THE MODERN BRITISH CONSTITUTION: THEORY AND PRACTICE

AN INTERPRETATIVE AND CRITICAL STUDY OF THE PUBLIC LAW OF THE UNITED KINGDOM

MD. ABDUL HALIM

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An Interpretative and Critical Study of the Public Law of the United Kingdom

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To

Mr. Ali Ahmed

of Bamna, Barguna.

Who, during my very difficult days in the Dhaka City when I got admission to Dhaka College, Treated me as his own brother; supported Me with all his affection, love and sacrifice; Sheltered me and my younger brother Like his own family members.

50% of the author's profit goes to the Children's Charity Bangladesh, a charitable organisation for the promotion of child education and child rights in Bangladesh.

On the arduous road to get education in my life the people who helped me are many and their contribution is irreparable. At the advent of this small work, which could not be possible but for their help I cannot but remember some of their names with respect and gratefulness;

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PREFACE

The principles of British Constitutionalism have developed along the long road to evolution over centuries. On its piecemeal road to evolution there have occurred few instances to make a sudden halt or change its course as has been the frequent scenario in most other democratic systems. However, the joining of the UK into the European Union, ratification of the European Convention on Human Rights, enforcement of the Human Rights Act 1998 and recent devolution of powers to its Union-Members- all these seem to have underpinned the system in recent times in such a way that in practice, though not necessarily in theory, modification is taking place in most of its body polity. There is a strong suggestion that the House of Lords will ultimately come out as a Constitutional Court which has hitherto been unknown to the traditional Dicean system of democracy. This new development and its prospects will have special treatment all through in this book. In taking an initiative to write *The Modern British Constitution: Theory and Practice* it is not my intention to provide a comprehensive survey of the field, as this would be quite impossible for me. My aim is to produce a text-type study for students of law and politics with necessary modern and recent developments underpinning the system in recent times. I must take this opportunity to say that to prepare this work I have relied on most of the available writers on contemporary British constitutional law.

Though the whole work has grown out of my personal interest, the force behind is the demand of the LLB students both in Bangladesh and overseas with particular attention to those studying LLB under the University of London external programme. Apart form the students of law, the book will certainly be of immense importance for those studying politics and those interested in learning the British constitutionalism. It is hoped that they will find it an understandable and lucid treatment of the subjects with which it deals and that the material contained in it will be rendered more accessible and digestible to them by the use of frequent sub-headings.

I have all along been selective in writing this book because of demands and needs of students and their preference to read on

examination paper-line. However still some vital topics could not have been covered which I hope to do in the next edition.

I acknowledge with gratitude my indebtedness to Mr. Andrew F. Bennett, former MP of the House of Commons who helped me finding out some vital information from the House while in London. Acknowledgement to Mr. Kazi Tauhid Hasan, Director of the Bangladesh Parliament Library and particularly to Md. Abu Dawood, Librarian and their staff for the sincere help I received from them. I must take this opportunity to express my gratefulness to my friend Barrister Shamim Mohiuddin who has not only been very helpful all along this work but also presented me my most wanted book '*the English Constitution*' by Walter Bagehot.

I also acknowledge my indebtedness to my teacher Dr. M. Ershadul Bari, Vice Chancellor, the Open University (former Dean, Faculty of Law, Dhaka University) for I have shared some of his views and styles expressed in his lectures while teaching in the Dhaka University.

The preparation of this book was facilitated by my younger brother A.M Jamal Hossain, student of MBA, Dhaka University who employed most of his spare time in composing, preparing indexes and arranging footnotes with charm and great ability. I am deeply in his debt. I express my heartfelt gratitude to my publisher CCB Publications for processing this edition.

The views and opinions expressed in this book are absolutely mine except those which I have quoted. I do not claim that my views are correct from every point of view. There may be shortcomings, factual errors, mistaken opinion and stylistic lapses which all are mine and I alone am responsible for those. If there are mistakes in facts or otherwise I shall appreciate if readers come forward to have corrected by me so that the second edition may be a better volume.

