

THE CONSTITUTION OF THE UNITED KINGDOM.

A POSITIVIST PERSPECTIVE

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Prof. Sebastian SCHMID

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This paper will focus on three basic aspects of the UK constitution: That it is *unwritten*, its categorisation as *political* constitution and *parliamentary sovereignty* as its prime principle. Admittedly, writing about these standard topics of UK constitutional law requires special justification: This article aims to contribute to the discussion by adopting a theoretical approach which is not popular and thus not common among Anglo-American scholars. It can be described as strictly positivist view on law.¹ According to this approach, legal norms are created by human beings

¹ See for the following Hans Kelsen, *Pure Theory of Law*, translation from the second German edition by Max Knight (University of California Press, 1967); *ibid.*, *General Theory of Norms*, translated by Michael Hartney (Clarendon Press, 1991); Robert Walter, *Der Aufbau der Rechtsordnung*, 2nd edn (Manz, 1974); Rudolf Thienel, *Kritischer Rationalismus und Jurisprudenz* (Manz, 1991); Matthias Jestaedt, *Das mag in der Theorie richtig*

and regulate human behaviour in the form of commands; seemingly other types of norms such as authorising and enabling norms are regarded as parts of commands, since they are indissolubly linked to commanding norms. Law is basically regarded as a system of coercive orders which are regularly effective. It is an essential position of this theoretical approach that the science of law is only concerned with questions of what and how the law *is* and not how it *should be* which is identified as a question of (legal) political science. In describing the meaning of legal provisions by interpretation, legal scholars provide information on how individuals *should* behave and not on their *actual* behaviour. Thus, this theoretical approach aims to separate legal science from other sub-disciplines of jurisprudence – used here as a generic term – such as legal political science, legal historical science or legal philosophy and to establish it as an own branch of science with a particular methodology.

In adopting this approach, this article will try to show that the peculiarity of the UK constitution is not that it is unwritten but that the United Kingdom does not have a constitution in a formal sense. The discussion on political and legal constitutions will be embed in the fundamental distinction between ethics and legal science which will lead to the conclusion that basically every country has a political as well as a legal constitution. In regard to the principle of parliamentary sovereignty, it will be argued that the existence of a supreme or sovereign law-maker is a common feature of all modern legal systems.

1. The *unwritten* constitution of the United Kingdom

The UK constitution – as well as the constitutions of New Zealand and Israel – is often scientifically classified as *unwritten* in order to differentiate it from written constitutions. Such a conception of a scientific term can be distinguished from

sein... Vom Nutzen der Rechtstheorie für die Rechtspraxis (Mohr Siebeck, 2006); Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011).

making statements on norms.² This division refers to the two major aims of legal science: to systematise and to classify law on the one hand, and to describe the legal provisions in force on the other hand.³ Statements on norms aim to provide information on the validity and content of legal norms. As epistemic acts, they are made under the principle of truth. In other words: To say that a specific norm has certain content, can be verified or falsified.⁴ In contrast, the conception of scientific terms is not primarily based on considerations about truth; rather, it is based on the premise of usefulness and appropriateness. Consequently, the conception of scientific terms can be considered useful or inappropriate; however, it cannot be verified or falsified. The following paragraphs will focus on the question, whether it is appropriate to call the UK constitution “unwritten” in order to describe its distinctiveness from other constitutions.

At first glance, it does not seem appropriate to call the UK constitution unwritten since some of its parts are written down, for instance, in Acts of Parliament.⁵ At the same time, the extent to which unwritten provisions, such as conventions, are regarded as a part of the constitution is exceptional in contrast to other legal systems. However, the attribute “unwritten” cannot be taken literally and it is, thus,

² Heinz Peter Rill, *Gliedstaatsverträge* (Springer, 1972) pp.2-3.

³ Thienel, *Kritischer Rationalismus und Jurisprudenz*, p.210.

⁴ Kelsen, *Pure Theory of Law*, p.73; Robert Walter, “Normen und Aussagen über Normen” in Bernd-Christian Funk et. al. (eds), *Staatsrecht und Staatswissenschaften in Zeiten des Wandels. Festschrift für Ludwig Adamovich zum 60. Geburtstag* (Springer, 1992) 714-720; Eugenio Bulygin, “On Norms of Competence” (1992) 11 *Law and Philosophy* 201 at p.211.

