entitled to vote.
- Part 11 of the Government of Wales Act 1998 defines the functions of the Assembly. Section 22 provides for the transfer of ministerial functions to the Assembly, by the means of Orders in Council. Any ministerial function exercisable by a Minister of the Crown in relation to Wales may be transferred. The necessary Order came into effect in July 1999, and the National Assembly has had conferred on it powers in the fields of agriculture, forestry, fisheries and food. The extent and expansion of its powers depends on the extent to which the Westminster parliament is willing to delegate further discretionary power to it.
- The National Assembly has powers to transfer to itself by statutory instrument all or any of the functions of any of the Welsh health authorities (section 27). It also has a variety of powers with respect to those public bodies listed in schedule 4.
- In addition to its stated functions, the National Assembly is expected to contribute towards the economic growth of Wales by establishing a new economic agenda for Wales, while promoting sustainable development (section 121). Sustainable development is not defined within the context of the Government of Wales Act 1998, although some indication has been provided as to its exact meaning:

  "*Sustainable development is not about a quick fix. This Government has a broad agenda for sustainable development, encompassing a range of economic, social and environmental objectives. We would expect the Assembly to take forward that agenda in Wales. But inevitably sustainable development must look through the long-term future and many of its measures may not be capable of short-term assessment* (Hansard, H.L. Vol. 590, col. 1345)."
- The Government of Wales Act 1998 created the National Assembly as a `body corporate' (section 1(2) and all members of the National Assembly for Wales are members of the home civil service (section 34) and are granted greater autonomy and are entitled to move away from body corporate status.

The Committee Structure

The National Assembly for Wales operates a committee structure. The Government of Wales Act 1998 requires the Assembly to establish an executive committee, subject committees, a sub-ordinate legislation scrutiny committee, an audit committee and regional committee. The Assembly has the power to establish any committee that their feel is appropriate (section 54).

The Executive Committee

The members of the Executive Committee are the First Secretary, the Chair of the Executive Committee, and the Assembly Secretaries (section 56). The Government of Wales Act 1998 permits the Assembly to provide for its own title for this committee and it has been decided that it should be called the Cabinet. The First Minister of the Assembly is elected by members of the Assembly and if the First Minister resigns a replacement is to be elected by the Assembly.

The First Minister is accountable to the Assembly for the Assembly Cabinet, and each Minister is accountable to the National Assembly for the exercise of those parts of the Assembly's functions allocated to the Minister (section 56).

Subject Committees

Subject committees are responsible for the fields in which the Assembly has functions (section 57). The Minister for that field is also a member of that committee, but does not chair it. The role of the Committee is four fold:

- holding administration to account by calling for papers and witnesses to appear before them;
- policy making both with respect of the work of the Welsh Assembly and by responding to, developing and amending Westminster legislative proposals;
- considering such draft secondary legislation as the Deputy Presiding Officer decide should be referred to them; and
- reviewing expenditure and advising on budget allocation.

The subordinate legislation committee scrutinises all subordinate legislation that comes before the Assembly. The Audit Committee is responsible for ensuring that the Assembly's resources are used properly and efficiently. This committee examines and reports on the accounts of the Assembly (headed by the Auditor General for Wales). The Audit Committee may take evidence on behalf of the House of Commons' Public Accounts Committee, which can continue to investigate public expenditure in Wales. The Regional Committee for each of the four regions of Wales have to meet in their regions at least twice a year and advise the Assembly on matters affecting the relevant region.

The Legislative Making Process

Primary Legislation: Assembly Process

The Government of Wales Act 1998 prevents the Assembly from being granted any primary legislative power. Under section 33 of the Government of Wales Act 1998 "the Assembly may consider, and make appropriate representations about, any matter affecting Wales." *By virtue of section 31 of the Government of Wales Act 1998, the Secretary of State is required to undertake consultation with the National Assembly for Wales "as soon as reasonably practicable after the beginning of each session of Parliament*" regarding the government's legislative programme for the Parliamentary year.

Section 31 and Standing Order 6 relate to proposals in Bills already before Parliament or which have been announced in the Queen's Speech as forming part of the UK Government's legislative programme for the current session. Effective representation of the Assembly's wishes for primary legislation provision requires much earlier input. Standing Order 31.9 - 31.14 makes provision directed at such input. These paragraphs provide that at any time an Assembly Minister or three Assembly Members may table a motion calling for the UK Government to bring forward a public Bill on any matter specified in the motion. Each year, no later than March 31, an Assembly Minister has to propose a motion setting out the Assembly's Cabinet's proposals for primary legislation in the next session of the UK Parliament or, if the Assembly Cabinet has no such proposals, asking the Assembly to note that fact.

The process set out in Order 31 is designed to enable the Assembly to contribute to the annual process in Whitehall leading to agreement on the content of the UK Government's programme for the next parliamentary session. It provides a formal mechanism for communications within Whitehall about the future legislative programme are not.