Md. Abdul Halim

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Misnomer - ভুল নাম প্রদান/অনুপযুক্ত নামে
কোন নাম বা কাজের অপব্যবহার।
comprises- গঠিত

CHAPTER I

THE BRITISH CONSTITUTION: NATURE, SOURCES AND DEVELOPMENT

1. The British Constitution or the Constitution of the United Kingdom?

Walter Bagehot one of the greatest constitutional writers entitled his book "The English Constitution" (1867); Dicey often used the same phrase also. However, modern writers like Ivor Jenings or Colin R Munro have found this as a misnomer. According to Munro a common object of study in constitutional law, whether in Bristol or Edinburgh, Aberystwyth or Belfast, is the British Constitution or more accurately, the constitution of the United Kingdom[1]. This is because, as Munro states, the first concern of constitutional law is with the institutions of government in a state, the United Kingdom. The British Parliament is the legislature which represents the people of that state. England and Scotland are not states but parts of the same state. The United Kingdom as a state comprises three distinct legal systems: English law, Scots law and the law of Northern Ireland. That is why the land law taught in Belfast differs from that taught in Birmingham or in Glasgow. Even in constitutional law, when it comes to matters such as police powers, or public order or remedies in administrative law, there are important differences between the three systems. However, the existence of different legal systems is not a consequence of a federal system. It is a consequence of the political history including the arrangements made when unions were agreed and the arrangements made since for different parts of the state.[2] The Westminster parliament is omnipotent, even if it may authorise others to legislate as well but there is no network of state legislatures with their own powers conferred by constitution, such as is found in the United States or Germany. The full title of state is the United

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[1] Munro, Colin R, *Studies in Constitutional Law*, 2nd ed. P. 15

[2] For these reasons, it has been suggested that the United Kingdom should be considered a union state rather than unitary (as traditionally contrasted to federal).

Kingdom of Great Britain and Northern Ireland[1]. Great Britain[2] comprises only the mainland of England, Wales and Scotland and does not include Northern Ireland which is part of the United Kingdom.

2. Unitary System of Government

British constitution is a unitary constitution as opposed to federal constitution. This is because all the powers of the government are vested in one central government and there is no division of power between central government and provincial government as exists in the USA and India. To be mentioned that like many other countries there are systems of local government like county, borough etc in the UK. They provide services and exercise some governmental powers and functions within local areas; they also have a certain degree of legal freedom and political independence. However, these local governments derive all their powers from parliament and parliament can legislate on any subject or can destroy their existence[3]. Again, in political practice, the distinction between federal and unitary states becomes one of degree. The United Kingdom is not classified as federal, but the legislative and the executive powers exercised in Northern Ireland under the provisions of the Government of Ireland Act 1920 afforded that province a greater degree of autonomy than is enjoyed by the provinces in some nominally federal states. This 'devolution' of power has been characterised by the Royal Commission on the Constitution as 'the delegation of central

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[1] The union as the United Kingdom of Great Britain and Ireland came into being on 1st January 1801 by the force of the Act of Union, 1801. According to the provisions of this Act the union itself was to last 'for ever'. However, the union between Great Britain and Ireland was never a happy one. After a series of crisis and conflicts between Ireland and the Great Britain in 1922 the British Parliament passed legislation whereby the union was dissolved; Ireland became free and independent state. However, Northern Ireland remained part of the state which became the United Kingdom of Great Britain and Northern Ireland.

[2] England and Wales form Britain; Great Britain was formed in 1707 by the Act of Union when Scotland united with England and Wales to form Great Britain.

[3] Harvey and Bather, *The British Constitution and Politics*, 5th Ed. P. 480.

government powers without the relinquishment of sovereignty'[1]. Professor Munro also mentions that the Royal Commission described three models of devolution: legislative devolution, executive devolution and administrative devolution which have been accorded to all of the constituent parts of the Union. Under the Government of Ireland Act, 1920 the Northern Ireland had its own legislature and executive; the legislature was composed of two Houses; one directly and one indirectly elected. Likewise, under the concepts of administrative and executive devolution many functions concerning education, development and environment etc. are performed by the Scottish and Welsh Officers respectively. Scotland has its own Secretary of State, assisted by three Parliamentary Under Secretaries, in charge of four administrative departments with headquarters in Scotland. Each is completely independent of its corresponding English department and is subject only to the control of the Treasury. Nevertheless, despite these devolution, the United Kingdom's government is unitary, for all its various parts are subject to the legislative supremacy of the Parliament at Westminster.

