

The Limits of Judicial Authority

Professor Mark Elliott

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Judicial law-making

Judiciary



Legislature

Judicial review of executive action

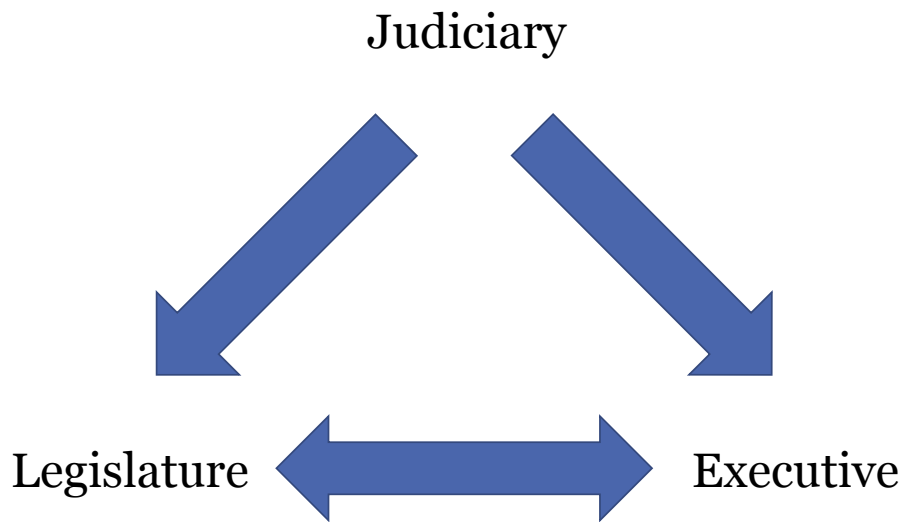
Judiciary

*R v North and East Devon
Health Authority, ex parte
Coughlan* [2001] QB 213

*Pham v Secretary of State for
the Home Department*
[2015] UKSC 19

Executive

Judicial constitution-making



Three contexts

Constitutional statutes

- *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)
- *R (HS2 Action Alliance Ltd) v Transport Secretary* [2014] UKSC 3

Embedded constitutional values

- *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147
- *R (Evans) v Attorney General* [2015] UKSC 21

Impervious constitutional values

- *R (Jackson) v Attorney General* [2005] UKHL 56
- *Moohan v Lord Advocate* [2014] UKSC 67

Constitutional statutes: *Thoburn*

Professor A V Dicey

‘Neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law.’

Laws LJ

‘We should recognise a hierarchy of Acts of Parliament: as it were “ordinary” statutes and “constitutional” statutes.’

Constitutional statutes: *HS2*

Background

- Compatibility of parliamentary process with EU law
- Would judicial scrutiny of process breach Bill of Rights, Article 9?
- Could EU law override so as to require Article 9-incompatible scrutiny of parliamentary process?

Implications

- ECA not to be taken to give EU law degree of priority sufficient to override Article 9
- Bill of Rights' fundamentality outstripped that of ECA
- Basis for hierarchy of *constitutional* statutes, not just of *statutes*

Embedded constitutional values

Anisminic

- Ouster clause protected only *valid* ‘determinations’
- Determinations valid only if intra-jurisdictional
- Ouster continued to apply to errors of law on face of record while that category of errors remained

Evans

- Executive override of judicial decision
- Broad override power would ‘cut across fundamental components of the rule of law’
- Power exercisable only if change of circumstances or if judicial decision demonstrably flawed

Impervious constitutional values

Jackson

- ‘Pure and absolute’ conception of sovereignty ‘out of place’ in modern Britain — Lord Steyn
- Parliamentary sovereignty ‘no longer, if it ever was, absolute’ — Lord Hope
- Court may reject attempt to ‘subvert rule of law’ by getting rid of judicial review — Lady Hale

Moohan

- If Parliament ‘abusively sought to entrench its power by a curtailment of the franchise ..., the common law, informed by principles of democracy and the rule of law and international norms, would [possibly] be able to declare such legislation unlawful.’ — Lord Hodge

