Britain's case for federation. The contemporary debate on devolution and modern challenges to the doctrine of parliamentary sovereignty in the light of Dicey's views on Irish Home Rule.

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Introduction

1.1 Aim of the paper

The aim of this article is to present a legal case for the federalisation of the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom")[1] under a written constitution which would restrict the powers of Parliament in accordance with the Lockean concept of limited government. It will be proven, with reference to the relevant historical context, that such a constitutional change is the most appropriate response to the challenges that the Constitution of the United Kingdom faces today.

AV Dicey is the highest authority on the constitutional law of the United Kingdom, therefore any discussion surrounding this subject cannot be conducted without touching upon his work. His interpretation of the doctrine of parliamentary sovereignty remains the underlying principle of the British Constitution. This article is not interested in challenging this principle on the basis of political practice but rather to show Dicey's reasoning as outdated or otherwise unsuitable for the 21st century. Consequently, by refuting Dicey, one removes the main obstacle that stands in the way of major constitutional reform. The reform that would clarify grey areas of contemporary British

[1] Interpretation Act 1978, schedule 1

constitutional law: such as the position of the law of the European Union, the effectiveness of the Human Rights Act 1998, and the question of progressing devolution. In the face of those developments it is necessary to reconsider the validity of the doctrine of the sovereignty of Parliament. In order to do so, one must reconsider the conclusions and assumptions that led to the establishment of the doctrine in the first place.

1.2 Schedule

Firstly, this article will examine the historical context starting with the concept of the separation of powers itself. In order to understand the nature of the British Parliament its history will be presented in the context of the ideological conflict between John Locke and Thomas Hobbes on the scope of powers that a government should enjoy. Subsequently, this article will thoroughly examine Dicey's understanding of the doctrine of parliamentary sovereignty, as well as his approach to the concept of legal autonomy in reference to Irish Home Rule. At this point, this article will aim to refute Dicey's arguments against any measure that would impose limits upon the powers of the United Kingdom Parliament. Only then will the contemporary issues of European Union law, Human Rights, and devolution be introduced to the debate. The final chapter will sum up the previously presented arguments and conclude the discussion.

1.3 Terminology

Firstly, it should be clarified what is meant by "*Parliament*". The Parliament of the United Kingdom is a legislative body that consists of the House of Commons, House of Lords and the Crown, acting together as the "*Queen in Parliament*".[2] An Act of Parliament is a product of three readings in each

[2] Dicey A.V., "*Introduction to the Study of the Law of the Constitution*" (The Macmillan Press Ltd, London 1959) at p39

House, though the requirement of assent from the House of Lords can be bypassed after one year has passed since the introduction of the Bill.[3] Similarly, the role of the Queen is purely symbolic, as it is a constitutional convention that the Monarch gives their Assent.[4]

The literature cited in this article remains inconsistent in terms of the terminology, especially in relation to the names of Parliament at different time periods. It should be noted that this article relies on the reprints of the final versions of original works. However, in order to avoid confusion, it will adopt a simplified model of terminology: "*English Parliament*" refers to the historical Parliament of England (which at the time included also Wales)[5] before the Union with Scotland in 1707,[6] "*British Parliament*" refers to the Parliament of Great Britain (England, Scotland and Wales) whereas "*the United Kingdom Parliament*" refers to the Parliament of both the United Kingdom of Great Britain and Ireland (1801-1922) and the contemporary Parliament of the United Kingdom of Great Britain and Northern Ireland. "*The Parliament of Ireland*" refers to the proposed Parliament of Ireland under the Home Rule Bills whereas "*The Northern Ireland Assembly*" is the contemporary legislature of Northern Ireland under devolution.[7] Similarly, "*the Parliament of Scotland*" refers to the Parliament of Scotland before its Union with England in 1707 and it should not to be confused with "*the Scottish Parliament*", that is the legislature of Scotland under devolution.[8] Consequently, "*the National Assembly for Wales*" is the devolutionary legislature of contemporary Wales.[9]

[3] Parliament Act 1911, s2 as amended by Parliament Act 1949, s1
[4] Jennings I., "*The law and the Constitution*" (University of London Press, London 1959) at p143
[5] Laws in Wales Act 1542
[6] Union with Scotland Act 1706
[7] Northern Ireland Act 1998
[8] Scotland Act 1998
[9] Government of Wales Act 1998

In relation to the Constitution, this article will adopt the general terms "*the British Constitution*" and "*the Constitution of the United Kingdom*" which will be used interchangeably regardless of the historical period.

Finally, it should be clarified that the use of the term "*government*" in this article refers to "the system by which a state or community is governed";[10] as opposed to "*the executive*" which only refers to the executive branch of government under the doctrine of the separation of powers.

Historical Context

This section deals with the historical context of the sovereignty of the United Kingdom Parliament. Firstly, it will describe the difference in approach to the social contract theory between Thomas Hobbes and John Locke, with the emphasis on the doctrine of the separation of powers. Last but not least, it will present a short history of the United Kingdom Parliament in the light of such intellectual struggle.

2.1 Social Contract Theory

The Social Contract is "an implicit agreement among the members of a society to cooperate for social benefits, for example by sacrificing some individual freedom for state protection..."[11] The concept was initiated by theorists such as Thomas Hobbes and John Locke and subsequently developed by Jean-Jacques Rousseau[12] to explain the source of the legitimacy of a government.

[10] Oxford Dictionaries; http://www.oxforddictionaries.com/definition/english/government retrieved 28/11/14
[11] Oxford Dictionaries; http://www.oxforddictionaries.com/definition/english/social-contract retrieved 28/11/14
[12] "*Of The Social Contract, Or Principles of Political Right*" (1762)

2.1.1 Hobbes: *Bellum omnium contra omnes*

In his book "*Leviathan*",[13] Thomas Hobbes, put forward the concept of the omnipotent sovereign as a response to a bleak vision of man's nature. Hobbes believes that an individual is driven by "a perpetuall and restlesse desire of Power..."[14] which leads to a permanent state of war.[15] Consequently, people seek help in the society as the only way to secure their life and liberty.[16]

Peace can last only where "*a common Power*" exists to enforce contracts.[17] People might give up their right to governance by transferring it to another person by word and/or actions.[18] However, then, such a move is irreversible and further exercise of the right by a transferee should not be hindered.[19] "For a man that hath passed away his Right to one man to day, hath it not to passe to morrow to another".[20] Hence, all men have "to conferre all their power and strength upon one Man, or upon one Assembly of men ... and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgement ... it is a reall Unitie of them all, in one and the same Person..."[21]

Such a doctrine of unity has very profound consequences. Accordingly, the Sovereign "cannot Forfeit: He cannot be Accused by any of his Subjects, of Injury: He cannot be Punished by them. He is Sole Legislator: and Supreme Judge of Controversies..."[22] Consequently, Hobbes refuses to accept

[13] Originally printed in 1651
[14] Hobbes T., "Leviathan" (W. W. Norton & Company Inc. New York 1997) at p55
[15] *Ibid.*, at p56
[16] *Ibid.*, at p57
[17] Hobbes (n 14) at p76
[18] *Ibid.*, at p73
[19] *Ibid.*
[20] *Ibid.*, at p77
[21] *Ibid.*, at p95
[22] *Ibid.*, at p110

any separation of powers. In fact, the author claims that an attempt to divide the Sovereign power leads to mutual destruction.[23]

Finally, the Sovereign cannot be found in breach of the social contract because "the Soveraigne maketh no Covenant with his Subject before-hand..."[24] What is more, there would be no judge to adjudicate on the dispute.[25] Consequently, subjects of the Sovereign cannot challenge the authority once established.[26]

2.1.2 Locke and Federalist Papers

The concept of a Sovereign with unlimited powers was opposed by John Locke. In his *magnum opus,* "*Two Treatises of Government*",[27] Locke sets out his idea of a social contract written in the light of the Glorious Revolution.[28]

Although Locke distinguishes between a State of Nature and a State of War[29] he agrees with Hobbes that "*a common Superior*" is necessary because humans, as partial creatures, should never be judges in their own cases when a dispute arises.[30] Consequently, Civil Government must be established so that the violence is restrained.[31]

It is the extent of powers (that the sovereign should enjoy) that Hobbes and Locke disagree about. Accordingly, "the liberty of Man, in Society, is to be under no other Legislative Power, but that

