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The British Constitution: Why It Is Not a Myth

Whereas some objections and criticisms can be, and have been, expressed against the validity and sovereignty of the principles of the English legal system, Parliament's sovereignty and the UK constitutional system in general, especially in the recent times of European integration, the bases for the functioning of this system are far from mythical. This paper proposes to explain the cultural and institutional identity of Great Britain in the light of the English legal system. It includes the enactment, interpretation, application and enforcement, as well as the historical development of the law of England and Wales: constitutional conventions (including Parliamentary supremacy vis-à-vis the EU law), Acts of Parliament and the development of legal principles through case law. These determine the specificity of the constitution, without a written constitutional act (in the "monist" or continental sense of this term), which might seem a potential cause of misguided and unpredictable interpretations. Yet, the conventional wording of the Statutory enactment: "BE IT ENACTED by the Queen's Most Excellent Majesty..." (e.g. at the **Human Rights Act 1998**) is, to say the least, far from purely symbolic, even in the context of a situation where the Monarch has no factual law-making or executive power.

Thus, it could be claimed that the Convention Parliament of 1689–1690, which was not a supreme body and whose resolutions depended on the assent of one who was not the legal Monarch (William III of Orange, the husband of James II's daughter Mary) caused an "incurable defect" of the "Revolution", which it was very hard to "work into" the system¹. Basically, that Parliament was said not to have been in a position to declare itself supreme. However, that this sovereignty was and has been consistently and unquestionably enforced by those responsible for the forming of the new system including the judiciary, and

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¹ F.W. Maitland, *The Constitutional History of England*, CUP, Cambridge 1908, at 285.

appropriate legislation pursuant to that act has been put into practice in the following centuries – cannot be ignored. This is shown by a number of courts' judgements upholding the arguments of a historical nature and emphasizing the factual supremacy of Parliament (e.g. that no Act of Parliament can be “disregarded”, in **Pickin v. British Railway Board [1974] AC 765, UKHL 1**²). The issue of “subsequent legislation” was raised in **Jackson and Others v. HM's Attorney General [2005] UKHL 56** (to be discussed below, from a different angle), where the judges, in the context of the validity of the **Parliament Act 1949**, referred to the legislation enacted in both Houses “against a background awareness” of the validity of the **1911 Act** as amended later. The decision was based on “a general understanding of the effect” of the Acts (the analogy is drawn with “parties' subsequent conduct as an aid to the interpretation of their contract”) (in **Jackson and Others... [2005]**, per Lord Nicholls of Birkenhead, para 69). The same reasoning is apparently applicable to legislation and practice following an act over periods longer than half a century, considering the tradition of custom and the stability of constitutional conventions as the sources of law in the English system.

It is also considered that the **Crown and Parliament Recognition Act 1689** and the **Bill of Rights**, which established a constitutional monarchy, did not actually abolish the Monarch's sovereignty in legal terms; the Royal prerogative cannot be debated by Parliament without the Monarch's consent³. The question of who is or was the Monarch at the time and of the ruling power should be addressed separately.

Furthermore, it remains an issue whether the British legislature is now dependent on EU law and those who work to ensure its implementation. There is no denying that Acts of English law are to be and have been interpreted “in the light of the wording and purpose” of the provisions of Community (now EU) law (**Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891**), as in the doctrine of indirect effect or “conforming interpretation” (in **Von Colson... [1984]**; **Pupino [2005] ECR I 5285**). As regards the case of **McCarthy's Ltd. v. Smith [1979] (case 129/79 ECJ and CA)**, a number of objections to the conformity of the **European Communities Act 1972** with the constitutional convention of the sovereignty of Parliament (on whether this Act

² The references to legal cases, in their Neutral or ICRL citation formats (2014-01-02), are made on the basis of the official law reports of judicial decisions published online by the British and Irish Legal Information Institute (BAILII, at <http://www.bailii.org/uk/cases>, for example: <http://www.bailii.org/uk/cases/UKHL/2005/56.html> for **Jackson & Ors v. HM's Attorney General [2005] UKHL 56**), which has partnered with the Incorporated Council of Law Reporting for England and Wales (ICLR, at www.iclr.co.uk, <http://cases.iclr.co.uk/Subscr/Search.aspx>), the publisher of *The Law Reports* (official monthly reports for the Superior and Appellate Courts: UKHL, AC, QB) and *The Weekly Law Reports* (WLR), with some references to the European Court of Justice (ECJ) in Luxembourg.

