THE CAMBRIDGE-TILBURG LAW LECTURES

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Editors: Dr B.S. Markesinis and Mr J.H.M. Willems

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FOREWORD

The year 1978 marked the thirtieth anniversary of Professor C.J. Hamson's 'Summer course for foreign lawyers' and of his untiring efforts not only to introduce the civil lawyer to the mysteries of the Common law but also to bring closer together lawyers from bots sides of the Cannel. The same year saw the beginning of the 'Cambridge-Tilburg Law Lectures' which developed indirectly form the 'Summer cours' and which seek to achieve similar aims by different methods.

The idea of inviting two Cambridge scholars to assist their Dutch colleagues in the teaching of the Common law as a regular option for undergraduate studies is novel and, to judge from first reactions, has so far been successful. The immediate objects are to achieve closer links between Common lawyer and Civil lawyer; to encourage the further systematic teaching of the Common law; and to produce a series of lectures, two of which will be published annually in the hope that they may be interest to a wider public.

The realisation of this idea became possible thanks to be generosity of the Tilburg Law Faculty and the impressive energy, euthusiasm and hospitality of its members. To name all who in divers ways contributed to the realisation of this scheme is, unfortunately, impossible but the names of Professors Jeukens, Schoordijk and Deelen demand special attention. On the Cambridge side the project was extremely fortunate to gain the early support of Professor Gareth Jones, Professor Tony Jolowicz, Mr. David Williams and Mr. Tony Weir.

The fourth series of the Cambridge-Tilburg Law Lectures were delivered in Tilburg in March 1981 by Dr P. Elias and Dr L.S. Sealy and once again are published by the Tilburg Law Faculty in association with Kluwer Law and Taxation Publishers.

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by

P. Elias

1. The growing crisis

The United Kingdom[1] is undergoing a crisis of confidence. For the past twenty years she has faced a variety of problems, international, economic and social, and, despite the remedies prescribed by successive governments of different political persuasions, solutions have not been forthcoming. Internationally, Britain's focus has shifted from the Commonwealth to Europe. At the end of the Second World War the British Empire spanned every continent, from India to South Africa, Australia to Zanzibar. But in the following three decades, beginning with the grant of independence to India and Pakistan in 1947, dozens of British colonies gained their independence. The Empire gave way to the Commonwealth, an association of sovereign states.[2] It is no longer even the 'British' Commonwealth, the word British having been removed to emphasise the equality between, and independent status of, the Member States. Insofar as Britain retains any special position in the Commonwealth, it derives from its close historical links with the members and from the fact that the Queen is recognised as Head of the Commonwealth - the one symbol of unity in what is often a deeply divided association of states. Twenty years ago the American diplomat, Dean Acheson, summed up the difficulties which Britain was experiencing in adjusting to this rapid and traumatic loss of power and influence when he commented that 'Great Britain has lost an empire and has not yet found a role'.[3] It has since attempted to find its rols in Europe. After first declining to join, and later being rebuffed when she changed her mind, Britain - of more accurately the United Kingdom - finally became a member of the European Economic Community in 1973. However, her commitment has remained equivocal and, despite a national referendum in 1975 which showed a 2:1 majority in favour of remaining in the Community, opposition to membership remains strong and is increasing. Indeed, the Labour party, at present in opposition, has officially adopted a policy of taking Britain out of Europe, and most political commentators see this as a potential vote winner.[4] Whether this is so or not, it is clear that the question of whether Britain schould remain within the Common Market has not been finally determined and will be one of the crucial issues in the next general election. The opposition to Europe is

largely economic: the expected benefits have not materialised. But opposition on political grounds is also strong, and brings together strange bedfellows. Many left-wingers object to the capitalist nature of the Community and fear that the Market will reinforce capitalism in Britain, whilst right-wingers bemoan the loss of national independence and self-determination which Community membership entails.

Alongside this sense of indirection in international affairs, Britain has suffered from very serious economic problems. In absolute terms its economy has improved significantly since the war, but relatively its performance has been poor and dissatisfaction has stemmed from the failure of successive governments to satisfy the rising material expectations of the people. For example, over the last thirty years Britain's economy has risen an average of 2.5% per year, whereas the German economy has performed more than twice as well. Britain consumes more than she produces. This has created a balance of payments problem, with imports greatly exceeding exports, which has had to be solved by borrowing money from overseas investors. This in turn has had an effect on the government's freedom of action since a principal source of funds, the International Monetary Fund, will sometimes require certain policies to be pursued domestically as a condition of granting a loan.[5] But these constraints have still not prevented inflation running higher in Britain than in any other western country. Furthermore, attempts to bring down inflation have resulted in growing unemployment. This unemployment grew steadily in the 1970's and has, at the time of writing, practically reached the 3 million mark. The inability of successive governments to reduce inflation whilst at the same time retaining relatively full employment has diminished the electorate's confidence in the competence of government.