[23] *Ibid*., at p165
[24] *Ibid*., at p97
[25] *Ibid*.
[26] *Ibid*., at p98
[27] Originally printed in 1689
[28] 1688
[29] Locke J., "*Two Treatises of Government*" (A Mentor Book, New York 1965) at p321
[30] *Ibid*., at p316
[31] *Ibid*.

established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it".[32] The law making power must be vested exclusively in the legislature appointed by the public[33] or otherwise the legislation passed would lack legitimacy.[34] The Members of society confer upon the legislature only such powers as they themselves used to enjoy in the State of Nature.[35] Hence, the legislature enjoys only powers related to the protection of life and property.[36]

Consequently, and unlike Hobbes, Locke believes that such a body "can never have a right to destroy, enslave, or designedly to impoverish the Subjects".[37] Neither can it deprive citizens of their property without their consent.[38] Locke argues that although the legislature is the supreme authority of the land[39] it nevertheless must act within the scope of powers conferred upon it by the citizens who can "*remove or alter* the Legislative, when they find the Legislative act contrary to the trust reposed in them".[40]

Unlike Hobbes, Locke also believes that everyone must be subject to the law.[41] As a result, the executive power must be distinguished from the legislative in order to avoid a situation where the law-making body exempts itself from the laws it has made.[42] As such the executive must be accountable to the legislature.[43] This is because once the Sovereign is in possession of "both legislative and Executive Power in himself alone, there is no Judge to be found, no Appeal lies

[32] *Ibid*., at p324
[33] *Ibid*., at p401
[34] *Ibid*.
[35] *Ibid*., at p402
[36] *Ibid*., at p403
[37] *Ibid*.
[38] *Ibid*., at p406
[39] Locke (n 29) at p412
[40] *Ibid*., at p413 (emphasis added)
[41] *Ibid*., at p373
[42] *Ibid*., at p410
[43] *Ibid*., at p414

open..."[44] Consequently, Locke recognises the separation of powers only between the executive and legislature. He does not suggest that legislation should be subject to judicial review, even though he believes it must not contravene natural law.[45]

The Lockean idea of the separation of powers was further developed by Montesquieu in "*The Spirit of the Laws*".[46] However, unlike Locke, Montesquieu argued for the separation of powers between the executive, the legislature and the judiciary. What is more, Montesquieu contributed to the system of checks and balances "by placing powers of control over the other branches in the hands of each of them."[47] The creators of the United States, the Founding Fathers, expressly accepted that "the accumulation of all powers, legislative, executive and, judiciary. In the same hands ... may justly be pronounced the very definition of tyranny".[48]

The Founding Fathers accepted also Hobbes's idea of the state of nature as permanently engrossed in war; however they rejected his concept of the omnipotent sovereign.[49] "For them, the American experience can be viewed only as a Lockean solution to a Hobbesian problem."[50] Hence, Madison explained that "the interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devise should be necessary to control abuses of government".[51]

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[44] *Ibid*., at p370
[45] Waldron J., "*The Dignity of Legislation*" (Cambridge University Press, Cambridge 1999) at pp63-4
[46] Originally published in 1748
[47] Vile M.J.C., "*Constitutionalism and the Separation of Powers*" (Oxford University Press, Oxford 1967) at p93
[48] Hamilton A., Jay J., Madison J., "*The Federalist: or, The new Constitution*" (J. M. Dent and Sons Limited, London 1937) at p245
[49] Mace G., "*Locke, Hobbes, and the Federalist Papers*" (Southern Illinois University Press, Carbondale 1979) at p10
[50] *Ibid*.
[51] Hamilton, Jay, Madison (n 48) at p264

2.2 History of the United Kingdom Parliament

Unlike the American Congress, the Parliament of the United Kingdom is a result of centuries of gradual evolution. Inevitably, its nature is different. The political history of pre-union England is a history of struggle between Kings and Parliaments.[52] This struggle ended with the unquestionable victory of the legislature. However, it seems that Parliament did not merely limit the powers of the Crown but has claimed them for itself.

Following the Magna Carta,[53] the King was obliged to consult the Barons before any direct taxation burdens could be levied.[54] However, since the Statute of Proclamations 1539, until it was struck down by the court,[55] the Crown had a practice of ruling by decrees.[56] Even after that, the Monarch was still in a position to refuse the assent or suspend the operation of an Act which would infringe upon his or her prerogatives.[57] The parliamentary authority in the early 17th century continued to be weak. The judiciary still maintained that common law controlled legislation passed by Parliament[58] and might even treat an Act of Parliament as void if it contravened the Scripture[59] or natural law[60] in general.[61]

In 1628 Parliament forced Charles I to assent to the Petition of Right[62] which, *inter alia*, "asked for a settlement of Parliament's complaints against the King's non-parliamentary taxation and

[52] Butt R., "*The Power of Parliament*" (Constable, London 1967) at p34
[53] Magna Carta 1215, article 14
[54] Butt (n 52) at p33
[55] *Case of Proclamations* (1611)
[56] Barnett H,, "*Constitutional & Administrative Law*" (Routledge, Abingdon 2011) at p110
[57] *Ibid*.
[58] *Dr Bonham's Case* (1610) 8 Co Rep 114a at 118a
[59] *R v Love* (1653) 5 State Tr 825 at 828
[60] *Day v Savadge* (1614) Hob 85; 80 ER 235 at 237
[61] Loveland I. "*Constitutional Law, Administrative Law and Human Rights; A critical Introduction*" (Oxford University Press, Oxford 2009) at p23
[62] Petition of Right 1628

imprisonments without trial".[63] This, however, did not resolve the conflict between Parliament and the King which subsequently led to the outbreak of the Civil War[64] and a temporary abolition of the monarchy altogether. The short period of the Republic[65] ended with the restoration of the Stuart dynasty to the throne by the Long Parliament.[66]

Not until the Glorious Revolution of 1688 did Parliament establish its superior position.[67] The Bill of Rights passed in 1689 substantially limited the powers of the Crown. It forbade the Monarch from keeping a standing army in time of peace,[68] reaffirmed the authority of Parliament in relation to all taxation burdens,[69] prevented the Monarch from suspending the laws passed by the legislature[70] and others.[71] The principles laid down in the Bill of Rights were to enjoy a superior status in relation to the powers retained by the Crown.[72] Consequently, from that point any case law setting limits upon the validity of parliamentary legislation was to be disregarded.[73]

It is safe to say that early medieval Kings ruled in accordance with the Hobbes's idea of an omnipotent sovereign across the whole of Europe. The process of taking over the competences of the British Monarchs by Parliament, although initiated by the latter, was sanctioned by a series of judicial decisions. However it was possible only after Parliament passed the Act of Settlement 1700: imposing further limitations upon the competences of the Crown by securing judicial independence. Accordingly, in 1701 Holt CJ suggested that "an Act of Parliament can do no wrong, though it might

[63] "Charles I and the Petition of Right" http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/ retrieved 26/11/2014
[64] 1642–1651
[65] 1649-1660
[66] Butt (n 52) at p49
[67] Barnett (n 56) at p115
[68] Bill of Rights 1689, article 6
[69] *Ibid*., article 4
[70] *Ibid*., article 1
[71] Maer L., Gay O., "*The Bill of Rights 1689*" (House of Commons Library 2009) http://www.parliament.uk/briefing-papers/SN00293/bill-of-rights-1689 retrieved 26/11/2014
[72] Loveland (n 61) at p28
[73] *Ibid*.

do several things that look pretty odd".[74] This principle was confirmed by Blackstone in 1765 in his "*Commentaries*".[75] However, apart from ambiguous suggestions in the *Thornby*[76] and *Greate Charte Parish*[77] cases, at that time there was still little judicial authority to support this claim.[78]

In 1832[79] the whole electoral system of England and Wales was reformed. "The Reform Act of 1832 gave the House of Commons greater influence over the formation and the political complexion of governments..."[80] From that point the composition of the House was independent from the Crown's patronage.[81] It seems that the Great Reform improved the legitimacy of Parliament as a whole. Consequently, the judiciary expressly obliged itself to follow the intention of the legislature. In 1842 Lord Campbell[82] declared that the validity of any Act appearing at the Parliamentary Roll cannot be challenged in a court of law.[83] This approach was confirmed in 1871[84] and remains the official line today.[85] It is probably this process that Lord Steyn had in mind when he said that the supremacy of the United Kingdom Parliament had had its origin in the common law.[86]