⁵ See, e.g., the Human Rights Act 1998 or the Constitutional Reform Act 2005.

regularly understood in a broader sense as “not codified”:⁶ According to a conception of van Caenegem

“[a] true codification is an original work and, in contrast to a compilation, must be intended as a general, exhaustive regulation of a particular area of law (for example, civil law or civil procedure). Furthermore, the drafting of a code involves a coherent programme and a consistent logical structure. The language of a modern code ought to be accessible to all and, as far as possible, free from archaisms and technical professional jargon. Codes of this type appeared only from the eighteenth century onwards.”⁷

Based on this definition, it is true that the UK constitution is not written down in one document and that its fragmentation differentiates it from other fundamental legal orders. This understanding is supported by the argument that in a common law system, constitutional law cannot be organised in the same way as in a civil law country in the sense that all norms of constitutional law are codified in one document. Since not only Acts of Parliament but also decisions of courts are generally binding, a codified or totally incorporated constitution which comprises all generally binding provision – such as the German *Grundgesetz*⁸ – would require continuous and frequent adaptation. However, there are many civil law jurisdictions which do not have an incorporated constitution such as Germany or a

⁶ See Vernon Bogdanor and Stefan Vogenauer, “Enacting a British Constitution: Some Problems” [2008] P.L. 38-57; Richard Gordon, *Repairing British Politics. A Blueprint for Constitutional Change* (Hart, 2010) pp.xiii, 8; Jeffrey Jowell and Dawn Oliver, “Editors’ Introduction” in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, 7th edn (Oxford University Press, 2011) pp.2-3; Peter Leyland, *The Constitution of the United Kingdom. A Contextual Analysis* (Hart, 2007) p.2; David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law*, 4th edn (Oxford University Press, 2007) p.2.

⁷ Raul C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press, 1992) p.12.

⁸ Grundgesetz für die Bundesrepublik Deutschland (German Federal Law Gazette 1949, p.1, subsequently amended).

comprehensive codification of constitutional law at all. Examples for fragmented fundamental laws comprising different legal sources can be found in Sweden⁹ and Austria¹⁰. Thus, the lack of codification – or in other words: fragmentation – is not an exclusive feature of the UK constitution.¹¹

The unique characteristic of UK constitutional law is that it is solely determined by substantive criteria and that it cannot be defined, as probably in all other legal systems, by formal criteria such as special majorities in parliament or the need for a referendum when enacting or amending it.¹² In terms of this characteristic, the UK constitution is sometimes called *unentrenched*.¹³ The distinction between constitutional law in a formal and substantive sense is a long standing categorisation of legal science. It refers, on the one hand, to procedural aspects, on

⁹ The Swedish Constitution consists of four fundamental laws: The Instrument of Government (SFS 1974:152, subsequently amended); The Act of Succession (SFS 1910:926, amended 1979); Freedom of the Press Act (SFS 1949:105, subsequently amended) and The Law on Freedom of Expression (SFS 1991:1469, subsequently amended).

¹⁰ In Austria, constitutional law can be found in many different documents. Next to the *Bundes-Verfassungsgesetz* (Austrian Federal Law Gazette 1930/1) which consists of more than 200 articles, there are more than 300 constitutional provisions in other constitutional Acts of Parliament and “ordinary” Acts of Parliament; see Ewald Wiederin, “Verfassungsrevision in Österreich” in Michael Thaler and Harald Stolzlechner (eds), *Verfassungsrevision. Überlegungen zu aktuellen Reformbemühungen* (Jan Sramek Verlag, 2008) 17 at p.25.

¹¹ Thus, opinions such as Vernon Bogdanor’s (*The New British Constitution* [Hart, 2009] p.8) that all but three democracies (United Kingdom, Israel, New Zealand) have constitutions “embodied in a document” and that “[i]n this sense, of course, Britain has no constitution” are to be rejected.

¹² This insight is far from being new; see A.V. Dicey’s comparison between the US and the UK constitution in *Introduction to the Study of the Law of the Constitution*, 10th edn (Macmillan, 1959) pp.4-6 who is referring to Émile Boutmy, *Études de Droit constitutionnel*, 2nd edn (Plon, 1888) p.8.

¹³ H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford University Press, 1994) p.150. The term is also used by S.E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Clarendon Press, 1995) p.43. However, these authors create a link between entrenchment and codification which is not necessarily the case: entrenched legal provisions do not have to be codified and *vice versa*.

the other hand, to the content of legal provisions: If a specific procedure to enact or amend constitutional law exists (constitutional law in a formal sense), “any contents whatever may appear under this form”.¹⁴ *Vice versa*, the procedure according to which a legal provision is enacted does not play any role, when constitutional law is defined by content-related criteria (constitutional law in a substantive sense). Consequently, not only constitutional Acts of Parliament but also “ordinary” Acts of Parliament, regulations or judgements are regarded as constitutional law as long as their subject of regulation is of constitutional nature.