Alongside the loss of international power and the relative economic decline there has been a third development which has created social and political problems: this is the marked change in the composition of British society. From the late 1950's - a time when there was full employment and British industry was looking for labour - immigrants came into England from various Commonwealth countries, notably India, Pakistan and the West Indies. At that time they had a right of free access to Britain. But subsequently various statutes have been passed limiting immigration, and it is now strictly controlled.[6] The effect of this influx has been to transform Britain from a relatively homogeneous society into a multi-racial one, at least in

certain areas, with diverse colours, cultures and languages. Occasionally racial tensions within communities have resulted and racial discrimination appears to have been commonplace.[7] Since 1965 successive Race Relations Acts have sought to prevent such discrimination occurring,[8] but their success has been limited, and racial problems continue to exist.

So successive governments have been beset by intractable problems, and their failure to solve them has led to a general lack of confidence in the competence of British governments. For example, in a public opinion poll conducted in 1977 fewer than 40% of the adults polled believed that either of the major parties was capable of finding solutions to Britain's economic and political difficulties. This lack of confidence in the traditional parliamentary process is reflected in an increasing tendency for groups to reject the orthodox political channels and resort instead to direct, and frequently violent, action to achieve their objectives. This is graphically illustrated by the continuing terrorism in Northern Ireland, but violence is by no means confined to the Province. The last year has seen a number of riots in some of England's inner cities and whilst their precise causes are difficult to identify, it is clear that the lack of employment opportunities, particularly for young blacks, has been a significant factor.[9] This gradual erosion of respect for authority and the law is also seen in the startling rise in the crime rate. In the last thirty years the number of serious crimes has increased fivefold, and crimes of violence tenfold.

It is hardly surprising that against this background of a growing disillusionment with the political process, there should have been calls for constitutional reform. The British constitution, for so long perceived as one of the greatest achievements of the British people, is probably under greater stress now than at any previous time in its proud history. There is hardly a single constitutional principle which has escaped critical scrutiny. The remainder of this essay aims to outline the principal features of the constitution and to focus on some of the more far-reaching proposals for constitutional reform.

2. The nature of the British Constitution

A brief shorthand description of the formal British system of government might say that it is a constitutional monarchy, embracing a unitary rather than federal structure, with effective and untrammelled power being exercised by a bicameral legislature. Its most distinctive feature is the enormous power which rests with Parliament itself or, more accurately, the Queen-in-Parliament. This is usually described as the doctrine of Parliamentary sovereignty.

The Doctrine of Parliamentary Sovereignty

There are two related aspects to the doctrine of Parliamentary sovereignty. The first is that legally Parliament can pass whatever law it likes,[10] and the second is that no court can question any law passed by Parliament. So there is no judicial review of primary legislation as occurs in many other constitutional systems. The judges' duty is loyally to interpret and apply the laws laid down by Parliament; they cannot question them. Naturally political pressures will in practice restrict the range of laws which Parliament can pass, a fact which caused Dicey, the most influential of Britain's constitutional lawyers, to distinguish between legal and political sovereignty.[11] But the law is blind to these political realities, and if Parliament were to act in defiance even of overwhelming public opinion, still its laws would be valid.

This doctrine of Parliamentary sovereignty is connected with the fact that Britain has what is termed an 'unwritten constitution'. This does not, of course, mean that constitutional rules are never written down. It simply describes the fact that there is no single fundamental constitutional document which sets out the powers of the various organs of government and states the rights of individuals as against the State. Almost every other country in the world has such a basic statement of its constitutional arrangements. The reason for the lack of such a document in Britain is that there has been continuity in Britain's constitutional arrangements since

the end of the seventeenth century: there has since that time been no civil war or military defeat, no coup d'état or revolution, which has led to a fresh constitutional start and a restatement of constitutional principles.