Nevertheless, "we might ... wonder if the sovereignty of Parliament, a constitutional device created to safeguard the nation and its empire against the tyranny of its King, had succeeding merely in transferring tyrannical authority into different hands?"[87]

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[74] *City of London v Wood* (1701) 12 Mod Rep 669 at 687 cited in Loveland (n 61) at p31
[75] Loveland (n 61) at p31
[76] *Thornby d Duchess of Hamilton v Fleetwood* (1712) 10 Mod 114
[77] *Greate Charte Parish and Kennington Parish* (1742) 2 Stra 1173
[78] Loveland (n 61) at p31
[79] Representation of the People Act 1832
[80] Butt (n 52) at p61
[81] *Ibid*.
[82] *Dalkeith Rly Co v Wauchope* (1842) 8 Cl & Fin 710, 8 ER 279, HL
[83] Loveland (n 61) at p32
[84] *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576
[85] Loveland (n 61) at p32
[86] *Jackson v Attorney General* [2005] UKHL 56, *per* Lord Steyn at [102]
[87] Loveland (n 61) at p29

It is apparent that the sovereignty of the United Kingdom Parliament has its roots in Hobbes's concept of unity between "*a common Power*" and citizens. It can be illustrated by the fact that an Act of Parliament cannot be challenged in a court of law – as Hobbes puts it, "he cannot be Accused by any of his Subjects..."[88] What is more, as Hobbes prescribes, the rights of men "depend on the Silence of the Law".[89] Although the transition of the competences from the Crown to Parliament was seemingly in accordance with the Lockean idea of an appointed sovereign, the scope of the transferred powers is plainly contrary to the vision of Locke. It could be concluded that, unlike following the American Revolution, the omnipotence of the British Crown was transferred to Parliament rather than to "*people*".[90] As a result, the legal position of an individual in relation to a government remains the same.

It has been suggested that the transition of powers from the Crown has not stopped at Parliament. Although in theory it is the legislature that exercises the unlimited power over the United Kingdom, political practice determines that "the executive dominates Parliaments, so that parliamentary sovereignty often seems to amount to a form of elective executive dictatorship".[91] The phenomenon was first formulated by Walter Bagehot in "*The English Constitution*".[92] Bagehot argues that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers".[93] The Cabinet is "a committee of the legislative body selected to be the executive body", it is the link connecting the two branches of government.[94]

Traditionally it was the Monarch that was in position to choose the ministers; however this is one of the powers claimed by Parliament now.[95] Nevertheless, the Cabinet enjoys a range of powerful

[88] Hobbes (n 14) at p110
[89] *Ibid*. at p130
[90] Loveland (n 61) at p28
[91] Waldron, "*The Dignity of Legislation*" (n 45) at p4
[92] Originally printed in 1867
[93] Bagehot W., "*The English Constitution*" (Sussex Academic Press, Brighton 1997) at p8
[94] *Ibid*.
[95] *Ibid*.

competences, such as advising the Monarch on the dissolution of Parliament, therefore, it could be claimed that the Constitution of the United Kingdom involves a fusion of the legislative and executive rather than absorption of one by the other.[96] Bagehot believes that fusion has the benefit of flexibility and ensures the smooth cooperation between the legislative and executive.[97]

It could be claimed that the fusion of powers described by Bagehot expressly contradicts the principle of checks and balances. In fact he agrees with Dicey and insists that a strict separation of powers hinders functioning of both the legislature and executive.[98] According to Bagehot, "the excellence of the British Constitution is that it has achieved this unity; that in it the sovereign power is single, possible, and good".[99] On the other hand, the system of checks and balances was devised for a reason. The reason being that power concentrated in the hand of one branch, not limited by the Constitution, must inevitably result in abuse.

Dicey's Worldview

This section examines Dicey's understanding of the sovereignty of Parliament. Firstly, it will deal with the nature of the British Constitution. Next, it will explain the doctrine of parliamentary sovereignty in contrast to legislatures limited by written constitutions. Finally, this section will examine Dicey's approach towards potential restrictions upon the powers of the United Kingdom Parliament in the light of the author's criticism of Irish Home Rule.

[96] Bagehot W., "*The English Constitution*" (Sussex Academic Press, Brighton 1997) at p10
[97] *Ibid*., at p18
[98] *Ibid*., at p15
[99] *Ibid*., at p125

3.1 Introduction

The first issue that must be considered is the doubt surrounding the British Constitution itself. The fact that it remains unwritten has led some into questioning its very existence.[100] However the Constitution of the United Kingdom, as with any other constitution, consists of "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state".[101] In that sense, according to Dicey, the British Constitution consists of two sets of rules – strict "*laws*" and unwritten conventions.[102] Its uniqueness, however, is to be found in its form: namely, the rules of constitutional value are not written in a single document and cannot always be clearly distinguished from other laws.[103] British "laws therefore are called constitutional, because they refer to subject supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws".[104]

Such features of the British Constitution have led Dicey to distinguish between sovereign and non-sovereign legislative bodies.[105] Accordingly, a sovereign legislative body, such as the Parliament of the United Kingdom, can alter constitutional rules with an ordinary majority of the Houses rather than by using a special procedure.[106] What is more, legislation passed by such a body is not subject to judicial review on the grounds of its constitutionality.[107]

[100] De Tocqueville cited in Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p22
[101] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p23
[102] *Ibid*.
[103] *Ibid*., at p89
[104] *Ibid*., at p127
[105] *Ibid*., at p87
[106] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p89
[107] *Ibid*., at p92

3.2 The Sovereignty of Parliament

In order to establish what a sovereign legislative body entails one must refer to Dicey's *magnum opus* "*Introduction to the Study of the Law of the Constitution*".[108]

In simple terms, the doctrine means that Parliament is a body which, to use Dicey's own words, has "*the right to make or unmake any law whatever*" that would be enforced by the courts.[109] Consequently, a feature of "*supremacy*" is attached to Parliament so that "there is no person or body of persons who can, under [the British] constitution, make rules which override or derogate from an Act of Parliament..."[110] The omnipotence of the United Kingdom legislature is illustrated by a common proverb that "Parliament can do everything but make a woman a man and a man a woman".[111]

Furthermore, Parliament is a sole legislator for the land and no other body can claim such power unless it is derived from an Act of Parliament.[112] Hence, Parliament is not bound by international law unless expressly consented.[113] This is illustrated by the fact that although it is the executive that concludes international treaties, they do not form part of the law of the United Kingdom until incorporated by an Act of Parliament.[114]

Finally, the last element of the doctrine of parliamentary sovereignty is the principle of implied repeal. That is, the existing Parliament cannot bind any subsequent Parliaments.[115] Where a

[108] Final version printed in 1908
[109] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p40 (emphasis added)
[110] *Ibid*.
[111] Jean-Louis de Lolme *inter alia* cited in Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p43
[112] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p52
[113] *Ibid*. at p62
[114] Loveland (n 61) at p34
[115] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p64

subsequent Act of Parliament is inconsistent with legislation that is already in force, such an Act must automatically prevail.[116] Hence, although some Acts use expressions such as "*forever*",[117] it does not preclude Parliament from altering or repealing such Acts altogether.[118]

On the other hand, it should be noted that the unlimited power of Parliament is a purely legal doctrine and even Dicey himself admits that it should not be confused with either day-to-day political power to make any law it wishes[119] or sovereignty as expression of the will of electors.[120] Nevertheless, Dicey's interpretation of the doctrine is heavily criticised by Sir Ivor Jennings who claims that "if sovereignty is supreme power, Parliament is no sovereign".[121] He implies that courts have never attempted to curtail the powers of Parliament because Parliament has never taken extreme measures.[122] This approach seems to have been confirmed by the Appellate Committee of the House of Lords in *Jackson's* case: where it was stated *obiter* that although the supremacy of Parliament was "*the general principle*" of the British Constitution it was not "unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism".[123]

3.3 Criticism of Legislative Limits

The following paragraphs deal with Dicey's criticism of the general concept of legislative limits as expressed in his major work "*Introduction to the Law of the Constitution*".