A problem of substance-related definitions of constitutional law is uncertainty of what the legal constitution is. Which contents characterise constitutional law? According to the predominant definition among UK legal scholars – if there is one provided at all¹⁵ –, constitutional law is

“a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and relations between persons and public authorities.”¹⁶

This definition finds support within the judiciary as Laws LJ stated in *Thoburn v. Sunderland City Council*:

“We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is

¹⁴ Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Harvard University Press, 1946) p.125.

¹⁵ Ian Loveland, *Constitutional Law, Administrative Law and Human Rights*, 5th edn (Oxford University Press, 2009) p.4, follows a functional approach according to which “a constitution is to articulate and preserve a society’s fundamental principles.” Instead of offering a one sentence definition “the entire book” shall be seen as definition.

¹⁶ Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 7th edn (Cambridge University Press, 2011) p.4.

one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”¹⁷

At first glance, these definitions sound useful and have almost reached authoritative status by repetition,¹⁸ but an example might prove its weakness: Is an Act of Parliament which regulates the electoral system in detail constitutional law?¹⁹ It can be argued that the right to vote is a fundamental political right in a democracy and that the relationship between citizens and the State is concerned. However, electoral provisions are usually very specific in regulating how the national territory is divided into constituencies or how the votes are counted and transferred into seats in a legislative body. Such detailed rules do not seem to be “fundamental enough” for a basic law which sets principles for state organisation. Thus, if the “basic tenets”²⁰ of the UK constitution are put aside, a substance-related definition of constitutional law almost necessarily ends up in a controversy whether certain norms are to be classified under the category of constitutional law or not.²¹

¹⁷ *Thoburn v Sunderland City Council, Hunt v London Borough of Hackney, Harman and Dove v Cornwall County Council, Collins v London Borough of Sutton* [2002] EWHC 195 Admin at [62].

¹⁸ Similar substance-related definitions can be found in Bogdanor, *The New British Constitution*, p.9; Anthony Bradley and Keith Ewing, *Constitutional and administrative law*, 14th edn (Pearson Education, 2006) pp.3-4; Leyland, *The Constitution of the United Kingdom*, p.1.

¹⁹ This question has already been asked by Bogdanor and Vogenauer, [2008] P.L. pp.42-43.

²⁰ The Select Committee on the Constitution identified five basic tenets of the Constitution in its First Report: Sovereignty of Parliament, Rule of law encompassing the right of the individual, union State, representative government, and membership of the Commonwealth and other international organisation.

²¹ Turpin and Tomkins, *British Government and the Constitution*, p.4. See already Dicey, *Introduction to the Study of the Law of the Constitution*, p.7: The “English commentator or lecturer [...] will find, unless he can obtain some clue to guide his steps, that the whole province of so-called “constitutional law” is a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by conventionalism.”

The distinction between constitutional and “ordinary” legislation is not only a question of scientific classification; it is crucial in regard to the application of law: According to Schedule 5 of the Scotland Act 1998, one of the so-called “Reserved Matters” which remain in the exclusive legislative competence of Westminster Parliament, is “The Constitution”. However, although five sub-items²² define what is meant by “The Constitution” in this context, the question arises – especially for the Supreme Court²³ – which contents of statutes are to be qualified as “constitutional”.

This uncertainty in the qualification of legal provision as constitutional or “ordinary” Act of Parliament does not appear when a formal view is adopted: Since the hierarchical position of a legal provision results from the procedure by which it is enacted, the classification of norms of a legal system into different hierarchical layers turns out to be unproblematic. In the case of constitutional law, procedural provision quite often require specific quorums in parliament, sometimes combined with a referendum or the explicit designation as “constitutional law”. If such a viewpoint is adopted, legal provisions of any content may be classified as constitutional law. It is up to the constitutional legislator and in terms of legal policy recommendable that only such provisions are enacted as constitutional law which constitute fundamental rules. However, the attempt to identify constitutional law in a formal sense in the UK legal system does not produce a result. It fails because there are no specific procedural rules provided according to which constitutional Acts of Parliament can be distinguished from “ordinary” Acts of Parliament. The United Kingdom does not have a constitution in a formal sense which makes this legal system indeed outstanding.

²² Which are a) the Crown, including succession to the Crown and a regency, b) the Union of the Kingdoms of Scotland and England, c) the Parliament of the United Kingdom, d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal, and e) the continued existence of the Court of Session as a civil court of first instance and of appeal.

²³ Section 33 and Sch.6 Scotland Act 1998.