Official level communication will ease the task of preparation and handling of Bills proposals but cannot of course establish Assembly policy. At some point the Assembly as a whole has to determine the policy and at

that point the Assembly process involves all party consideration, and may include detailed examination in subject committees of the impact of proposals and the taking of evidence and opinion from relevant individuals and groups in Wales. Assembly policy so developed carries considerable democratic legitimacy in Wales, before it reaches the Westminster parliamentary process.

Secondary Legislation: Assembly Process

The Westminster process for making such legislation has no application to secondary legislation made by the Assembly. The process for the National Assembly for Wales takes up no less than nine of the thirty-six Standing Orders (Standing Orders 22 to 30). The Standing Orders Provide for:

- the sifting of instruments on their merits to determine the appropriate amount of legislative scrutiny to be applied;
- pre-legislative scrutiny of instruments and of proposals for instruments meriting such treatment by subject committees;
- debates to take place on a substantive motion;
- amendments to be sought during an instrument's legislative passage; ,es grouping of instruments for approval in plenary where appropriate;
- a form of private members subordinate legislation, whereby the Assembly can present proposals which, if approved by the Assembly in plenary, must be brought forward by the relevant minister in the form of draft subordinate legislation;
- all subordinate legislation , whether or not made by statutory instrument, to be published.

Management of the Assembly's legislative business

The Assembly has a clear role in law making through both primary and subordinate legislation. Its subordinate legislation procedures are more elaborate and take more legislation time than central government and can include reference of the substance proposed legislation to all party committees.

The powers and responsibilities of the Assembly

Under Schedule II of the Government of Wales Act 1998, the Assembly has the power to develop and implement policy in a range of areas:

- agriculture
- ancient monuments and historic buildings .
- culture
- economic development .
- education and training
- the environment
- health and health services
- highways
- housing
- industry
- local government
- social services
- sport and leisure
- tourism
- town and country planning .es transport and roads
- the Welsh language

The Role of the Secretary of State for Wales after Devolution

As a Cabinet member, the Secretary of State:

- ensures that the interests and needs of Wales are fully considered in policy formation within the UK Government
- is charged with making devolution work smoothly through membership of the Joint Ministerial Committee between the UK Government and the devolved administrations
- is responsible for taking through Parliament provisions in primary legislation which relate particularly to Wales.

Under the Government of Wales Act 1998, the Secretary of State for Wales has the power to:

- transfer the Welsh budget from the Treasury to the Assembly
- consult and debate the Government's legislative programme with the Assembly .es participate in plenary sessions of the Assembly but not to vote.

Key Figures in the Welsh Assembly

The Presiding Officer

The Assembly is chaired by the Presiding Officer, who is the equivalent of the Speaker in the House of Commons and who is elected by the whole Assembly.

Once elected, the Presiding Officer serves the Assembly impartially. There is also a Deputy Presiding Officer who is elected in the same way.

The Presiding Officer is responsible for:

- the working of the Assembly and for ensuring that the laid down procedures are observed
- services for members, such as the library and briefing service, which support members in their work
- services to the public, such as the information service and the visitors' programme, which aim to raise the public's awareness and understanding of the Assembly.

The First Minister and Assembly Ministers

The sixty members of the Assembly delegate their executive powers, that is, the making and implementing of decisions and laws, to the First Minister, who is elected by the whole Assembly and therefore usually represents the largest political party. The First Minister in turn delegates responsibility for delivering the executive functions to a number of Assembly Ministers. They are responsible for individual subject areas, such as health and education. Together they form the Assembly's executive committee, the Assembly Cabinet, which makes many of the Assembly's day to day decisions. The Assembly Cabinet is accountable to the rest of the Assembly.

Scotland

Devolution Process

- Publication of White Paper Scotland's Parliament, Cm 3658 -outlining proposals for devolution
- Referendums (Scotland and Wales) Act 1997 - gave authorisation for holding referenda
- Referendum held on 11 September 1997 - 60.4% turnout of which 74.3% voted in favour of a Scottish Parliament. (That Scotland should have tax raising powers - 60.24% turnout with 63.5% in favour of tax raising powers)
- The Scotland Act 1998
- 6 May 1999 - first elections to the Scottish Parliament
- 12 May 1999 - the first plenary meeting of the Assembly took place with members electing the first Presiding Officer, Deputy Presiding Officer and First Minister of the Assembly
- 1 July 1999 - State Opening of the Scottish Parliament - Parliament took up its full legislative powers

The Scottish Parliament

The Scotland Act 1998 provided for the establishment of a Scottish Parliament. Under the terms of the Act, the Scottish Parliament has power to legislate on a wide range of issues affecting Scotland (referred to as `devolved matters').

(The legislation of the Scottish Parliament is known as `Acts of the Scottish Parlaiement [Section 28 of the Scotland Act 1998] and must be within the legislative competence of the Parliament [Section 29])

The Act also gave the Scottish Parliament the power to raise or lower the basic rate of income tax by up to 3 pence in the pound.