[116] *Ellen Street Estates Ltd. V Minister of Health* [1934] I KB 590 cited in Jennings (n 4) at p162
[117] Eg Union with Ireland Act 1800
[118] Jennings (n 4) at p168
[119] Dicey "*Introduction to the Study of the Law of the Constitution*" (n 2) at p71
[120] *Ibid*., at p73
[121] Jennings (n 4) at p148
[122] *Ibid*., at p160
[123] *Jackson* (n 86), per Lord Steyn at [102]

First of all, Dicey is in favour of flexible constitutions with no clear distinction between ordinary and fundamental laws. He argues that, by an attempt to secure some fundamental rules, rigid constitutions prevent natural developments which might trigger revolutions.[124] Although this argument finds confirmation in history, especially the French history of the 18th and 19th centuries, flexible constitutions carry their own risks. If no demanding procedure is required to alter some fundamental laws, there is no effective safeguard for civil liberties, which makes revolution equally possible. It appears that the balance should be struck so the constitution is rigid enough to secure rights for citizens but flexible enough to allow changes when necessary.

Secondly, for Dicey, any legislature which must follow a special procedure in order to amend constitutional law is a non-sovereign law-making body.[125] The author reasons that as long as legislation is subject to potential invalidation on the grounds of unconstitutionality, a legislature that produces it is merely a subordinate law-making body, not a sovereign one. Moreover, Dicey draws a strong parallel between municipal bodies possessing a limited law-making power, such as School Boards, and national Parliaments, such as the Parliament of France.[126] Even though he himself admits the absurdity of the comparison, he nevertheless maintains that the American Congress could be compared to an English Railway company.[127]

It could be said that Dicey's conclusion is premature. He argues that if measures passed by the Parliament of France and a School Board can both be invalidated as contravening a higher form of law both bodies must be subordinate. At no point does the author attempt to reconcile this position with the fact that the Parliament of France and the American Congress can still change the

[124] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p129
[125] *Ibid*., at p92
[126] *Ibid*., at p93
[127] *Ibid*., at p150

Constitution – they are merely obliged to abide by a special procedure. On the other hand, a School Board would never be able to alter a legislative act that governs it, regardless of the procedure used.

Considering Dicey's approach to the idea of a limited government, it seems natural that he would oppose the idea of federalism. Dicey believes it could come into existence only when certain preconditions are fulfilled and even then it is inferior to a unitary form of government. Accordingly, there must be "*a body of countries*" which used to be the subject of a common sovereign, share locality and history and therefore are capable of bearing the "*impress of common nationality*".[128] Furthermore, inhabitants of such countries "*must desire union and must not desire unity*"[129] as well as feel a strong allegiance to their own government.[130] According to Dicey, federation is designed to reconcile national unity with rights of local states.[131] In order to do so, powers are divided between the central and local governments so that only matters of common interest fall within the scope of powers of the federal government.[132] This distribution of powers must be safeguarded by a constitution which is written,[133] rigid[134] and alterable only in accordance with a special procedure.[135] Consequently, any law contravening the supreme law of the land would be invalidated by the Supreme Court whose position is vital for upholding the Constitution.[136]

Such legalism, according to Dicey, would lead to the predominance of the judiciary and would make the judges "the masters of the constitution".[137] This, however, seems to be an unfortunate exaggeration. If properly designed, a constitution based on the separation of powers devised by Locke and Montesquieu prevents any branch of government from gaining a supreme position within

[128] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140
[129] *Ibid*.,
[130] *Ibid*., at p142
[131] *Ibid*., at p143
[132] *Ibid*.,
[133] *Ibid*., at p146
[134] *Ibid*.,
[135] *Ibid*., at p147
[136] *Ibid*., at p158
[137] *Ibid*., at p175

the government. Accordingly, judges are still liable to impeachment for misconduct or, in the United States, Congress can increase the number of judges sitting in the Supreme Court so the opposition is outvoted.[138] a move which was attempted during the Roosevelt administration of the 1930s.[139]

Finally, federalism limits the powers of a government in accordance with the classic system of checks and balances so all three branches stand at the same level.[140] Dicey believed that the separation of powers along with the distribution of powers between the federal and local governments led to "*a weak government*".[141] In his view, federalism leads to the dilution of powers which, in confrontation with a centralised state, would put federation in a disadvantageous position.[142] He claims that the welfare of the United States flows not from federalism but in spite of it, and this is only because the United States does not have any powerful neighbours and also does not need foreign policy.[143] Undeniably, such a claim is no longer valid. Since the end of the World War II the United States has been conducting a very active foreign policy and at no point was it hindered by the federal nature of the United States government.[144]

3.4 Criticism of Irish Home Rule

Dicey seems to believe that the sovereignty of Parliament is the source of British welfare; therefore it is not a surprise that he opposed Irish Home Rule. Accordingly, throughout the three books he wrote on Irish Home Rule the author makes several important arguments opposing legal autonomy within the British Constitution as well as any potential federalisation of the United Kingdom. The

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[138] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at 175, footnote
[139] Clark T.S., "*The Limits of Judicial Independence*" P.L. 2012, Apr, 374-377 at 375
[140] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p156
[141] *Ibid*., at p171
[142] *Ibid*., at p172
[143] *Ibid*.
[144] It appears that similar conclusions could be inferred from the international position of the Russian Federation.

following paragraphs will explain the nature of Irish Home Rule itself, and then critically examine Dicey's approach to the question of a special legal autonomy; while the final paragraphs will focus on the author's attitude towards the potential federalisation of the United Kingdom. Such a critical examination of Dicey's ideas will take into account the social, political and legal changes that have taken place since the end of the 19th century.[145]

3.4.1 Structure and History of Irish Home Rule

Irish Home Rule was designed to create an autonomous Irish legislature which would resemble the colonial manner of self-governance. It was introduced to the political debate as a response to the problems that Great Britain experienced in governing Ireland. Accordingly, Irish Home Rule, by creating an autonomous legislature, was to be the final settlement of the Irish question that would relieve the United Kingdom Parliament from the burden of Irish affairs but at the same time maintain its supremacy.[146]

There were three Home Rule Bills which Dicey was concerned about. All of them bear similar features. Therefore, regarding the aim of this article, there is no need to go into great details of the proposed Bills. Consequently, the following paragraph will explain the subtle differences between the relevant pieces of legislation, but the subsequent chapters will not distinguish between the different variations of Home Rule. Similarly, some arrangements, such as administrating financial and religious regulations, which are immaterial for the purpose of the presented arguments, will not be discussed.

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[145] The criticism of Dicey's arguments against the Irish Home Rule should be constructed as directed at Dicey's position on the concept of autonomy and federation in general. At no point does the author of this paper claim that so called Home Rule was an appropriate tool to govern Ireland at the time.

[146] Dicey A.V., "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (Forgotten Books, London 2012) at p34-5

The First Irish Home Rule Bill[147] was defeated in the House of Commons in 1886.[148] Dicey argued against that Bill in "*England's Case against Home Rule*".[149] Had it been passed, the Bill would have established the Irish legislative body[150] which in practice would have elected the executive chaired by the Lord-Lieutenant as a representative of the Crown.[151] The Irish Parliament, as Dicey calls it, would have been allowed to legislate on any subject not expressly forbidden by the Act[152] – examples of such exclusions being the succession of the Crown,[153] declaring war,[154] regulating the military,[155] conducting a foreign policy.[156] Accordingly, an Act of the Irish Parliament would have been subject to the veto of the Lord-Lieutenant[157] and constitutional scrutiny by the Judicial Committee of the Privy Council.[158] Under the Bill, in return for an autonomous legislature, Ireland would have given-up its representation in the United Kingdom Parliament.[159] However, had it come into force, the Act would have been alterable only by the Parliament of the United Kingdom ("*the Imperial Parliament*") with the Irish representatives reflecting the previous composition.[160]

The Second and Third Irish Home Rule Bills were designed not to strip the United Kingdom Parliament of the Irish representation.[161] However the Irish members of the Imperial Parliament would have not been allowed to vote on matters confined exclusively to Great Britain.[162] The Bills were argued against in "*A Leap in the Dark or our New Constitution*"[163] and "*A Fool's Paradise; Being*