A consequence of the lack of formal constitutional law in the United Kingdom is the principle of parliamentary sovereignty: No superior law – except European Law – limits the legislative competences of Westminster Parliament. Moreover, the legal norms which are regarded as constitutional law due to their content do not enjoy greater legal protection than “ordinary” Acts of Parliament. Thus, “[t]here is an obvious weak link in the protection of fundamental constitutional principles” in the constitution of the United Kingdom.²⁴

As mentioned above, the United Kingdom is regularly categorized as one of the few countries which are regarded to have an unwritten constitution. This description turns out to be misleading and is, thus, inappropriate. It is neither its characteristic as being unwritten nor its lack of a codification which makes the UK constitution special. The outstanding characteristic of UK constitutional law is that it cannot be defined by formal criteria since “ordinary” Acts of Parliament and “constitutional” Acts of Parliament can only be distinguished in respect of their content. This result challenges the myth that there are significant parallels between the constitutions of the United Kingdom, New Zealand²⁵ and Israel²⁶ since the legal

²⁴ Dawn Oliver, “Constitutionalism and the Abolition of the Office of the Lord Chancellor” (2004) 57 *Parliamentary Affairs* 754 at p.765.

²⁵ According to s.268 of the Electoral Act 1993, five provisions of this Act and one provision of the Constitution Act 1986 can only be amended by a majority of 75% of all the members of Parliament.

²⁶ In contrast to the regular procedure, according to which the Knesset passes bills by a simple majority (majority of the members present, s.25 Basic Law: The Knesset 1958), s.4 of this Act can only be amended by an absolute majority (majority of the members of the Knesset). This procedure is, for instance, also provided for amendments of any provision in the Basic Law: Freedom of Occupation 1994 (s.7) or most of the provisions of the Basic Law: Government 2001 (s.44). Furthermore, according to the consistent case-law of the Israeli Supreme Court all so-called “Basic Laws” have a constitutional status so that regular Act of the Knesset have to be in accordance with these Laws. From a formal point of view, this jurisdiction can be based on the sophisticated observation that Basic Laws without a special amendment procedure can be separated from regular Acts of the Knesset because of their explicit designation as “Basic Law” when they are published. As a consequence, any amendment of a Basic Law has to be designated as “Basic Law” as well (see decision of the Israeli Supreme Court in the case H CJ 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village*, 49 (4) PD 221; Suzie Navot, “Israel” in Dawn Oliver and

systems of both countries contain constitutional law which can be defined according to formal, i.e. procedural criteria.

2. The *political* constitution

In the late 1970s, J.A.G. Griffith made a declaration for the political constitution of the United Kingdom.²⁷ The idea of a political constitution is characterised by the existences of non-legal norms which regulate the political process. In contrast to legal norms, the creation of these other social norms which can be referred to as “norms of morality” is less formalised, since they are a result of the day-to-day-political process. Thus, their normative content as well as the working of a political constitution is difficult to discern.²⁸

For over three decades, constitutional scholars have raised the question whether the UK constitution is rather political or legal. Today, there is broad agreement that the constitution is in transition from a political to a legal or “principled”²⁹ legal order. However, the debate drifted away from Griffith’s initial thoughts by asking “either” / “or” questions. Griffith did not argue, I would dare say, that the United Kingdom has solely a political constitution³⁰ and he did not deny that there are provisions in the UK legal system which are to be classified as “constitutional”. Rather, Griffith’s major argument was that legal instruments are not suited for

Carlo Fusaro [eds], *The Changing Constitution* [Hart, 2011] 191-209.

²⁷ J.A.G. Griffith, “The Political Constitution” (1979) 42 M.L.R. 1-21.

²⁸ Graham Gee and Grégoir C.N. Webber, “What Is a Political Constitution?” (2010) 30 O.J.L.S. 273 at p.286.

²⁹ Dawn Oliver, “The United Kingdom Constitution in Transition: from where to where?” in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of Law. A Liber Amicorum* (Oxford University Press, 2009) 147-162.

³⁰ See Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003) p.21 who characterises Griffith’s concept of a political constitution as “lacking normative content”.

solving certain political issues. Going back to Griffith's initial article, the following paragraphs try to demonstrate that the distinction between political and legal constitutions refers to a more fundamental theoretical setting: the distinction between legal and moral norms and between legal science and ethics respectively.

In his article, Griffith explicitly adopted a positivist view on the UK constitution and constitutional law:

“I do not believe that the concept of law is a moral concept. Of course I will, as cheerfully and as seriously as the next person, engage in discussions about the value of individual laws and pass moral judgements about them. But laws are merely statements of a power relationship and nothing more. [...] I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position; that laws made by those in authority derive validity from no other fact or principle, and so impose no moral obligation of obedience on others”.³¹

It is one of the fundamental positions of a pure positivist theory of law that legal norms have to be distinguished from norms of morality.³² Both, legal and moral norms regulate human behaviour; thus, legal science is not the only discipline which is concerned with the description of social norms.³³ One difference between a legal and a moral system is that legal norms are created by legally authorised human beings. It is crucial that the power to adopt a legal norm can only result

³¹ Griffith, (1979) 42 M.L.R. p.19.