Some of the issues devolved to

- Education
- Health
- Agriculture .

- Justice
- Transport
- Housing
- Training
- Economic Development
- Environment

RESERVED MATTERS

The Scotland Act 1998 (Part I Schedule 5) specifies certain issues on which the Scottish Parliament cannot legislate known as `reserved matters' which, due to their nature and the fact that they affect the United kingdom as a whole entity, are reserved specifically for the United Kingdom parliament at Westminster.

The reserved matters include: .

- The Constitution
- The registration of political parties
- The Civil Service
- Foreign Affairs
- Defence
- National Security
- Treason

The Scottish Parliament can however still debate on the reserved matters.

The United Kingdom Parliament at Westminster ultimately retains the power to legislate on ANY matter but the United Kingdom Parliament will normally consult and gain the consent of the Scottish Parliament in order to legislate on devolved matters

The Scottish Parliament consists of 129 Members of the Scottish Parliament (MSPs). Scotland retains 72 Scottish MPs at Westminster so as to represent Scotland on reserved matters.

The main functions of the Scottish Parliament

The main functions of the Scottish Parliament are:

- To hold the Scottish Executive to account through oral and written questions, and through scrutiny of its policies in the committees
- To make laws on devolved matters through the process of examining, amending and voting on Bills
- To conduct debates on topical issues
- To conduct inquiries and publish reports

The Scottish Executive

The relationship between the Scottish Parliament and the Scottish Executive is similar to that of the relationship between the United Kingdom Government and the United Kingdom Parliament at Westminster.

The Scottish Executive is the government in Scotland for all devolved matters. Most of the responsibilities previously held by the Scottish Office are now part of the remit of the Scottish Executive.

The Scottish Executive is comprised of The First Minister, The Lord Advocate and the Solicitor General (also known as Law Officers) and other Ministers appointed by the First Minister (Section 44 Scotland Act 1998)

The Scottish Executive is formed from the party or parties that hold a majority in the Parliament. Members of the Executive are referred to as `the Scottish Ministers'. All Ministers are MSPs.

The role of the Secretary of State for Scotland after devolution

The Secretary of State for Scotland remains a Member of the United Kingdom Cabinet and is not a member of the Scottish Executive. The role of the Secretary of State is to promote communication between the Scottish parliament and Executive and between the United Kingdom Parliament and government on matters of mutual interests. The Secretary of State also represents Scottish interests in reserved matters.

Key Figures in the Scottish Parliament

The Presiding Officer

The position of Presiding Officer requires political impartiality, at all times taking into account the interests of all Members of the Scottish Parliament and acting on their behalf.

The role of the Presiding Officer and the two deputy Presiding Officers is to:

- Chair meetings of the Parliament
- Convene and chair meetings of the Parliamentary Bureau
- Decide on questions raised regarding the meaning of the rules for Parliamentary proceedings
- Represent the Parliament in discussions with other parliamentary or governmental bodies

The First Minister

- Selected by MSPs and formally appointed by the Queen.
- The First Minister is head of the Scottish Executive and has a direct relationship with the Sovereign in appointing ministers, law officers and judges of the Court of Session

Scottish Law Officers

- Two Scottish Law Officers - The Lord Advocate and the Solicitor General for Scotland (Both part of the Scottish Executive)
- The Scottish Law Officers advise the Scottish Executive on legal matters and represent its interest in court.

DEVOLUTION AND THE REGIONS

On Thursday 4th November 2004 the projected development of Regional Assembles in England suffered a major set back, with the rejection by an overwhelming majority of the voters in a referendum of the proposed North East Assembly.

The English Assemblies project, the government's response to the Mid-Lothian Question, envisaged the establishment of eight regional assemblies in England, to complement the Welsh Assembly, Stormont in Northern Ireland and the Scottish Parliament. In anticipation of approval for the assemblies by referenda, the Government had already established Regional Assembly Committees in the eight regions under the Regional Assemblies Preparation Act 2003. The Assemblies are currently staffed by appointed members and a range of local authority powers have already been transferred to these quasi autonomous non governmental organisations (QUANGO) having been taken away from locally elected councils. The constitutional status of devolution is now left in limbo.

Firstly, the so-called Mid-Lothian Question remains unanswered. The matter concerns the ability of Scottish M.P.s to vote on matters concerning England at Westminster, whilst Westminster no longer has the right to vote on similar matters that govern Scotland. Thus Scottish Labour MPs supported the introduction of University Fees in England, whilst the Scottish Parliament introduced grants for Scottish Universities free from the control of Westminster. Similarly, the Welsh Assembly has introduced financial assistance for prescription drugs not available in England. A further anomaly lies in that English patients can benefit from this by crossing the border and attending a Welsh based chemist. The promise of English Assemblies had formed a central plank of the government's justification of Devolution. For the foreseeable future Welsh, Irish and particularly Scottish MPs (because their Parliament is more powerful than the other assemblies) will continue to exercise a disproportionate degree of power over English affairs. This further exacerbates the financial imbalance that applies to the regions. England is a net contributor to the local government budget whilst the regions are non-contributing beneficiaries. This imbalance is likely to be in even sharper focus in a situation where the political make up of regional assemblies and Westminster do not mirror each other. This might occur either because Plaid Cymru or the Scottish National Party form the majority in the Welsh Assembly and Scottish Parliament respectively, or where Labour controls the devolved bodies and the Conservatives or Liberals control Westminster.