Resistance

Constitutional statutes

- No implied repeal
- Some more fundamental than others

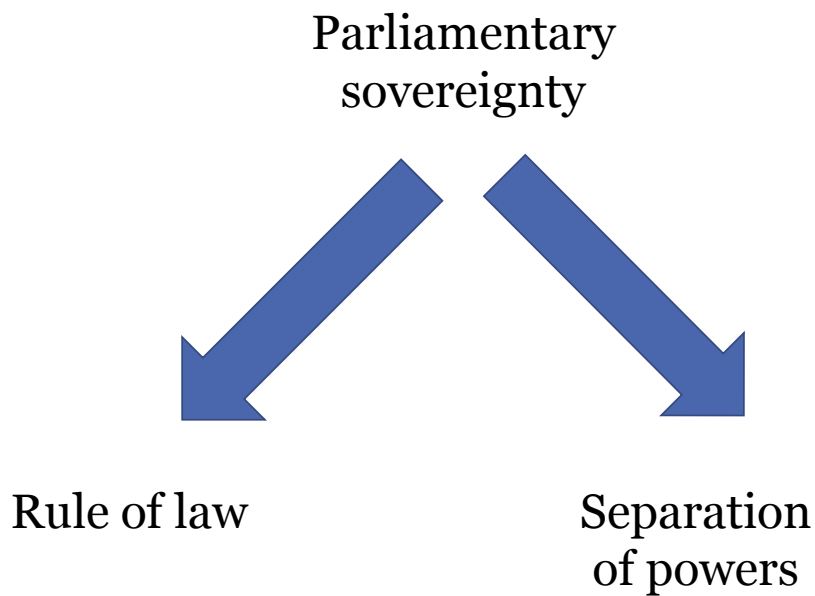
Embedded constitutional values

- Resistant to legislation
- Capable of (largely) emptying statutory provisions of content

Impervious constitutional values

- Wholly resistant to legislation
- Constitutional bedrock

Fundamental principles: View I



Evans

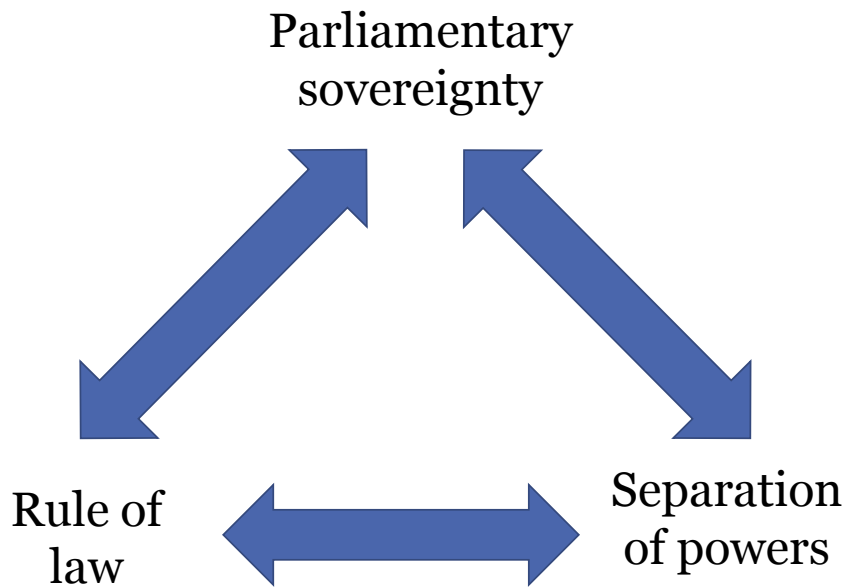
Lord Wilson

‘[I]n reaching its decision, the Court of Appeal did not in my view interpret section 53 of the Freedom of Information Act 2000 ... It re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy.’

Lord Hughes

‘The rule of law is of the first importance. But it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says.’

Fundamental principles: View II



Evans

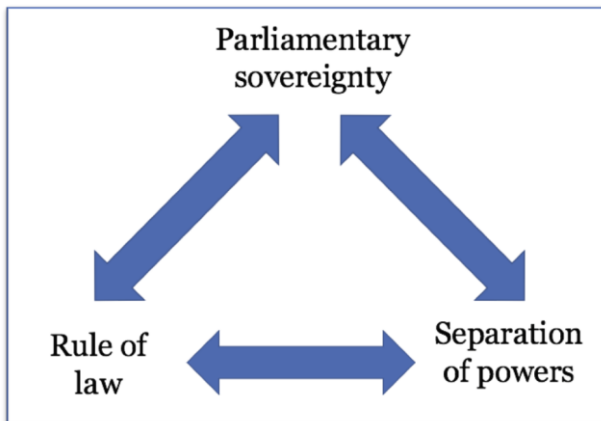
Rule of law

- Judicial obligation to apply the law, including statute law
- Fundamental judicial duty to serve as arbiter of legal disputes
- Executive override of judicial decisions stands on its head rule-of-law requirement that executive is subject to legal, including judicial, control

Separation of powers

- Ascribes legislative, including institutional allocation, function to Parliament
- But also ascribes judicial function to the judiciary, and casts doubt on legitimacy of executive power to override judicial decisions

Relational constitutional principles



- Content and scope of each principle is contestable
- Weight of each principle may be context-sensitive
- Sovereignty's capacity to blunt other principles may not be a constant

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