³² Maxim of separation of law and morals (*Trennungsthese*); Heinz Peter Rill, “Grundlegende Fragen bei der Entwicklung eines Rechtsbegriffs” in Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011) 1 at pp.15-19.

³³ Ethics is a science concerned with norms of morality.

from another legal (enabling) norm so that, as a consequence, legal systems appear as self-contained normative orders the validity of which does not derive from norms of morality. A further difference is that legal norms are enforceable by use of state power whereas sanctions for immoral behaviour are imposed interpersonal.

From a positivist point of view, the relationship between law and morality is characterised by the insight that both normative systems exist independently, especially that the validity of a legal norm does not depend on a judgement with regard to its compliance with moral values. To claim that legal provisions are only valid if they are just or in compliance with morality³⁴ implies that there are absolute moral values. This presumption is challenged by representatives of a pure theory of law by arguing that it is not possible to objectify moral values from a scientific point of view.³⁵ Attempts to identify perfectly valid norms of just behaviour, i.e. norms which exclude the possibility to consider other behaviour than determined by the norm as just, are doomed to failure. No judgement on justice can ever claim to be perfectly valid because the possibility of a differing value judgement cannot be excluded. The content of a moral system changes over time and is highly related to the background of the judging individual.³⁶ This view on the relationship between legal and moral systems does not deny that factual relationships between law and morality exist and it certainly does not exclude the claim that law should be in accordance with moral values which are valid within a society. But these empirical and political viewpoints do not influence the validity of legal provisions which are in force independently of any however fundamental moral position.

³⁴ For theories of law that include justice as criterion for the validity of law, see generally Hart, *The Concept of Law*, ch.9; see further Stephen Guest, "Why the Law is Just" (2000) 53 *Current Legal Problems* 31-52.

³⁵ However, this does not mean that it is not possible to enter into a rational discourse on value judgements. See basically Hans Kelsen, *What is justice? Justice, Law and Politics in the Mirror of Science* (University of California Press, 1957).

³⁶ Relativistic theory of values.

It is this understanding of the relationship between legal and moral norms which is the foundation for Griffith's article on the political constitution:

“For myself, I am very doubtful about the value of the exercise of telling judges or other legislators that they should look towards the ideal of justice, truth and beauty in their search for the right solution to difficult cases or problems. And I am even more sceptical when they are urged to look to the moral standard of the community – or the general welfare – because I do not think that these things exist. All I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement.”³⁷

In this context, the *political* constitution is a generic term for all the non-legal norms in force which regulate the constitutional order of the United Kingdom. It comprises all the long-established practices by which state representatives feel bound because of valid moral obligations. It makes perfectly sense that the notion of a political constitution has great influence in the United Kingdom since the extent to which constitutional life is regulated by moral norms is exceptionally high compared, for instance, to some positivistic continental constitutions.

In contrast to the post-Griffith discussion, he himself does not argue that the UK constitution is either legal or political. Put pithily, his key message is: Do not mix up law and politics. That is a purely political statement reflecting Griffith's personal view on the reasonable use of legal instruments.

“I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. It is an obvious corollary of this that the responsibility and accountability of our rulers should be real and not fictitious. ... And we need to force governments out of

³⁷ Griffith, (1979) 42 M.L.R. p.12.

secrecy and into open. So also the freedom of the Press should be enlarged by the amendment of laws which restrict discussion. But the remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government.”³⁸

It is an illusion – I believe he argues – to solve problems within a society merely by enacting laws. Further juridification and justicialisation in form of a codified constitution – as often proposed in the last centuries – are not regarded as proper answers to current problems within society.

According to what has been said, I think the term “political constitution” was not introduced to invent a model *in contrast* to the model of a legal constitution but rather *in addition* to it. When Gee and Webber³⁹ have only recently come to the conclusion "that Britain's constitution today embraces [...] *both* a political model *and* a legal model" we are exactly where we started in 1979: The idea of political and legal constitutions are not excluding models. The distinction refers to different normative systems which have, according to Griffith, different functions and thus should not be mixed up. Apart from that, not only the United Kingdom has a political constitution; any constitutional order is consisting of legal and moral or political norms, though, in regard to the influence and prevalence of one normative system, differences occur. It is the maxim of separation of law and morals which leads to the recognition of a political constitution which found a strong supporter in Griffith.