Secondly, what is now to happen to the regional assembly quangoes? The intention was to transfer their interim powers to the new elected assemblies. This will not now happen, at least as far as the North East

Assembly is concerned and it appears unlikely that, given the rejection of the concept by the electors, the government will continue with referenda in the other seven regions. It has cost £30M to establish the regional assemblies and the referendum cost £10M.

In the meantime, the East of England Regional Assembly has recently approved planning permission for almost half a million new houses in the Stanstead / Peterborough corridor which will decimate that areas green belt. This highly controversial policy, which does not appear to have support even from root and branch Labour supporters is being pursued by the Deputy Prime Minister and an un-elected and thus unaccountable body made up of political appointees, which the elected local councils are powerless to stop despite their broad opposition to the program. These councils, which retain responsibility for water, health, transport and sewage will have to deal with the additional calls on their resources that will result from an additional 500,000 houses and an in excess of 1.5 million people being imposed upon them. In the meantime Westminster will remain in charge of their budgets both by its power to allocate local authority grants and by capping the permitted rates of property levies.

The consequence is that power remains centralised in the government at Westminster, but the government ministers escape accountability to Parliament since responsibility for exercising that power vests with the Quangoes.

A third problem lies in the fact that regional assemblies are eligible for grants from the EU at Brussels. Whilst Wales has been able to benefit from this additional source of income, much of England may not be able to do so, despite the fact that it is a major contributor to EU Funds.

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Constitutional and Administrative Law

SOVEREIGNTY MATRIX

Van Dicey

The 4 elements of Parliamentary Sovereignty

1 Parliament can make any law.
2 Parliament is the Supreme Law maker.
3 The courts must apply statutes without question.
4 Parliament can unmake any law.

Rationale for the Doctrine of Parliamentary Supremacy

Absence of restraint, on the Sovereignty of the People to make law, through its spokes-body.
Question : "Does Parliament really legislate by and for the people?"

Is Parliament Sovereign?

Can Parliament make any law?

- Physical limitations
- Political limitations
- Jurisdictional limitations / Devolution
- EC limitations / ECHR
- Natural law / divine & superior law
- Retrospective Legislation
- International Commitments

Are Parliament's Laws Superior?

- International Executive Agreements and Domestic Statutes.
- Relationship between Westminster and devolved bodies with legislative power
- Sovereignty of elected inferior bodies.
- Shared sovereignty with E.C.
- Common Law – status with Statute

Can Court's Question Statutes?

Statutory Interpretation.
Judicial Review under Human Rights Act
S3 ECA 1972 and TEU.
International Court at The Hague.

Can Parliament unmake any law?

Implied and Express repeal
Human Rights Convention and Act
Decolonisation Treaties
United Nations - superior laws?

Questions:

- "Are all 4 elements essential : what is the status of the Doctrine if an element fails?"
- "Are there any counter balancing checks within the Constitution to make up for breaches?"
- "If there are no counter balancing checks is the Constitution in crisis?" and
- "If so, what can and should be done about it, if anything at all?"
- "IS PARLIAMENT SOVEREIGN, OR HAS THE DOCTRINE OF SEPARATION OF POWERS BROKEN DOWN SO COMPLETELY THAT THE EXECUTIVE EXERCISES LEGISLATIVE SUPREMACY UNDER AN UNCONTROLLABLE ELECTED DICTATORSHIP, WITH TOTAL DISREGARD FOR THE WISHES OF PARLIAMENT?"

Is The Doctrine of Parliamentary Sovereignty Relevant to the 21st Century

Questions :

- "Is political sovereignty more important than legislative sovereignty?"
- "Does economic sovereignty vest in the global financial market?"
- "Can a nation be sovereign if it does not maintain fiscal control?"
- "Can a nation be sovereign if it lacks the power to implement an independent foreign policy?"

DEVOLUTION, SOVEREIGNTY OF PARLIAMENT AND EC SOVEREIGNTY

The traditional view of Devolution is that it is `*the delegation of central government powers without the relinquishment of sovereignty*'.[34] From this perspective Devolution is simply another layer of local government, rationalising it and making it more cohesive. If this is so, then devolution should have no adverse impact upon the doctrine of parliamentary sovereignty. The problem is that public perceptions and or aspirations in respect of the function and purpose of Devolution may not reflect the legal model and "*real politique*" may differ somewhat from the strict legal regime.