There are, of course, many statutes of great constitutional importance. These include the Bill of Rights of 1689 - a misleading title since it did not establish the rights of citizens as against the State, which is what would now be generally understood by a Bill of Rights, but rather asserted the power of Parliament as against the King; the Act of Settlement of 1700, which among other matters established the title to the Crown and the independence of the judiciary; the Reform Acts of 1832, 1867 and 1884, which gradually extended the franchise to all adult males and transformed the system of government from an oligarchy to a democracy; the Parliament Acts of 1911 and 1949, which further cemented this transformation by asserting the power of the elected House of Commons as against the hereditary House of Lords; and, more recently, the European Communities Act 1972, which provides the legal basis on which European Community law has been absorbed into the law of England. But a curious feature of all these laws is that although they are of the most profound constitutional significance, they are no more protected from repeal than, to cite Professor Wade's example,[12] the statute which makes it an offence to pick flowers in the Antarctic.

The reason for this legal vulnerability stems, paradoxically, from the doctrine of Parliamentary sovereignty itself. For there is one important limitation on the power of Parliament to do whatever it wishes, and it is inherent in the very notion of a continuing sovereignty: no Parliament can bind its successors. Each individual Parliament has the unfettered power to set at nought all the work of its predecessors, and any attempt by one Parliament to bind a future Parliament is doomed to fail. This, at least, is the traditional view of the doctrine of Parliamentary sovereignty,[13] though, as we shall see, there are murmurings of doubt as to whether this is a wholly accurate account of the doctrine.[14] And, according to this orthodox analysis, since the judges must blindly accept what Parliament enacts, they are in no position to deny the legal validity of any constitutional amendment secured by the Queen-in-Parliament, however unpopular, unacceptable or revolutionary the change may appear to be.

It is sometimes alleged that the doctrine of Parliamentary sovereignty has been substantially modified following Britain's accession to Europe,[15] but this is inaccurate insofar as the legal concept of sovereignty is concerned. In order for Britain to became a fully fledged member it was necessary for Parliament to give effect to Community law and to ensure that in any conflict with domestic English law, Community law would prevail. The mere accession to the Treaty of Rome was not in itself sufficient to achieve this purpose, since treaties signed by British governments do not automatically became part of English law; in the language of the international lawyers, they are not 'self-executing'. They will become part of domestic law only if Parliament so provides. In this respect Britain differs from most of her European neighbours. Consequently the European Communities Act 1972 was passed to incorporate and give the necessary priority to European law in the English legal system as Community law required,[16] and also to ensure that the final court for interpreting Community law would be the European Court.[17]

The result of the 1972 Act is that most of the potential conflicts between English law and Community law have been resolved in favour of the latter. Of course, the European Court has frequently asserted that national courts must give priority to European law.[18] But this in itself is strictly irrelevant as far as the English Courts are concerned. The reason why European law is followed is not because the European Court says it should be, but because the British Parliament has required that it should be.

But not all potential conflicts are solved by the 1972 Act. It successfully ensures that later European legislation will override prior inconsistent British statutes. But what if a future British Act of Parliament was to be directly incompatible with a prior law emanating from Europe? The 1972 Act has still sought to give priority to the European law by providing in section 2(4) that British legislation 'passed or to be passed' should take effect subject to European law.[19] But on the traditional view of Parliamentary sovereignty this intention of Parliament as expressed in 1972 cannot bind a future Parliament. Hence Parliament could in future pass laws which are inconsistent with Britain's European obligations,

or, indeed, even repeal the 1972 Act altogether. If this were to arise, the important question would be what the judges would do. Would they follow the traditional doctrine of sovereignty and uphold the law as enacted by the later Parliament? Or would they treat Parliament's powers as limited by Britain's European obligations, thereby giving a special status to the 1972 Act? There seems no doubt that at present they would adopt the latter approach, and indeed there are judicial statements to this effect.[20] But this does not mean that the 1972 Act gives no special protection at all to European law. One view, propounded by Lord Denning, is that it will prevent any accidental or implied repeal of European law.[21] This would mean that not only would ambiguous legislation be interpreted in the light of European provisions - which is the usual approach of the English courts - but English law might even be treated as invalid to the extent that it unconsciously conflicted with earlier European law. This approach rests upon the courts assuming that Parliament does not intend to act inconsistently with European obligations unless it makes it clear that it is deliberately intending to do so. Furthermore, it is possible that if Britain remains in Europe, the time will come when she is so bound up in the Community that the judges will be prepared to modify the traditional doctrine of sovereignty and bring legal theory into line with political reality by simply treating as invalid statutes which contravene European laws. This would in legal terms constitute a revolution; what Kelsen called the 'grundnorm' of the system would be changed unilaterally by the judges. Needless to say, Britain's relations with Europe will have to be based on a much firmer footing, and her commitment to the Community will need to be far stronger than at present, before any such change is likely to be made.