Conclusively, the discussion on legal and political constitutions has to be placed within the general distinction between law and morality. The debate is not on a

³⁸ Griffith, (1979) 42 M.L.R. p.16.

³⁹ Gee and Webber, (2010) 30 O.J.L.S. p.292.

yes/no question but, rather, on the recognition and the influences of legal and moral norms within a constitutional system.

3. Sovereignty of the Queen-in-Parliament

Much has been written about parliamentary sovereignty as the basic principle of the UK constitution.⁴⁰ It basically concerns the unlimited legislative powers of Westminster Parliament and its relationship to the courts. The principle of parliamentary sovereignty is multifaceted and its content changes depending on the viewpoint adopted. The following paragraphs do not aim to give an update of the discussion but rather to identify its legal characteristics instead of political realities.

According to Dicey who is still cited frequently in this respect 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.”⁴¹

Thus, it is one aspect of the principle of parliamentary sovereignty that “under the English constitution” Westminster Parliament has unrestricted power to legislate and to pass Acts of Parliament on any subject matter. In other legal systems, Parliaments are limited in their function as “ordinary” legislators because of constitutional norms, for instance, concerning the distribution of legislative competences in a federal state. Thus, the sovereignty of Parliament is sometimes considered as counterpart to the sovereignty of a constitution.⁴²

⁴⁰ For an overview see Jeffrey Goldsworthy, *Parliamentary Sovereignty. Contemporary Debates* (Cambridge University Press, 2010); Loveland, *Constitutional Law, Administrative Law and Human Rights*, pp.22-52.

⁴¹ Dicey, *Introduction to the Study of the Constitution*, pp.39-40.

From a theoretical point of view, this distinction is unfounded: It is a characteristic of modern legal systems that they appear as a hierarchical orders consisting of norms of different levels.⁴³ The norms of the highest level are created by a sovereign law-maker who is free to change them in any direction. That might not always be the Parliament, however, quite often it is: The South African constitutional legislator, for instance, has unlimited power to amend the South African Constitution according to the procedural rules set out for its change.⁴⁴ While in many legal systems it is the constitutional legislator who is sovereign,⁴⁵ in the United Kingdom, it is the “ordinary” legislator. This is the consequence of the fact that the United Kingdom does not have a constitution in a formal sense: The formal legal procedure to enact constitutional Acts of Parliament is not different from the one for “ordinary” Acts of Parliament. Thus, the distinction between sovereignty of Parliament and sovereignty of a constitution – more precisely: sovereignty of the constitutional legislator – does not characterise fundamentally different forms of legal systems. This categorisation merely depends on how varied a legal system is with regard to different hierarchical layers.

⁴² See, e.g., the book review by Dawn Oliver, “Richard Gordon, *Repairing British Politics: A Blueprint of Constitutional Change*” (2010) 6 *International Journal of Law in Context* p.399.

⁴³ A.J. Merkl, “Prolegomena einer Theorie des rechtlichen Stufenbaus” in Alfred Verdross (ed.), *Gesellschaft, Staat und Recht. Festschrift Hans Kelsen zu 50. Geburtstag gewidmet* (1931) pp.252-294; Kelsen, *Pure Theory of Law*, pp.221-278; Ewald Wiederin, “Die Stufenbaulehre Adolf Julius Merks” in Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011) pp.81-134; Joseph Raz, *The Concept of a Legal System* (1970) pp.95-100; for the UK legal system see Hart, *The Concept of Law*, p.25.

⁴⁴ Section 73 and 74 Constitution of the Republic of South Africa 1996 (Act 108 of 1996, substituted by s.1 (1) of Act 5 of 2005).

⁴⁵ Section 2 of the South African Constitution is headed “Supremacy of Constitution” and states: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” According to the view represented in this article, this declaratory provision is to be interpreted as meaning that the Constitution is supreme with regard to the “ordinary” legislator. However, since in South Africa any constitutional law can be changed, it is the constitutional legislator who is sovereign and not the Constitution.

It could be argued against this position that the conception of Westminster's sovereignty differs from other sovereign legislators because in the United Kingdom, Acts of Parliament are passed when either House agrees on by a majority of votes cast. In contrast, the unlimited legislative competences of other Parliaments such as the South African can only be exercised by super-majorities.⁴⁶ Further, the legal basis for the legislative process in the United Kingdom can be found in Standing Orders, while the legislative procedure for changes of constitutional law in other legal systems is usually regulated in the constitution itself. However, differences concerning the form and procedure in which a legal norm is enacted lie within the power of each sovereign law-maker who otherwise would not be sovereign. Undoubtedly, Westminster Parliament has the power to pass a bill concerning the legislative procedure.⁴⁷ It is not useful to refer to the procedure and form in which a sovereign law-maker decides to enact legal provisions, since these are not useful qualities to point out the characteristics of legislative sovereignty. Thus, if the powers of Westminster Parliament are not compared with other "ordinary" legislators but instead with other sovereign legislators, the UK principle of parliamentary sovereignty appears as entirely common feature of modern legal systems.