[147] Government of Ireland Bill 1886
[148] Hadfield B., "*The Belfast Agreement, sovereignty and the state of the union*" P.L. 1998, Win, 599-616 at 602
[149] Originally Published in 1886
[150] Government of Ireland Bill 1886, clause 1
[151] Dicey A.V., "*England's Case Against Home Rule*" (The Richmond Publishing Co. Ltd. Richmond 1973) at p228
[152] Government of Ireland Bill 1886, clause 2
[153] *Ibid*., clause 3(1)
[154] *Ibid*., clause 3(2)
[155] Government of Ireland Bill 1886, clause 3(3)
[156] *Ibid*., clause 3(4)
[157] *Ibid*., clause 7
[158] *Ibid*., clause 25
[159] Dicey, "*England's Case Against Home Rule*" (n 151) at p231-2
[160] Government of Ireland Bill 1886, clause 39
[161] Government of Ireland Bill 1893, clause 9
[162] *Ibid*., clause 9(3)
[163] Originally Published in 1893

a Constitutionalist's criticism on the Home Rule Bill of 1912"[164] respectively. The Third Irish Home Rule Bill was passed into law as the Government of Ireland Act 1914; however, it was suspended due to the Great War.[165]

Dicey claimed that although in theory Home Rule sustained the sovereignty of the United Kingdom Parliament, in practical terms it would have rendered it purely symbolic in relation to Ireland.[166] The author points out that a distinction must be made between Great Britain's reality where Parliament legislates on a daily basis and the colonial practice whereby it is only occasionally that Parliament exercises its legislative power,[167] although in theory reserving the right to do.[168] Accordingly, although Parliament would have been able to repeal laws passed by the Irish legislature, Dicey argued that Irish Home Rule in practice would mean no more than the power to amend the Act under which it operates.[169] As a result, Parliament would no longer govern Ireland the way it governed Great Britain.[170]

For Dicey, regardless of its form, Home Rule for Ireland was a flawed device based on a faulty assumption that all regions should be governed by similar local bodies because it works in one of them.[171] Dicey maintained that introduction of legal autonomy would not solve the problem of Irish hostility towards the United Kingdom government because it would have only granted Ireland partial independence.[172] Accordingly, Dicey admits that by virtue of being a nation, Irish people have the right to full independence rather than to demand a deep constitutional reform of the Constitution of the United Kingdom as a whole.[173] On the other hand, according to Dicey, granting Ireland full

[164] Originally Published in 1913
[165] Hadfield (n 148) at 602
[166] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p35
[167] *Ibid*., at p37
[168] Subsequently embodied in the Statute of Westminster 1931
[169] Dicey A.V., "*A Leap in the Dark or our New Constitution*" (Forgotten Books, London 2012) at p25
[170] Dicey "A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912" (n 146) at p36-7
[171] *Ibid*., at p28
[172] Dicey, "*England's Case Against Home Rule*" (n 151) at p98
[173] *Ibid*., at p70

independence would also have had serious consequences for Great Britain, such as the loss of available resources,[174] impediments to trade, necessity of conscription and the burden of additional taxation.[175]

3.4.3 Federalisation of the United Kingdom

As previously explained, Dicey rejected the idea of the special legal autonomy as well as of an independent Ireland. He suggested that the other outcome Home Rule could lead to was the quasi-federalisation of the United Kingdom.[176] Nevertheless, Dicey opposed reshaping the United Kingdom into a federation even though he admitted that monarchies could also form federations.[177] He acknowledged that federations have some advantages, such as impartiality of the central government so that no region feels inferior to another.[178] Similarly, Dicey admitted that the US Constitution was right in prohibiting Congress from passing any *ex post facto* laws,[179] as well as any legislation[180] that would set aside contracts.[181] Nevertheless, Dicey remained very sceptical to the idea of federalisation of the United Kingdom. He believed that a federal form of government is unsuitable for the United Kingdom.

First of all, Dicey claims that the United Kingdom consists neither of different states nor nations but is unitary.[182] He refers to the point made in "*Introduction to the Law of Constitution*" that federation requires "*a body of countries*" bearing "*an impress of common nationality*". [183] His claim in relation to the United Kingdom appears not to have been true then, and is even less true now. Throughout his

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[174] *Ibid*., at pp145-6
[175] *Ibid*., at pp147-8
[176] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p14
[177] Dicey, "*England's Case Against Home Rule*" (n 151 at p163
[178] *Ibid*., at p270
[179] US Constitution, Article 1, Section 9
[180] US Constitution, Article 1, Section 10
[181] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p89
[182] Dicey, "*England's Case Against Home Rule*" (n 151) at p53
[183] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140

book Dicey admitted that the Irish were a separate nation.[184] Undeniably, so are the Scottish[185] and Welsh.[186] The modern United Kingdom is "a multinational state, holding together people belonging to a number of different nations".[187] Furthermore, adopting Dicey's own requirement of inhabitants who "must desire union and must not desire unity",[188] it could be argued that such circumstances might have existed at the time of the creation of the Unions with Scotland and Ireland. Dicey himself noted in "*Thoughts on the Union between England and Scotland*"[189] that, before the Union took the form of a unitary state, the Scots argued for federation.[190] Nevertheless, irrespective of the circumstances of the past, it seems that such a condition exists now. It can be illustrated by progressing devolution on the one hand, and the unsuccessful Scottish referendum for independence on the other – union, not unity.

Secondly, Dicey argues that federalism could be justified only as a transitional period adopted by two independent states on a route to a complete unity, but not as a step backwards.[191] However he does not submit any arguments in support of this claim. It is solely his subjective opinion and there is no logical argument why it could not be the ultimate form of statehood. He claims there is a tendency in favour of great unitary states. It must be admitted that the 19th century did in fact witness small states uniting into big entities such as the German Empire or the Kingdom of Italy. However, it could be argued that the nature of international relations has shifted from force-based

[184] E.g. Dicey, "*England's Case Against Home Rule*" (n 151) at p142
[185] E.g. Tony Blair in "*Scotland's Parliament"* Cm. 3658 (1997) cited in Brazier R., "*Constitutional Reform; Reshaping the British Political System*" (Oxford University Press, Oxford 2008) at p109
[186] E.g. Welsh Labour Manifesto 2010 at p23 http://www.politicsresources.net/area/uk/ge10/man/parties/waleslabmanifesto.pdf retrieved 04/12/2014
[187] Bogdanor V., "*The New British Constitution*" (Hart Publishing, Oxford and Portland, Oregon 2009) at p89
[188] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140
[189] Originally printed in 1920
[190] Gray J.M., "*Memoirs of the Life of sir John Clerk of Penicuik*" (University Press, Edinburgh 1892) at p60 cited in Dicey A.V., Rait R.S., "*Thoughts on the Union between England and Scotland*" (MacMillan and Co. Ltd., London 1920) at p209
[191] Dicey, "England's Case Against Home Rule" (n 151) at p66;

interaction to political and economic cooperation, such as within the European Union. Consequently, there is no need for big states with even bigger armies.

Similarly, there is no longer a need for Parliament to enjoy unlimited power for the purpose of defence.[192] Insofar as such a legislature is useful in times of war, it is highly undesirable in times of peace. As mentioned before, an unrestricted Parliament can disregard civil liberties. On the other hand, even Dicey admits that a legislature under a federal constitution must observe a Bill of Rights.[193] Therefore, regarding the nature of contemporary international relations, it seems that the need for civil liberties outweighs the need for extensive powers in the name of national defence.

Thirdly, Dicey claims that a local government of Ireland (as opposed to a federal government) under a federal constitution could obstruct the implementation of foreign policy or even secretly favour enemy states at the expanse of the federal government.[194] However there is no historical data that would support such a claim. Similarly, contrary to what Dicey argues,[195] there is no evidence that a federal constitution leads to a contest between local and central governments. Such interaction will ultimately depend on the attitude of citizens and the manner in which the Constitution has been written.

What is more, Dicey insists that the British Constitution lacks the spirit of federalism.[196] According to the author, the Parliament of the United Kingdom is composed of equal members who in principle do not represent their communities but rather the nation as whole.[197] Dicey's argument is supposed

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[192] *Ibid*., at p169
[193] *Ibid*., at p167
[194] *Ibid*., at p177
[195] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p19
[196] *Ibid*., at p7
[197] *Ibid*.

to be illustrated by the fact that there are no regional parties such as a Scottish Party.[198] Plainly, this is no longer the case.[199]

Dicey makes a point that the nature of the problem with Ireland is very peculiar due to its historical background; therefore it might be resolved only by a specifically tailored measure.[200] In his view, federalism would apply the same solution to different problems presented by different constituent parts of the United Kingdom.[201] On the other hand, the demands for autonomy currently flowing from Scotland, Wales and Northern Ireland are all based on similar reasoning. Any differences peculiar to the region could be dealt with by the local governments created under the federal constitution. Dicey argues that introducing federation would raise problems related to the relationship between Great Britain and its colonies such as India.[202] Obviously, such concerns are no longer valid.