Theoretically, therefore, entry into Europe has not affected the legal doctrine of the sovereignty of Parliament. Laws emanating from Europe are given legal effect because Parliament has said that they should be. If Parliament were to state otherwise, the courts would obey. The fact that priority would continue to be accorded to European laws by the European Court would be irrelevant as far as English law is concerned, though the failure of British courts to give such priority would probably mean that Britain was in breach of her international obligations. But at a practical level, decision-making on a whole range of issues has been transferred from Westminster to Brussels, and British interests are determined in part by Europeans. So it can be said that

politically Britain has indeed voluntarily ceded part of her sovereignty to Europe, though not irreversibly. It is this possibility that the British Parliament could again reassert her full powers which leaves intact the sovereignty of Parliament as a legal doctrine.

From Parliament to the Executive: the Evolution of Power

Ascribing sovereignty to the Queen-in-Parliament is an accurate statement of constitutional theory but a gross distortion of political reality. There are three elements to the Queen-in-Parliament, the legislative body: the Queen, the House of Commons and the House of Lords. But curiously, effective political power resides in none of these! Historically it is possible to discern a gradual shift in power in three directions, the combined effect of which has been to place political power into the hands of the executive. First, the very formidable legal powers of the Crown have long been exercised by Ministers. It is the essence of a constitutional monarchy that powers which are formally to be exercised by the hereditary monarch will in practice be exercised by the representatives ultimately accountable to the people. This gradual transfer of power was not achieved by law: no statute directs how the Queen should act, no judge has directed her. In typically English fashion the change was achieved by a gradual evolutionary process. It is still not law that the Queen must exercise her powers through her Ministers, but it is a binding rule of practice, what Dicey called one of the conventions of the constitution. If the Queen were to act in defiance of her ministers, she would be breaking no law, but she would almost certainly bring about the demise of the monarchy. She could not now reverse the direction of history and seek to revert to an absolute, as opposed to a constitutional, monarchy. But nor, of course, would she wish to do so. The Queen is accepted - and highly respected and admired - principally because as a non-political figure she can act as a symbol of nationhood, an object of loyalty and fealty. This invaluable role would be undermined if she were to descend into the political arena.[22]

The other two shifts in power were both the consequence of the extension of the franchise to all adult males which was gradually achieved by the three Reform Acts of 1832, 1867 and 1884. One was the expansion of the power of the Commons at the expense of the Lords;[23] the other was the

relatively rapid shift in influence from the Commons itself to the Executive.

Until the Reform Act 1832 the Lords was practically as powerful as the Commons. The government was appointed by the King and it was drawn largely from the Upper House. Furthermore, although the members of the Commons were elected by property owners, the members of the Lords were such extensive landowners that in practice it was often their patronage that secured election to the Commons. And even the members of the Lower House were drawn from the educated classes. In effect politics was the private sport of the monarch and certain well-to-do aristocrats.

But the Reform Acts changed all that. The first Act of 1832 was a modest extension of the franchise covering only a minority of adult males, but it did nevertheless create a sufficiently large electorate to prevent the Commons being controlled so extensively by the power of the nobility. The aristocracy remained influential, but the Commons was able to assert a greater independence. Indeed, the period between the first Reform Act in 1832 and the second in 1867 is sometimes referred to as the 'golden age' of the Commons. For part of that short period the Commons did effectively choose the government of the day. It never actually governed - it was inevitably too unwieldy to do that - but it did replace governments and remove individual ministers. Political groupings were fluid and subject to change and could not demand allegiance as they were subsequently able to do, so the House was able to assert itself and compel governments to change policies. Indeed, on four occasions it changed governments without suffering a dissolution.

Once the franchise had been made universal it became impossible to justify the exercise of political power by a body of hereditary peers, and it was simply a matter of time before the elected representatives of the Commons would seek to clip the wings of the Upper House. This predictable step was finally taken in 1911. After the 1867 Reform Act the Lords had usually acquiesced in the policies of successive governments, but occasionally a piece of legislation would prove particularly contentious and then the Lords could exercise the power of veto to frustrate the wishes of the government. On three occasions the Lords opposed legislation designed to give independence to Ireland, and the last straw occurred when they rejected the Liberal Party's budget in 1911. Although the Lords finally gave way on this matter, the government wanted to end the Lords' power of veto. This could be achieved by creating new peers who would ensure that the Lords