³ Cf. W. Bagehot, *The English Constitution*, Fontana, London 1993

can bind future legislation with respect to its compatibility with EU law) were, explicitly or not, addressed by ascribing to the Treaties “an overriding force” and pronouncing that courts had the “duty to give priority to EC law”, even if the Statute “appears deficient” or incompatible with that law.

It would follow from this, even if the purposive interpretation of the law makers’ aim behind the statutory provisions should suggest inconsistency with EU law, that the UK has become a European state where, in the absence of a written constitution or any other supreme act of law, the sovereignty of the national courts in relying on the domestic legal system was overridden. However, the dualist nature of the English legal system is retained in the same judgement (**McCarthy’s... [1979]**, per Lord Denning MR) in making it the courts’ obligation to follow the Statute if “our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any of its provisions”. Of course, the political feasibility of such an act ever being implemented is a question not to be raised in the present context.

The question of judicial interpretation (in as much as it is necessary to comply with the EU law, which does not lead to legislation) was later raised in connection with the operation of the **European Convention on Human Rights and Fundamental Freedoms (ECHR)** as part of the Community law. The UK **Human Rights Act (HRA) 1998** provided for the possibility of a “declaration of incompatibility” by the courts – if and only if such legislation cannot be “read and given effect” in such a way as it is compatible with the Convention (ECHR) rights (in **HRA 1998**, sec. 4). However, any such interpretation cannot automatically invalidate or affect the operation or enforcement of primary or secondary legislation (in **HRA 1998**, sec. 3).

What is more, even if the ECHR was pronounced to have been “safely relied on” prior to the implementation of the **HRA 1998**, as in **R v. Lambert... [2002] QB 1112**, the court was satisfied that the Convention itself did not contain provisions which would “regard presumptions of fact or [domestic] law provided for in the criminal law with indifference” (per Lord Woolf CJ, in **R v. Lambert [2002]**, para 14, after **Salabiaku v. France [1988] 13 EHRR 379**). Consequently, the doctrine and legal effect of the sovereignty of the Acts of Parliament with regard to the transferring of the legal (persuasive) burden of proof to the defendant is upheld in that the defendant is required to “establish a special defence or exception” (in **R v. Lambert [2002]**, para 16). That was one of those “presumptions” to be observed. Nevertheless, even before any court’s decision, Parliament may enact provisions whose agreement with the ECHR is questionable (e.g. the problem of retrospective interpretation in the **Anti-Terrorism, Crime and Security Act 2001**).

Even in the absence or ignorance of the ECHR, incorporated into English law in the provisions of the **HRA 1998**, the doctrine of “residual liberties”, which encompasses respective citizens’ rights, had been applied and guarded by

the courts through the interpretive presumptions (especially in criminal law), in common law and by Statutes. These facts, although there must have been defects and inconsistencies, invalidate the claim that the interpretation of the European Communities' law in the UK has resulted in a fundamental revolution overturning the system in order to enforce provisions "from the outside".

Equally, it remains an unfounded challenge to the stability of the system that statutes can be questioned by courts. In **Duport Steels Ltd. v. Sirs [1980] 1WLR 142** (per Lord Diplock LJ), the court said that "in controversial matters [...] Under our constitution, it is Parliament's opinion on these matters that is paramount". It obviously remains an open question what exactly constitutes that "opinion" and a wide scope of interpretation is left to courts in respect of the ways in which the proper aim behind the words of the statute is sought, but that "opinion" is opposed here to what the judges consider "right" or proper. Also, **McCarthy's Ltd. v. Smith [1979]** (cited above) showed the duty of the courts to adhere to Parliament's explicit intentions, so legislation itself is not and cannot be overruled by the judiciary, as said above in the context of the implementation of the EU law. Clearly, the doctrine of Parliamentary sovereignty has not become futile by applying judicial interpretation.