The proclaimed advantage of the devolution of administrative power to the lowest level is to ensure that localised issues that differ from national concerns are addressed and supported by those affected by them. The problem arises when the locale perceives itself as being a distinct political, social or racial unit. Devolution then becomes a vehicle for the expression of regional nationalism, pursuing policies that betray an indigenous element. Nationalistic movements are in direct conflict with the globalisation movement which seeks to eliminate national differences between peoples and to harmonise government structures in line with the global community, to facilitate trade, the free movement of peoples and the exchange of ideas. The same conflict is evident within the European Union which seeks to strike a balance between harmonisation of law and subsidiarity, the objective of localising decision making at the lowest level of society wherever possible, providing it does not conflict with the over all aims and objectives of the Union.

Traditionally Plaid Cymry in Wales, Sin Fein in Ireland and the Scottish Nationalist Party (SNP) in Scotland have all sought independence from the United Kingdom. They were perceived for a long time as minority movements, where a large portion of the local populace was not prepared to sacrifice the political and economic advantages of being an integral part of the United Kingdom in exchange for local autonomy. Whilst each region had local economic strengths, be it whisky, peat, coal, water, oil or gas etc, the South East of England remained the economic and financial engine of Britain. Consequently the regions enjoyed financial benefits from membership of the UK.

Furthermore, a divided UK could not have prevailed in the 2nd world war, so National Security has in the past been a powerful bonding factor. With the demise of the Soviet Union, the need for national security is no longer foremost in peoples' minds.

With the advent of the European Union, a new opportunity has arisen for self-determination of regions, relying on the Union for economic support, peace and security. The aspirations of some members of nationalist groups is to establish autonomous national regions with full independent members status within the European Union. This was reaffirmed in 2004 by both Plaid Cymry and the SNP.

The question that falls to be considered concerns the extent to which the European Union respects the interests of its constituent member parts ? Does the Union treat all members equally or does it pander to the interests of its strongest members such as Germany, France and the United Kingdom? Alternatively, can respect be demanded by groups of self-interested member states with shared interests? If this is the case, Scotland, Ireland and Wales may perceive that there is an advantage in achieving autonomy, assuming that such alliances could ensure more financial support for the region than is currently available to them as mere regions of the United Kingdom, where sovereignty over the budget vests in Westminster.

At the present time, financial sovereignty vests principally in Westminster, though some sovereignty has been shared with the European Union. The UK has financial commitments to Brussels, which then shares out the monies. Those countries that have signed up to the Euro have less budgetary sovereignty than those who have not, since they cannot manipulate local currency interest rates and national bank reserve levels. In exchange for giving this up they are freed from one aspect of the tyranny of international exchange rates (IER), though they all have to endure the vicissitudes of the exchange rate on the value of the Euro.

If the European Union achieves Federalism (*an increasingly distant possibility rather than an imminent event*) local nationalist parties may push for local autonomy so that they can deal directly with Brussels rather than work through an intermediary such as Westminster. Already, the availability of regional grants from Brussels weakens the authority of National Governments over its regions.

[34] Kilbrandon Report para 543

SOVEREIGNTY OF PARLIAMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) / THE HUMAN RIGHTS ACT

Introduction

The traditional Diceyan view of Parliamentary Sovereignty is that Parliament is free to legislate on any matter whatsoever, and that there can be no limitations on that power, particularly from prior legislation. Parliament is free to expressly repeal prior legislation. In the event that subsequent legislation is in conflict with prior legislation any conflicting portion of that prior legislation is impliedly repealed by the latter provision. Furthermore, whilst the courts would seek to find an interpretation of statutes that complied with the treaty obligations undertaken by the UK Government, in the event of a direct conflict with an Act of Parliament, the Act would prevail.

Thus, prior to 1998, the ECHR represented no challenge to the concept of Parliamentary Sovereignty. However, with the incorporation of the Convention into UK Law through the Human Rights Act 1998, the status of its provisions and their relationship with parliamentary sovereignty is central to any suggestion that the Convention is tantamount to a Bill of Rights which establishes fundamental or superior laws that cannot be impeached by Parliament.

CONTENTS OF THE HUMAN RIGHTS ACT 1998

Evaluation of the content of the convention contained in its Articles is dealt with in Chapter 13. This Chapter only seeks to deal with the sections of the Act, which specifically address the constitutional relationship of the convention provisions, and the mechanisms for applying convention rights in the United Kingdom. Selected parts of the Human Rights Act 1998 are examined below. The dotted lines ..... indicate omissions.

Incorporation of Convention Rights.

1(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-
- *(a) Articles 2 to 12 and 14 of the Convention,*
- *(b) Articles 1 to 3 of the First Protocol, and*
- *(c) Articles 1 and 2 of the Sixth Protocol,*

as read with Articles 16 to 18 of the Convention.

1(2) Those Articles are to have effect … subject to any designated derogation or reservation ….