Another major concern for Dicey is the role of the judiciary under a federal constitution. He believes that the existence of a written constitution requires a constant need for judicial interpretation as to the constitutionality of Acts of Parliament. [203] However at the same time he argues that since the judges err, it should not be up to them to decide on constitutional matters.[204] For Dicey, there is one more problem with the judicial power to invalidate Acts of Parliament. He claims that federal courts lack the ability to enforce their judgements.[205] Hence, judgements invalidating legislation would be left unenforced, especially regarding the fact that citizens of the United Kingdom lack the spirit of

[198] *Ibid*.
[199] The Scottish National Party, Plaid Cymru, Sinn Féin
[200] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p22
[201] *Ibid*., at p23
[202] *Ibid*., at p24
[203] Dicey, "*England's Case Against Home Rule*" (n 151) at p185
[204] Dicey, "*England's Case Against Home Rule*" (n 151) at p186
[205] *Ibid*., at p258

legalism.[206] After all, it is easier to recognise the authority of Parliament rather than of the Supreme Court.[207]

Doubts of similar nature are raised by Jeremy Waldron. He claims that since Hobbes rejected the idea of separation of powers altogether, and Locke recognised only separation between the executive and legislature, both thinkers believed that it was the legislature's role to adjudicate disputes under the social contract theory.[208] The law-making body is to be "*the Supreme Power*" therefore any other body with the power to overrule a piece of legislation naturally would have to be regarded as a higher power.[209] Ideally, the legislature has also the advantage of being composed of elected representatives as opposed to the unelected members of the judiciary.[210]

Waldron believes that legislation is a tribute to achievements citizens accomplish through cooperation.[211] Consequently, he argues that legislation derives its authority from the decision-making process based on deliberation, disagreements and the right of all citizens to participate in the debate which ultimately results in reaching a majority decision.[212] Waldron opposes the judicial review process on the grounds that all areas of law, including fundamental rights, should be subject to a democratic debate.[213] He argues that in the course of such debate, an agreement might be collectively arrived at that a particular right is to be sacrificed for certain legislative objectives.[214] Hence, to subsequently authorise judges to strike down such legislation is to allow the minority's view to prevail after the actual debate has been concluded.[215] Finally, Waldron agrees with Dicey that although the democratic process is likely to result in mistakes, a judicial scrutiny is not immune

[206] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p18
[207] Dicey, "*England's Case Against Home Rule*" (n 151) at p188
[208] Waldron, "*The Dignity of Legislation*" (n 45) at p86
[209] *Ibid*.
[210] *Ibid*., at p87
[211] *Ibid*., at p156
[212] Goldsworthy J., "*Legislation, Interpretation, and Judicial Review Review*" 51 U. Toronto L.J. (2001) at p75
[213] *Ibid*., at p78
[214] Goldsworthy "*Legislation, Interpretation, and Judicial Review Review*" (n 212) at p78
[215] *Ibid*.

to that risk either,[216] and that the constitutional arrangements do not guarantee compliance if not supported by the public spirit.[217] He also joins Dicey's earlier argument over the crucial role of the judiciary.[218]

Undeniably, all men err. However, both Dicey and Waldron overlook the fact that the majoritarian decision-making process, as prescribed by Waldron, seems to work in small communities where all voices can be heard. In the course of such debates it is, in fact, possible to consider and subsequently reject some fundamental rights for legislative purposes. Naturally, on a national level, such discussions can take place only in Parliament which, as an elected body, seemingly fulfils the role envisaged by Waldron. However the fusion of powers and the position of the Cabinet within the British Constitution, as described by Bagehot, create a situation whereby the executive dictates the agenda to the legislature. Considering the party discipline enforced by the Whips, it would be naïve to believe that the Members of Parliament are actually able to represent their constituents and not act in the interest of their own parties. Consequently, it appears that although the judiciary is the non-elected branch of government, it has the advantage of being apolitical and impartial legal experts immune to any external influence. Therefore it could be said that it would be wiser to render constitutional safeguards dependent upon the judiciary rather than count on the changeable wisdom of a politicised Parliament.

In terms of the unbearable burden on the courts, it seems that the judicial review of primary legislation is not as notorious as Dicey and Waldron insist. Accordingly, between the creation of the US Constitution and the outbreak of the Civil War, the Supreme Court of the United States invalidated only two Acts of Congress – one in 1803[219] and the other in 1857,[220] thereby unleashing

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[216] Waldron, "*The Dignity of Legislation*" (n 45) at pp84-5
[217] *Ibid*.
[218] Waldron J., "*A Right-Based Critique of Constitutional Rights*" 13 Oxford J. Legal Stud. 18 (1993) at p20
[219] *Marbury v Madison*, 5 U.S. 137 (1803)
[220] *Dred Scott v Sandford*, 60 U.S. 393 (1857)

the Civil War.[221] Finally, when an Act is in fact struck down, the decision will most likely be respected as there is no historical evidence to the contrary. What is more, it could be argued that Dicey overlooks the fact that it is not the force that secures compliance – it is the social contract. Interestingly, in the Irish context, Dicey admits that "you cannot vote men into content, you cannot coerce them into satisfaction".[222] According to the social contract theory, a judgment of a court is enforceable because there is an understanding amongst citizens which stipulates that it is socially useful to recognise the authority of the court.

Finally, Dicey argues that a federal relationship between England and Ireland would trigger demand from other parts of the Union for similar forms of autonomy.[223] Although such demands might not have existed at the time of writing, they do exist now. Unrest in Northern Ireland in the 90s, the recent referendum on the independence in Scotland, and further powers for the National Assembly in Wales under the Government of Wales Act 2006, all prove that there is a pressing need for local autonomy.

Contemporary Debate

This section deals with the contemporary challenges to the British Constitution. First of all, at the international level, the supremacy of European Union law directly contravenes the supremacy of the United Kingdom Parliament. Secondly, at the individual level, the Human Rights Act 1998 does not

[221] Bogdanor (187) at p83
[222] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p119
[223] Dicey, "*England's Case Against Home Rule*" (n 151) at p189

guarantee fundamental freedoms in the face of the will of Parliament. Finally, at the national level, there is a deep need for wider devolutionary powers for the local legislatures.

4.1 European Union

The legal system of the United Kingdom is of dualist nature. Accordingly, for ordinary international law to be enforceable before a British court it must be implemented by Parliament in the form of an Act.[224] In that respect, the law of the European Union is undeniably a unique invention. As established in the famous case of *Van Gend en Loos*,[225] under the doctrine of direct effect European Union law "is capable of conferring rights on individuals which national courts are obliged to uphold".[226]

However, it is not the doctrine of direct effect that causes friction within the British Constitution. The problem arises where an Act of Parliament collides with legislation of the European Union. The European Communities Act 1972[227] attempted to accommodate such inconsistency by directing a court to construe national legislation so as to give effect to the obligations flowing from membership.[228] The courts[229] have been willing to apply such an interpretation even contrary to the *prima facie* literal meaning of a statute;[230] however the Act was silent on the supremacy of Community law (as it then was) over national legislation. Such a doctrine derives from the jurisprudence of the European Court of Justice. Following the case of *Costa v ENEL*,[231] it is recognised that European Union law must take precedence over conflicting provisions of national legislation.

[224] Loveland (n 61) at p34
[225] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62
[226] Giddings P., Drewry G., "*Britain in the European Union; Law, Policy and Parliament*" (Palgrave MacMillan, Houndmills 2004) at p37
[227] European Communities Act 1972, s2(4)
[228] Giddings, Drewry (n 226) at p51
[229] E.g. *Pickstone v Freemans plc* [1989] AC 66
[230] Giddings, Drewry (n 226) at p51
[231] *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)

Those obligations were upheld by the Appellate Committee of the House of Lords in the famous case of *Factortame*.[232] It was stated that Parliament had accepted the supremacy of European Union law by virtue of the European Communities Act 1972.[233] Hence, "for the first time since 1688 a court suspended the operation of an Act of Parliament".[234]

It seems that the construction of the European Communities Act 1972 as a measure through which the supremacy of European Union law is acknowledged remains inconsistent with the traditional doctrine of implied repeal. To regard the European Communities Act 1972 as a justification for invalidation of a later Act of Parliament, is to regard the former as immune to implied repeal. This new position has been explained in the case of *Thoburn v Sunderland City Council.*[235] According to Lord Justice Laws, "*ordinary statutes may be impliedly repealed. Constitutional statutes may not*".[236] The European Communities Act 1972, inevitably an Act of constitutional value,[237] is therefore immune to the doctrine of implied repeal. This, however, only created more confusion.