In **B v. DPP [2000] 2 AC 428 (HL)**, the Lords interpreted the *mens rea* (the defendant's fault) for this offence, as one of the four possible interpretive options, as they considered the lack of clear provisions in the language of the **Indecency with Children Act 1960**. The case involved a boy aged 14 who was charged with the offence of inciting a child under 14 to commit an act gross indecency; the conviction was quashed and the defendant was acquitted, so the judgement was in favour of *mens rea*, irrespective of age. What is crucial for the present argument, however, is that the court made it explicit that such an application of the presumption of "no liability without fault" was only possible "unless Parliament indicated a contrary intention expressly or by necessary implication" (in **B v. DPP [2000]**, per Lord Nicholls of Birkenhead), that is, if no reasonable interpretation could have given it the effect to the contrary.

Considering the above, it has to be shown how the constitutional convention of Parliamentary sovereignty is reflected in courts' decisions and that the true meaning and legal effect of the constitutional conventions as regulators of the system can hardly be ignored or subjected to random adaptation. It is not denied that the principles of statutory interpretation are often considered as a shield behind which to hide the judges' personal views on what is the "proper" application of law. Nevertheless, the supremacy of constitutional conventions hardly ever enters into conflict with judicial interpretation, so it is unthinkable, for example, that the presumption prohibiting retrospective interpretation (applying the new law to past and present facts, as well as the future) should prevail over Statute if Parliament chooses to act to the contrary.

In **Jackson and Others v. HM's Attorney General [2005]** (cited above), in response to the Appellants' submissions questioning the validity of the **Parliament Act 1949** (and, consequently, the **Hunting Act 2004**), which had been stated to have introduced major changes without receiving consent from the House of Lords under the provisions of the **1911 Act**, the Lords, sitting judicially in 9 members, had applied the "historical background" or purposive interpretive guidance. The "historical background" interpretation of the procedures leading to the enactment, as well as "a careful study of the statutory language" of the latter (in **Jackson and Others... [2005]**, per Lord Bingham of Cornhill, paras. 29, 30), were to substantiate the literal interpretation of section 2(1) of the **Parliament Act 1911** (the word "any" legislation, subject to the noted exceptions, was "to mean exactly what it said" – per Lord Bingham of Cornhill, para 30). Thus the Appellants' challenge that the **1949 Bill** could not have been passed in reliance on the stated section 2 was dismissed. No discrimination in this respect is made between legislation introducing fundamental changes and that which is "relatively modest" and "straightforward" (in paras. 30, 38).

Moreover, statutes passed pursuant to another Act's procedure cannot be pronounced as "delegated legislation", so their legal validity is not to be questioned on that issue, since, according to Lord Nicholls (in **Jackson and Others... [2005]**, paras. 63, 64), this would lead to the absurdity of the definition of "delegate" or "agent". Consequently, and most importantly for the present argument, by determining the causes of Parliament's intention in that way, the court remained in line with interpretive rules in recognising and guarding, in particular, "the primacy of the House of Commons over the House of Lords" since the **1911 Act** (para 62) and, in general, the constitutional convention that no Parliament can be bound by its predecessors. This is how the identity of the sovereign body is confirmed as a "fundamental principle of law in the UK" (in **Jackson and Others... [2005]**, per Lord Bingham of Cornhill, para 28, quoting an authority).

Finally, the *stare decisis* system of precedent has not come to be a mere convention whereby judges may overrule any former judgements. Basically, it is only the *ratio* of the decision (also discussed below) that can bind lower courts. The eternal primacy of any precedent is dubious, but it would be certainly a too far-reaching and controversial claim that courts often ignored previous cases if they did not "wish" to follow them, as that would dramatically undermine legal certainty and public confidence in the system. **R v. R [1991] UKHL 12**, overruling the **1764** precedent for a husband's lack of criminal liability for rape and creating the marital rape offence, clearly regarded the former conception as "unacceptable" to any "reasonable" understanding (**R v. R [1991]**, per Lord Keith of Kinkel). Further recommendations on the grounds of such a dismissal were given by Lord Reid, on the changing conceptions and conditions of modern policy, social consciousness etc.⁴ Most probably, no precedent could ever have existed

⁴ Cf. S. Terrett, *English Legal System Workbook 1. English Legal History and the Sources of English Law*, Juris Angliae Scientia, Cambridge, Warsaw 2009.