1(3) The Articles are set out in Schedule 1.

1(4) The Secretary of State may by order make such amendments to this Act…..

1(5) In subsection (4) "protocol" means a protocol to the Convention-
- *(a) which the United Kingdom has ratified; or*
- *(b) …. signed with a view to ratification.*

1(6) No amendment may be made .. before the protocol concerned is in force in …. the United Kingdom.

Commentary : The above, on its own would not amount to a conflict with Sovereignty since Parliament has expressly made the provisions (*articles*) contained in the Convention part of UK Law.

Interpretation of Convention rights.

2(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-
- *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
- *(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
- *(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
- *(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.*

2(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

2(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section-
- *(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;*
- *(b) by the Secretary of State, in relation to proceedings in Scotland; or*
- *(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland-*
  - *(i) which deals with transferred matters; and*
  - *(ii) for which no rules made under paragraph (a) are in force.*

Commentary : This provision is similar to S3 European Communities Act 1972 and the ruling in Costa v E.N.E.L in European Community Law in that it seeks to establish a harmonised process for the determination of European Convention Provisions. Thus the UK courts must consider the judicial decisions of the ECHR, which provide definitive statements on the interpretation/meaning of the Convention's Rules. In simple terms the court produces binding precedent which UK courts must be guided by.

Legislation

Interpretation of legislation.

3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

3(2) This section-
- *(a) applies to primary legislation and subordinate legislation whenever enacted;*
- *(b) does not affect the validity ……. of any incompatible primary legislation; and*
- *(c) does not affect the validity …….. of any incompatible subordinate legislation ……..*

Commentary : The above establishes an additional rule for the interpretation of statutes that may conflict with the Human Rights Act, which operates alongside the Literal, Golden and Mischief Rules. The message is that this is compatible with Parliamentary Sovereignty. This may be true legally, but is it inaccurate in practice? Might a too generous reading of statutes that leans towards compatibility, which involves the stretching of language beyond it ordinary meaning, result in a de facto abrogation of sovereignty whilst giving an appearance of respect to the doctrine? Compare **McCarthys v Smith** in relation to EC Law.

Declaration of incompatibility.

4(1) *Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.*

4(2) *If the court is satisfied that the provision is incompatible …. it may make a declaration of that incompatibility.*

4(3) *Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, …….. is compatible with a Convention right.*

4(4) *If the court is satisfied-*
- *(a) that the provision is incompatible with a Convention right, and*
- *(b) that …. primary legislation …… prevents removal of the incompatibility,*

it may make a declaration of that incompatibility.

4(5) *In this section "court" means-*
- *(a) the House of Lords;*
- *(b) the Judicial Committee of the Privy Council;*
- *(e) …. High Court or the Court of Appeal.*

4(6) *A declaration under this section ("a declaration of incompatibility") -*
- *(a) does not affect the validity ……of the provision ……; and*
- *(b) is not binding on the parties to the proceedings in which it is made.*

Commentary : This enables senior UK judges to highlight any conflict between a UK Act and The HRA.

Right of Crown to intervene.

5(1) *Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice .*

5(2) *……..etc*

Commentary : This enables the Government to make representations to the court which could influence the court's interpretation, potentially leading to a finding of compatibility which the Government can accommodate. Thus the government can invite the judiciary to stretch the meaning of an Act beyond that which might otherwise occur.

Public authorities

Acts of public authorities.

6(1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

6(2) *…….*

***Commentary** : This is a powerful provision since it renders incompatible Government Department actions ULTRA VIRES and established the grounds for judicial review and a quashing order (certiorari), an enforcement order (mandamus) or prohibition.*

Proceedings.

7(1) *A person who claims that a public authority has acted … in a way which is made unlawful by s6(1) may-*
- *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
- *(b) rely on the Convention right or rights concerned in any legal proceedings,*

but only if he is (or would be) a victim of the unlawful act.

7(3) *If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.*

7(5) *Proceedings under subsection (1)(a) must be brought before the end of-*
- *(a) the period of one year beginning with the date on which the act complained of took place; or*
- *(b) such longer period as the court … considers equitable having regard to all the circumstances …….*

7(7) *For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Art 34 of the Convention if proceedings were brought in the European Court of Human Rights….*

7(9) *…….etc*

Commentary : This is a useful limiting device, establishing a strict requirement for standing (*locus standii*) on the applicant, effectively preventing busy bodies who have no direct interest in the matters under consideration from abusing the provisions of the act. This maintains the status quo that exists under Part 54 CPR 1998 and allied protocol and practice direction 54, in respect of procedures for an application for judicial review.

Judicial remedies.