Consequently, it might be the case that, as long as the European Communities Act remains in force, no Act of Parliament (other than by expressly repealing the Act itself) would be able to take precedence over legislation of the European Union.[238] On the other hand, it has been suggested that where an Act of Parliament expressly repudiates the law of the European Union a court will follow domestic legislation.[239]

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[232] *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1992] 1 AC 603
[233] *Ibid*., at 658
[234] E Wick, "*The Evolution of a Constitution: Eight Key Moments in British Constitutional History"* (Oxford, Hart, 2006) 156 cited in Bogdanor (n 187) at 29
[235] *Thoburn v Sunderland City Council* [2003] QB 151
[236] *Ibid*., at para 63 (emphasis added)
[237] *Ibid*., at para 62
[238] Jowell J., Oliver D., "*The Changing Constitution*" (Oxford University Press, Oxford 2011) at p118
[239] *Per* Lord Denning in *Macarthys v Wendy Smith* [1979] 3 All ER 325 at 329 cited in Giddings, Drewry (n 226) at p55

The sovereignty of the United Kingdom Parliament, although limited in practice, is to be found in the power to amend or in fact repeal altogether the European Communities Act 1972. Nevertheless, it can be argued that by creating an exception to the doctrine of implied repeal, parliamentary sovereignty as a whole has been altered.[240] At least as long as the European Communities Act 1972 remains in force. Evidently, the full impact of the obligation flowing from membership of the European Union on the constitutional arrangements of the United Kingdom remains unclear.

Interestingly, in terms of the philosophical background, Hobbes argues that "the Legislator in all Common-wealths, is only the Soveraign…"[241] Furthermore, "... nor is it possible for any person to be bound to himself; because he that can bind, can release..."[242] Hence, it could be claimed that the position of the law of the European Union affects the validity of the claim that the United Kingdom Parliament is a true sovereign as regarded by Hobbes.

4.2 Human Rights

It has been suggested that one of the main purposes of any constitution is to secure the basic rights of the individual.[243] The traditional approach to fundamental freedoms under the British Constitution is based on the concept of negative liberty: that is, freedom to do anything that has not been explicitly forbidden by Parliament.[244] The absence of special constitutional safeguards in combination with the unlimited power of Parliament results in a situation whereby, in Dicey's own words, "Parliament could, and would were the necessity acknowledged by the country, within twenty-four hours suspend the Habeas Corpus Act".[245] Hence, it is apparent that citizens of the

[240] Jowell, Oliver (n 238) at p119
[241] Hobbes (n 14) at p133
[242] *Ibid*.
[243] Bogdanor (n 187) at p54
[244] Jowell, Oliver (n 238) at p71
[245] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p96

United Kingdom are not protected by any effective Bill of Rights. This position has not been changed by the introduction of the Human Rights Act 1998.[246]

The Human Rights Act 1998 attempts to implement the European Convention on Human Rights[247] into the legal system of the United Kingdom in such manner as to both give effect to the international obligations and preserve the sovereignty of Parliament.[248] First of all, the Act imposes an obligation on all "public authorities" not to "to act in a way which is incompatible with a Convention right".[249] However, at the same time it expressly excludes from this obligation "*either House of Parliament*".[250] Secondly, the Act requires a responsible minister to issue a statement of compatibility in relation to the Bill being introduced to the House.[251] Thirdly, the court is directed to construe legislation so as to give effect to the Convention rights,[252] and in deciding so to take into account the jurisprudence of the European Court of Human Rights.[253] Where such interpretation is impossible, the court has discretion to issue a declaration of incompatibility.[254] Nevertheless, the declaration is not able to invalidate an Act of Parliament.[255]

This position remains in compatibility with Hobbes's view on the subject. Accordingly, "*the Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes...*"[256] because

[246] As mentioned before, under the dualist legal system of the United Kingdom international law requires an Act of Parliament in order to be enforceable by a national court of law. Therefore, the ratification of the European Convention of Human Rights in 1951 did not enable the citizens of the United Kingdom to bring claims under the Convention. From 1965 to 2000 British citizens could rely on the European Convention on Human Rights against the state only before the European Court of Human Rights. The Human Rights Act 1998 allowed individuals under the jurisdiction of the United Kingdom to rely on the Convention before British courts.
[247] Human Rights Act 1998, s1
[248] Bogdanor (n 187) at p59
[249] Human Rights Act 1998, s6(1)
[250] *Ibid*., s6(3)
[251] *Ibid*., s19
[252] *Ibid*., s3
[253] *Ibid*., s2
[254] *Ibid*., s4(2)
[255] *Ibid*., s4(6)
[256] Hobbes (n 14) at p133

an attempt to subject the Sovereign to laws tends to weaken the state.[257] It appears that Parliament has intentionally decided to cling to Hobbes's idea of unlimited power at the expense of guaranteeing fundamental freedoms.

Nonetheless, following the case of *Thoburn v Sunderland City Council,*[258] as a piece of legislation of constitutional value,[259] Human Rights Act cannot be impliedly repealed. Consequently, the Act constitutes another "*exception*" further undermining the sovereignty of Parliament as understood by Dicey.

It appears that the only effect of the declaration of incompatibility is to bring the matter to the attention of the executive[260] so that the responsible minister is in a position to remedy the legislation in question "by order".[261] Nevertheless, the executive can purposely derogate from the Convention and refuse to amend the relevant piece of legislation.[262] What is more, the Human Rights Act intentionally fails to empower a court to provide a remedy for a breach of the convention rights as prescribed in Article 13 of the Convention.[263] One might wonder what the purpose of the Act is if it does nothing but provide the court with the power to point out that an Act is incompatible with Human Rights. It has been suggested that the practice of the executive to amend legislation contravening the Convention rights might at some point in the future be considered a constitutional convention.[264] However it could be argued that a non-legal rule is not an adequate safeguard for something as fundamental as Human Rights. This typically neoliberal point of view is represented recently by authors such as Ronald Dworkin,[265] but at the same time continuously opposed by

[257] *Ibid*. at p164
[258] *Thoburn* (n 235)
[259] *Ibid*. at para 62
[260] Jowell, Oliver (n 238) at p86
[261] Human Rights Act 1998, s10
[262] Brazier R., "*Constitutional Reform; Reshaping the British Political System*" (Oxford University Press, Oxford 2008) at p129
[263] Bogdanor (n 187) at p60
[264] *Ibid*. at p61
[265] See Dworkin R., "*A Bill of Rights for Britain*" (Chatto & Windus, London 1990)

Jeremy Waldron.[266] Nevertheless, it could be claimed that by introducing the Human Rights Act 1998 the Labour Government consciously refused to accept the arguments put forward by Waldron as to the merits of a negative approach to liberty. It is now a question of rendering the Bill fully enforceable.

Since the enactment of the Human Rights Act 1998 there have been calls from the Conservatives[267] to replace the Act with a British Bill of Rights.[268] However it is impossible to enact a fully effective Bill of Rights and to preserve the sovereignty of Parliament at the same time. It has been suggested that, with the traditional approach to the sovereignty of Parliament, it might be only political reality or a gentleman's agreement that prevents Parliament from repealing a Bill of Rights.[269] As a potential solution Lord Scarman argued[270] that an Act of Parliament could be passed restoring the House of Lords' veto power in relation to Bills dealing with fundamental rights.[271] Such a solution makes it more difficult to alter those Acts; however it does not guarantee their inviolability.