to follow in the **Bland** case (**Airedale NHS Trust v. Bland** [1993] AC 789) to the effect that food and fluids supporting the life of a person with no prospects for recovery did not constitute medical treatment (there had been no precedent to the contrary). Whatever implications these two cases have in common, different in legal terms and in moral weight as they might be, consists in the “social” and “practicable” aspects of changes motivating the dramatic creating or overruling of precedents or set definitions. However, this would not lead to regular revisions of case law. The latter case can be considered an example of a clear definition (“medical treatment”) in terms of *ratio decidendi* (the legal “heart of the matter” in judicial decisions). Besides, in **R v. G and Another** [2003] UKHL 50 and **R v. Kansal** [2001] UKHL 62, the higher courts must raise more serious legal arguments for a *ratio* to be overruled in individual cases than just pronouncing that it is “incorrect” or not “right”. What is more, if such decisions were to be made on a regular basis with the effect of the invalidating of the previous cases going backwards in time (for all time), it might result in massive damages claims (e.g. in contracts or banking). Thus, law is developed through the successive decisions of the highest courts (the House of Lords or the Supreme Court, the Court of Appeal and the High Court – with restrictions), not by “making” new legislation and overruling or supplementing the former but by interpreting and applying both old principles and statutes to new legal and factual situations.

To conclude, it is proposed that the English legal system is not really a collection of principles and conventions open to random interpretation. Although some concerns have been raised about the “eroding” effect of e.g. the 1911 and 1949 Acts and subsequent legislation on “the checks and balances inherent in the British constitution” (in **Jackson and Others... [2005]**, per Lord Bingham of Cornhill, para 41; the judge himself refrained from expressing an opinion on that, though), these matters merit serious study in a different context. The system’s stability and capacity for reform is epitomized by the **Constitutional Reform Act 2005**, a rather symbolic act in the legal history of Britain, providing for the rule of separation of powers in relation to the judicial powers of the House of Lords by creating the Supreme Court, the new highest judicial offices and the Judicial Appointments Commission. An optimistic view was expressed by Lord Woolf, the first Lord Chief Justice of England and Wales since 2005, who said that “we can take genuine pride” in the system where we have successfully “benefited from a tradition of mutual respect, restraint or co-operation between the three arms of the Government”⁵ – all that without a written constitution!

⁵ H.K. Woolf (Lord Woolf CJ), *The Rule of Law and a Change in the Constitution*, “Cambridge Law Journal” July 2004, 63(2), at 318.

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Summary

This paper purports to explain the identity of Britain in the light of the legal system of England and Wales. The enactment, interpretation, application and enforcement, as well as the historical development of the main sources of law are shown as the central issues in describing the legal and political specificity of the UK. The aim of this paper is to discuss and evaluate the grounds for the stability of the English legal system. Thus, four general questions are addressed which may be considered problematic by those living in monist legal systems based on written constitutions: the supremacy of Parliament, including in the context of European Union law; the interpretation of statutes; the binding role of constitutional conventions; and following precedents as the epitome of common ('judge-made') law.

Keywords: constitution, parliament, interpretation, statute, constitutional conventions, supremacy, court, precedent.

Brytyjska konstytucja: dlaczego to nie mit

Streszczenie

Artykuł dotyczy tożsamości historycznej i prawnej Wielkiej Brytanii widzianej przez pryzmat systemu prawnego Anglii i Walii. Uchwalanie, interpretacja, zastosowanie, wprowadzanie w życie oraz rozwój historyczny określonych źródeł prawa ukazane są jako istotne cechy porządku prawnego i politycznego Zjednoczonego Królestwa. Celem niniejszej pracy jest ogólne omówienie i ocena podstaw stabilności systemu prawnego. Dlatego też autor stara się wyjaśnić cztery zagadnienia, które mogą wydawać się szczególnie problematyczne z punktu widzenia systemu „monistycznego”, w którym konstytucja stanowi najwyższy akt prawny w państwie, a mianowicie: suwerenność (supremacja) Parlamentu, również w kontekście zmian związanych z prawem Unii Europejskiej, interpretacja ustaw (aktów prawnych), wiążąca rola konwencji konstytucyjnych oraz zastosowanie przez sądy precedensów jako szczególny aspekt rozwoju prawa.

Słowa kluczowe: konstytucja, parlament, interpretacja, ustawa, konwencje konstytucyjne, supremacja, sąd, precedens.