8(1) *In relation to any act … of a public authority which the court finds is … unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*

8(2) *But damages may be awarded only by a court which has power to award damages ….*

8(3) *No award of damages is to be made unless, taking account of all the circumstances of the case, including-*

(a) *any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*

(b) *the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*

8(4) *In determining-*

(a) *whether to award damages, or*

(b) *the amount of an award,*

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

8(5) *…….*

Commentary : This provision breaks the traditional mould of judicial review in the UK in that it provides the remedy of damages which is not otherwise available and follows the model established by the EC for breach of EC law where the breach has a direct horizontal effect. Note however, that unlike EC law there is no external body with the power to fine the government. Damages are vital in order to enable the court to provide a remedy that is as effective as that offered by the European Court of Human Rights. Without this, successful litigants would be deprived of a remedy and thus able to petition the ECHR for compensation. One of the principal reasons for introducing the legislation was to limit the number of application being made by UK litigants to Strasbourg.

Judicial acts.

9(1) *Proceedings under section 7(1)(a) in respect of a judicial act may be brought only-*

(a) *by exercising a right of appeal; ……..*

9(2) *That does not affect any rule of law which prevents a court from being the subject of judicial review.*

9(3) *In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.*

9(4) *An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.*

Commentary : This provision limits the availability of judicial review in respect of the courts in that as opposed to the CPR Rule 43 procedure, the grounds for and permission for appeal must be made out and granted. This is arguably a higher standard than that under Rule 43.

Remedial action : Power to take remedial action.

10(1) *This section applies if-*

(a) *a provision of legislation has been declared under section 4 … and, if an appeal lies-*

(i) *all persons who may appeal have stated in writing that they do not intend to do so; … or*

(b) *it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.*

10(2) *…….*

Commentary : This provision enables a minister to take remedial action where court proceedings have been abandoned, but where the government perceives that there is a problem with compatibility that needs to be addressed and the HRA procedure for amendment will avoid the cost and expense of introducing new legislation. Legislation is costly, time consuming and labour intensive with three readings before both houses of parliament. It also ensures that the amendments are not subject to objections or further political debate. The downside is that it effectively enables the government to legislate without having recourse to Parliamentary scrutiny.

Other rights and proceedings

Safeguard for existing human rights.

11. A person's reliance on a Convention right does not restrict-

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

Commentary : This ensures that the Human Rights Act does not become the sole source of Human Rights and is not used as a tool to undermine other legislation that benefits the citizen.

Freedom of expression.

12.(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

12(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

12(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

12(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

12(5) In this section-

*"**court**" includes a tribunal; and*

*"**relief**" includes any remedy or order (other than in criminal proceedings).*

Commentary : Since freedom of expression is central to the interests of the media, it is hardly surprising that the Act gives particular emphasis to this right. The provision is carefully crafted to ensure that it is compatible with the common law and statutory provisions in respect of the tort of defamation (libel and slander). The press is jealous of and quick to defend its right to freedom of expression and has the power to turn any threat to its ability to publish what it considers to be in the public interest into a major public issue. Nonetheless, this provision has resulted in the further development of the so called Right to Privacy particularly in respect of the private life of celebrities, as illustrated by the **Douglas v Hello Magazine** Wedding picture saga.

Freedom of thought, conscience and religion.

13(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

Commentary : This again highlights the importance of freedom of religion and is broad enough to protect all religions and not just chritianity.

Derogations and reservations

Derogations.

*14(1) In this Act "**designated derogation**" means-*

(a) the United Kingdom's derogation from Article 5(3) of the Convention; and

Art 5(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Commentary : This derogation ensures that the question of speedy access to justice in the UK is not subject to judicial scrutiny. What is considered speedy or otherwise could be highly subjective.

Reservations.

*15(1) In this Act "**designated reservation**" means-*

(a) the United Kingdom's reservation to Article 2 of the First Protocol to the Convention; and

ARTICLE 2 : RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Commentary : This reservation ensures that where a pupil is expelled from a school for bad behaviour, that expulsion is not subject to the Act. Furthermore, the ability of the government to regulate religious education is preserved.

Period for which designated derogations have effect.

16(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act-

(a) in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;

(b) in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.

Commentary : This ensures that the derogation is subject to regular review and that the matter will be automatically reviewed so that any changes in the attitudes of society to the issue can be addressed.

Periodic review of designated reservations.

17(1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)-

(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and

(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

Commentary : This ensures that the derogation is subject to regular review and that the matter will be automatically reviewed so that any changes in the attitudes of society to the issue can be addressed.

Judges of the European Court of Human Rights : Appointment to European Court of Human Rights.

18(1) In this section "judicial office" means the office of-

(a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;

(c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.

18(2) The holder of a judicial office may become a judge of the European Court of Human Rights ("the Court") without being required to relinquish his office.

18(3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.

Commentary : This provision enables senior British Judges to sit on the bench of the ECHR.

Parliamentary procedure

Statements of compatibility.