Some constitutions explicitly state that certain – most fundamental – provisions cannot be amended.⁴⁸ These norms of constitutional law cannot be changed within the procedural framework of the constitution; an amendment can only be adopted

⁴⁶ According to s.74 of the South African Constitution amendments of s.1 and s.74 require a 75 per cent majority of all members of the National Assembly and a supporting vote of at least six provinces; any other provision of the Constitution can be amended with a majority of two-thirds of all members of the Assembly and the support of six provinces.

⁴⁷ See, e.g., the Parliament Acts 1911 and 1949.

⁴⁸ So called "eternity clauses"; see, e.g., art.79 para.3 German Basic Law; art.89 para.5 French Constitution or art.9 para.2 Constitution of the Czech Republic.

by an extra-constitutional act which creates a completely new constitution.⁴⁹ A sovereign legislator with unlimited law-making power does not exist in these legal systems. It has been argued that also Westminster's sovereignty is limited in one respect, namely, that the principle of parliamentary sovereignty itself cannot be changed or abolished, for instance, by the implementation of a constitution in a formal sense.⁵⁰ This opinion is regularly based on the existence of a "rule of recognition"⁵¹ which establishes the "criteria of validity in any given legal system" as an "empirical [...] question of fact".⁵² The content of the rule of recognition is "whatever rules legal officials do in fact accept and follow when they make, recognise, interpret or apply law."⁵³ According to this view, the supreme position of Westminster Parliament is a result of the fact that its sovereignty is accepted by the government and the courts. However, these arguments cannot be used as a legal foundation of parliamentary sovereignty in general and the unchangeability of the principle specifically. From the perspective of a pure theory of law, it lacks the insights that what ought to be cannot be derived from facts.⁵⁴ The validity of a norm necessarily can only result from another norm. By going back to the historically first constitution, a layer of norms is reached the foundation of which cannot be traced back to other norms. Thus, the idea to scientifically prove the

⁴⁹ Werner Heun, *The Constitution of Germany. A Contextual Analysis* (Hart, 2011) pp.25-26; G.F. Schuppert, "The Constituent Power" in Christian Starck (ed.), *Main Principles of the German Basic Law* (Nomos, 1983) pp.37-54.

⁵⁰ H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) C.L.J. 172 at p.174; Goldsworthy, *Parliamentary Sovereignty*, p.192; Anthony Lester, "The utility of the Human rights Act: a reply to Keith Ewing" [2005] P.L. 249 at p.257.

⁵¹ See generally Hart, *The Concept of Law*, ch.6.

⁵² Hart, *The Concept of Law*, p.292.

⁵³ Goldsworthy, *Parliamentary Sovereignty*, p.54.

⁵⁴ Kelsen, *Pure Theory of Law*, p.193.

objective validity of a legal system has to be abandoned, since the ultimate foundation of a legal system cannot be explained by means of legal science.⁵⁵

From a legal point of view, the reference to a rule of recognition cannot be applied to explain the origin of parliamentary sovereignty⁵⁶ and no other indication can be found in the UK legal system in force as to why Westminster Parliament should not be legally allowed to finally transfer powers to another authority.⁵⁷ Thus, not much support can be found for the widely held view that parliamentary sovereignty cannot be restricted.

According to the second major characteristic of the principle of parliamentary sovereignty, the courts cannot review Acts of Parliament. This aspect is sometimes used as political claim to argue that ultimate law-making power should remain with Westminster Parliament as democratically legitimised legislator and not with the courts which are only indirectly legitimised. However, in the context of this article, the legal aspects of the relationship between Parliament and the courts are of interest.

From a Diceyan point of view,⁵⁸ the courts are subordinate to Parliament. Some authors have argued against this view that the UK constitution is based on common law and that consequently the courts are empowered to decide whether Parliament

⁵⁵ Thienel, *Kritischer Rationalismus und Jurisprudenz*, pp.100-101. This is the basis for Kelsen's concept of a basic norm (*Grundnorm*) which, from a formal legal point of view, is nothing more and nothing less than the assumption that norms of the highest level are objectively valid. Only under such an assumption, norms of a legal system can be treated as objectively valid. Kelsen, *Pure Theory of Law*, pp.193-221.