It has been argued that for a Bill of Rights to be effective it must have a superior status in relation to other pieces of legislation and be amendable only by a special majority of Parliament.[272] The unlimited sovereignty of Parliament results in the equally unlimited power of the executive upon which there are no constitutional checks.[273] This is the effect of the Cabinet government described by Bagehot. It appears that the effective judicial protection of fundamental freedoms is the only course of action that protects an individual from abuses "in the name of majority, or simply through

[266] Waldron, "*A Right-Based Critique of Constitutional Rights*" (n 218)
[267] Conservatives Manifesto 2010, pp88 and 84
[268] Jowell, Oliver (n 238) at p98
[269] Brazier (n 262) at pp130-1
[270] "*Bill of Rights and Law Reform*" in R. Holme and M. Elliott (eds.), 1688-1988: "*Time for a New Constitution*" (London: Macmillan, 1988), 109-10
[271] Brazier (n 262) at p132
[272] Barnett A., Ellis C., Hirst P., "*Debating Constitution; New Perspectives on Constitutional Reform*" (Polity Press, Cambridge 1993) at p45
[273] Bogdanor (n 187) at p15

carelessness or thoughtless".[274] To leave the question of Human Rights entirely to Parliament is to disregard the system of checks and balances. It has been suggested that since the judiciary is already empowered to disapply legislation passed contrary to European Union law, there is no reason why a court should not be provided with such power in relation to Human Rights.[275] The doctrine of the sovereignty of Parliament is already undermined in any event.[276]

4.3 Devolution

It could be argued that devolution, although not in principle, "imposes a severe limitation upon the sovereignty of Parliament".[277] Accordingly, the United Kingdom Parliament does not govern Scotland, Northern Ireland and Wales in the same way that it governs England, where its sovereignty "still corresponds to a real power to make laws affecting every aspect of England's domestic affairs".[278]

Devolution is a means of delegation of powers from a central Parliament to the local legislatures.[279] This is as opposed to federalism which is based on the division of competences between the central and local legislatures. However it has been suggested that in practice the Parliament of the United Kingdom does no more than merely supervise devolved legislatures.[280] Consequently, "devolution may prove in practice to be closer to federalism than might at first sight appear".[281] In fact the whole concept of devolution is plain evidence of a struggle between regional-national ambitions and the traditional approach to the British Constitution. This struggle will become even more apparent now,

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[274] Barnett, Ellis, Hirst (n 272) at p40
[275] Bogdanor (n 187) at p80
[276] *Ibid*.
[277] *Ibid*., at p112
[278] Bogdanor (n 187) at 113
[279] Jowell, Oliver (n 238) at p213
[280] Bogdanor (n 187) at 113
[281] *Ibid*.

after Scotland has decided to maintain the Union amid promises of wider competences for the Scottish Parliament.[282]

The Scottish Parliament operates under the Scotland Act 1998. It is allowed to legislate on any matter unless it is reserved exclusively to the Parliament of the United Kingdom[283] Moreover, such legislation cannot be incompatible with the law of the European Union or the European Convention on Human Rights.[284] The Scotland Act 1998 expressly preserves the power of the United Kingdom Parliament to legislate on matters falling under the competencies of the Scottish legislature.[285] However it is a constitutional convention that the United Kingdom Parliament will not legislate for Scotland without the consent of the Scottish Parliament.[286] The Sewel Convention was a response to the concerns over the clash of powers between the United Kingdom and Scottish Parliaments. "A convention is a non-legal rule which supplements legal rules, imposing non-legal rather than legal obligations."[287] Hence, it seems that the Sewel Convention is in no way a sufficient guarantor for something as fundamental as the autonomy of the local legislature. It has been claimed that in the absence of federal arrangements the Convention is based on nothing more than goodwill.[288]

The Northern Ireland Assembly is a result of the Good Friday Agreement[289] and operates under the Northern Ireland Act 1998.[290] The scope of its powers resembles the position of the Scottish Parliament. However, "an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."[291] On the other hand, the National

[282] E.g. "*Better together - a new hope for a federal Europe*" , EUobserver, October 8, 2014
[283] Scotland Act 1998, s29(2)(b)
[284] *Ibid*., s29(2)(d)
[285] *Ibid*., s28(7)
[286] Bowers P., "*The Sewel Convention*" (House of Common Library, 2005) SN/PC/2084 http://www.parliament.uk/site-information/glossary/sewel-convention/ retrieved 28/11/14
[287] Bogdanor (n 187) at p16
[288] Burrows N., "*Devolution*" (Sweet & Maxwell, London 2000) at p62
[289] Belfast Agreement 1998, strand 1
[290] Cm. 3883 (April 1998) cited in Jowell, Oliver (n 238) at p230
[291] Northern Ireland Act 1998, s5(6)

Assembly for Wales operates under the Government of Wales Acts of 1998 and 2006. It has been argued that the Assembly was never intended to be as autonomous as the legislatures of Scotland and Northern Ireland.[292] Accordingly, only after the 2011 referendum[293] has the National Assembly been allowed to legislate in the form of Acts which are pieces of primary legislation.[294] Nevertheless, unlike the other devolutionary bodies, the Welsh Assembly is able to legislate only on the specific "*matters*"[295] listed in the Act.[296]

Any Act of any devolved body is subject to judicial scrutiny on the grounds of its *constitutionality*".[297] Accordingly, legislation passed outside the scope of powers conferred by the relevant devolution Act will be invalidated by a court as *ultra vires*. Likewise, in relation to European Union law and Human Rights, the effect of the case of *Thoburn v Sunderland City Council*[298] is that the Acts establishing devolved legislatures cannot be impliedly repealed.[299]

Devolution could be regarded as a sign that "the legal absolutism of British parliamentary sovereignty is not as settled throughout the United Kingdom as it was once taken to be".[300] However, despite devolutionary arrangements the United Kingdom remains a unitary state.[301] It was the Parliament of the United Kingdom that established the legislatures and it can deprive them of their powers by virtue of an ordinary Act.[302] Moreover, the scope of the power conferred cannot be extended by the legislatures themselves.[303] It seems that on the one hand, in legal theory, devolution has managed to preserve parliamentary sovereignty; however, on the other hand, in

[292] Brazier (n 262) at p113
[293] Government of Wales Act 2006, s103
[294] *Ibid*., s107(1)
[295] *Ibid*., s93(3)
[296] *Ibid*., Schedule 5
[297] Bogdanor (n 187) at p115
[298] *Thoburn* (n 235) at para 69
[299] Jane Munro J., "*Thoughts on the "Sewel Convention*"" S.L.T. 2003, 23, 194-196
[300] Brazier (n 262) at p111
[301] *Ibid*., at p110
[302] *Ibid*.
[303] *Ibid*., at p113

practice, devolution has undermined the principle of "*a sole Legislator*" as insisted on by Hobbes.

Epilogue

The United Kingdom is somehow unique in respect of the lack of a written and codified constitution. It has been argued that it is because a written constitution usually marks a fresh start in a state's history, whilst the United Kingdom did not have such ground-breaking moments.[304] Nevertheless, at this moment in history a new constitution is highly desirable. The Labour Government has initiated the reform by, *inter alia,* the already mentioned devolution and Human Rights Act, as well as by other innovations such as the introduction of the directly elected Assembly and Mayer of London,[305] reform of the House of Lords,[306] rights of access to information,[307] reform of the Appellate Committee of the House of Lords,[308] and the independence of the Bank of England.[309]

In any event, AV Dicey remains widely regarded as the highest authority on the British Constitution. Therefore, this article has dealt with his *rationale* for the sovereignty of Parliament. In the light of the uncertainties surrounding the European Communities Act 1972, Human Rights Act 1998 and devolution, it appears that the new constitution ought to discard parliamentary sovereignty as a leading principle. It could be argued that it is impossible to reconcile the Hobbesian approach to the omnipotent Legislator with the British society of the 21st century. Instead, the New Constitution

[304] Bogdanor (n 187) at p11
[305] Greater London Authority Act 1999
[306] The House of Lords Act 1999
[307] The Freedom of Information Act 2000
[308] The Constitutional Reform Act 2005
[309] Bogdanor (n 187) at pp4-5

would comply with the Lockean idea of a limited government expressed through the separation of powers along with the check-and-balance system.

Consequently, a fully enforceable Bill of Rights should be introduced. The judiciary would be empowered to disapply any legislation that contravenes fundamental freedoms. Whether the Bill was to be based on the European Convention on Human Rights or contain typically British rights remains outside the scope of this article.[310] Next, the authority of European Union law must be clarified. As long as the United Kingdom is a member of the Union, the impact of the European legislation should be transparent. Finally, devolution would be transformed into a full scale federation with local legislatures operating independently from the central Parliament. Accordingly, an English Parliament ought to be established so that there is no effect of non-English votes on English matters.[311]

[310] For discussion see Joint Committee on Human Rights Report "*A Bill of Rights for the UK?*" HL165, HC 150, 2007-8

[311] Hadfield B., "*Devolution, Westminster and the English Question*" P.L. 2005, Sum, 286-305 at 288