19(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before 2nd Reading of the Bill-

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

19(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Commentary : This provision ostensibly preserves Parliamentary Sovereignty since it is legally possible to intentionally disregard the HRA. In reality, a statement of incompatibility is a rag to a red bull, drawing attention of a BILL which would then be subject to immense public scrutiny and opprobrium. Furthermore, a statement of compatibility justifies the judiciary applying extremely wide interpretations of a provision to comply, even to the extent of stretching ordinary language way beyond its ordinary sense or meaning. In reality, it is virtually impossible for Parliament to evade the HRA, except in very special circumstances where National Security or other National Interests are at stake. Less than that would not justify the risk.

Supplemental : Orders etc. under this Act.

20(1) *Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.*

20(3) *Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.*

20(4) *No order may be made by the Lord Chancellor or the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament. …….*

Commentary : Ostensibly this ensures that any amendments to Acts is subject to parliamentary scrutiny and thus preserves the notion of Parliamentary Sovereignty. However, the degree of Parliamentary and general press scrutiny applied to Statutory Instruments is not as high as that accorded to a BILL. See also the comment above in respect of section 10.

Interpretation, etc.

21(1) …….

21(5) Any liability under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 to suffer death for an offence is replaced by a liability to imprisonment for life or any less punishment authorised by those Acts; and those Acts shall accordingly have effect with the necessary modifications.

Commentary : s21(5) ensures that the final exception to the abolition of the death penalty is removed. This also ensures compliance with European Community Law. On a more general level, the abolition of the death penalty has resulted in complications in respect of reciprocal arrangements for deportation to countries such as the USA for trial, where there is a potential for the death penalty to be imposed. The decision to put Abu Hanza on trial in the U.K. with the possibility that he might be sentenced to life imprisonment may be politically motivated to defer the application by the US for his deportation pending resolution of the trial and perhaps the serving of any sentence handed out by the British Court. This would at the very least avoid serious embarrassment for the current administration since the application may well fail on account of the HRA. By the time the trial and sentence are over, the US may have lost interest in him. Whichever way, another administration in the distant future would have to deal with the embarrassment.

Sovereignty, the HRA and Alternative Dispute Resolution.

The government and the courts are actively encouraging the use of ADR to settle public sector disputes. Where this occurs, matters regarding potential issues of sovereignty may be hidden from public view and private settlements reached that satisfy the litigant, but not the broader national interest. Some of these concerns and the scope of damages available for Human Rights actions are discussed in **ADR and Public Law.**[35]

Reading Material

Opinion: This Year's Model - The options for incorporation, European Human Rights Law Review (1997) EHRLR Issue 4 Pages 313-328

Constitutional reform and a Bill of Rights, European Human Rights Law Review (1997) EHRLR Issue 5 Pages 483-489

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Mechanisms for Entrenchment and Protection of a Bill of Rights: The Canadian experience, European Human Rights Law Review (1997) EHRLR Issue 5 Pages 496-500

Lord Irvine, Activism and Restraint: Human rights and the interpretative process, European Human Rights Law Review (1 999) EHRLR Issue 4 Pages 3 5 0-3 72

Entrenching Human Rights Legislation under Constitutional Law: The Canadian Charter of Rights and Freedoms, European Human Rights Law Review (1998) EHRLR Issue 3 Pages 312-331

Opinion: Devolution and human rights, European Human Rights Law Review (1998) EHRLR Issue 4 Pages 367-379

Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law, European Human Rights Law Review (1997) EHRLR Issue 1 Pages 71-80

Bringing rights half-way home, European Human Rights Law Review (1997) EHRLR Issue 2 pages 141-145

A Criminal Code: Must we wait for ever?, Criminal Law Review, October (1998) Crim LR 694 Pages 694-696

35 C.H.Spurin, ADR News, July 2004 p10, . http://www.nadr.co.uk/newsletter/published/July2004.pdf

Constitutional and Administrative Law

SOVEREIGNTY – DEVOLUTION – EC LAW – HUMAN RIGHTS

Van Dicey

The 4 elements of Parliamentary Sovereignty

1 Parliament can make any law.

2 Parliament is the Supreme Law maker.

3 The courts must apply statutes without question.

4 Parliament can unmake any law.

Rationale for the Doctrine of Parliamentary Supremacy

Absence of restraint, on the Sovereignty of the People to make law, through its spokes-body. Seeks to ensure that the people are not governed from the grave by predecessors with different social and political agendas.

Is Parliament Sovereign?

Can Parliament make any law?

- Devolution
- EC limitations
- ECHR limitations

Are Parliament's Laws Superior?

- Sovereignty of elected inferior bodies.
- Shared sovereignty with E.C.

Can Court's Question Statutes?

Statutory Interpretation.
Judicial Review under Human Rights Act
S3 ECA 1972 and TEU.

Can Parliament unmake any law?

Human Rights Convention
Human Rights Act – legally – in practice ?
EC Law – s3 ECA 1972 – Costa v Enel

THE PROPOSED EUROPEAN CONSTITUTION

Impact upon sovereignty.

The European Union Charter of Fundamental Human Rights.

Impact upon sovereignty.