⁵⁶ However, the rule of recognition is useful to describe empirically how a legal system is established.

⁵⁷ Powers of Westminster Parliament were limited, e.g., when legislative competences were finally transferred to the Canadian Parliament by s.2 of the Canada Act 1982.

⁵⁸ Dicey, *Introduction to the Study of the Law of the Constitution*, pp.60-61, 70.

is sovereign or not.⁵⁹ However, this argumentation has been refuted, for instance, by Jeffrey Goldsworthy who reasoned that neither a “historical” nor a “philosophical” analysis supports the thesis of a common law basis of the UK constitution.⁶⁰ Rather, it is generally regarded that the revolution of 1688 established the legal authority of Acts of Parliament over common law.⁶¹

Based on the assumption that Acts of Parliament are legal norms of the *highest* level in the UK legal system, it makes sense that the courts do not have the power to review parliamentary legislation: There is *no legal standard of review* for Acts of Parliament against which their legality can be measured. The insight that legal systems appear as orders of different hierarchical layers of legal norms leads to the conclusion that legal norms of a lower level have to be in accordance with norms of higher level.⁶² Since Acts of Parliament are norms of the highest level in the UK legal system – putting aside EU Law – the power to review Acts of Parliament necessarily has to be accompanied by the determination of a standard of review.⁶³ According to the legal system in force, it is the decision of the sovereign Westminster Parliament to enact laws according to which courts have the power to

⁵⁹ T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) p.271; W.S. Holdsworth, *A History of English Law*, 2nd edn (Methuen and Sweet & Maxwell, 1937), vol.6, p.263; Ivor Jennings, *The Law and the Constitution*, 5th edn (Hodder and Stoughton, 1959) p.39; Wade, (1955) C.L.J. pp.188-189.

⁶⁰ Goldsworthy, *Parliamentary Sovereignty*, ch.2.

⁶¹ Loveland, *Constitutional Law, Administrative Law and Human Rights*, p.28.

⁶² See fn.43.

⁶³ Even if there were norms of a higher level above “ordinary” Acts of Parliament, the courts would only have the competence to review legislation, if such a power is assigned to them by a legal norm. According to Art 190 of the Swiss Federal Constitution, “ordinary” Federal statutes are immunised against judicial review. Thus, even if they are in breach with constitutional law, “federal statutes remain ‘binding’ for the time being”; see Giovanni Biaggini, “Switzerland” in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change. A Comparative Study* (Hart, 2011) 303 at p.321.

review Acts of Parliament. Even if the UK Supreme Court would claim the competence to review Acts of Parliament⁶⁴ - regardless of the reasons it would give and regardless of the standards of review it would adopt – it is the solely decision of Westminster Parliament to put the Court in its place.

Consequently, both aspects of the principle of parliamentary sovereignty – unlimited legislative power and non-reviewability of norms enacted by a sovereign legislator – turn out to be common features of modern legal systems. Differences only occur in regard to procedural aspects and the authority which has sovereign legislative power which may be the the people via referendums, a Parliament by legislation, a court in passing judgements or a combination of two or more of such legislative authorities. However, these dissimilarities are not so significant as to justify that the Westminster model of parliamentary sovereignty is characterised substantively different than other forms of legislative sovereignty.

4. Final remarks

Most European countries saw a period of constitutionalisation in the 19th and early 20th century. It took some time to recognise what is taken for granted today: The power of Parliaments as “ordinary” legislators is not unlimited. In this sense, Adolf Julius Merkl held in 1916: “One often overlooks that the legislator is not omnipotent but instead nothing but the creature of the State Constitution.”⁶⁵ Sovereign legislative power was transferred from the “ordinary” to the constitutional legislator.

⁶⁴ See, e.g., Lord Steyn (para.102) and Lord Hope (para.107) in *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56.

⁶⁵ “Man übersieht vielfach, daß der Gesetzgeber nicht allmächtig ist, sondern nichts als die Kreatur der Staatsverfassung ist”; A.J. Merkl, “Die Ordnungsgewalt im Kriege III” (1916) *Juristische Blätter* 397, 409 at 410.

In accordance with the attitude “If it ain’t broke, don’t fix it” this development did not take place in the UK legal system with the major consequence that constitutional law in a formal sense is not a source of law in the United Kingdom. However, the lack of a constitution in a formal sense only leads to the conclusion that the UK legal system is less varied compared to other legal systems. Other characteristics of the UK constitution which are frequently and intensively discussed, such as the so-called “political constitution” and the parliamentary sovereignty, turn out to be common features of modern legal systems.