3. Unwritten Constitution

On of the main features of the British constitution is that this constitution is unwritten. The term 'constitution' may be used in two related senses. In the first and more precise sense it means a document in which are set out rules governing the composition, powers and methods of operation of the main institutions of the government. In this sense there is no constitution in the UK; in other words, there is no single instrument to which one can point out and say 'this is the constitution of the UK'. This is because the people of the UK never felt any necessity to adopt a constitution formally and receive with special sanctity as has been done in most of the modern countries. Thus if a constitution means a written document, then obviously the UK has no constitution. However, in the second sense of the term constitution means whether written or unwritten those rules determining the creation and operation of governmental institutions and in this sense obviously the UK has a constitution. Though the British constitution is unwritten, there are in fact several documents

[1] Kilbrandon Report, para 543.

which are central to the British constitutional law. They include Magna Carta (1215), the Bill of Rights (1689), the Act of Settlement (1700), the Acts of Union in 1707 (when Scotland united with England and Wales to form Great Britain) and in 1801 (when Great Britain united with Ireland to form the United Kingdom), the Human Rights Act (1998) etc.

4. The Constitution is Flexible

The British constitution is flexible in the sense that no special procedure is required to amend any of its provisions. Every law in the UK, whether relating to the constitution or government, or to anything else, can be changed in the same way and by the same body. In other words, the British parliament can change any provision of the constitution by ordinary law making process. Since every law in the UK is subject to change in this way, it follows that there are no laws which can be said to be 'superior' to any other law. Similarly, since the British constitution is flexible and unwritten, no laws can be said to be 'fundamental'. This is why there exists no difference between ordinary law and constitutional law.

5. Parliamentary Supremacy

One of the very important characteristics of the British constitution is the concept of parliamentary supremacy. This concept of parliamentary supremacy is used as opposed to constitutional supremacy. The law making power of the British parliament is unlimited; British parliament can make or unmake any law without any legal limitation and there exists no authority in the UK to examine the validity of any law made by it. The British parliament is supreme over the British constitution. This has been possible because of the fact that the British constitution is unwritten and flexible.

6. Parliamentary Governmental System

The British constitutional system is known as the mother of parliamentary system. The system of parliamentary democracy is used as opposed to Presidential system of democracy. The main features of parliamentary system include titular head of the state, cabinet's continuous responsibility to the parliament, existence of a strong opposition and absence of the doctrine of separation of power.

7. Constitutional Convention

A substantial part of the British constitutional system is covered by conventions. Though these conventions are not enforceable in a court of law, the whole edifice of the British Constitution is erected on these conventions. Some important fundamental principles of the constitution like parliamentary supremacy, ministerial responsibility, system of cabinet etc are governed by these conventions.

8. Rule of Law

It is said that the British Constitutional system is based on rule of law. Rule of law as an essential feature of the constitution has been described by Dicey. According to him rule of law means three things: absence of arbitrary power, equality before law and guarantee of citizen's rights.

9. Constitutional or limited Monarchy

The Government of the UK is monarchical. Though historically there was absolute monarchy in Britain, with the passage of evolution that absolute monarchy transformed into limited or constitutional monarchy. The Queen can exercise only limited power; she is just titular head of the state; the real power belongs to the cabinet through the parliament. Thus the Queen just reigns but does not govern the country.

10. Absence of Separation of Power

Unlike in the USA there is no separation of powers in proper sense of the term. This is because of the fact that in parliamentary system of government the application of this principle is not possible. All British ministers are involved both in the executive and in the law making. The Lord Chancellor occupies three positions at the same time. He is the head of the judiciary; head of the House of Lords and also an important member of the cabinet.

11. Difference between theory and practice

In British constitutionalism there is a wide gap between theory and practice. For example, though in theory there is monarchy in Britain, there is democracy in practice. Likewise, though in theory the cabinet is the advising body for the Queen, in practice the real power of the

state is exercised by the cabinet and the monarch is just the titular head.

The Development of the British Constitution

The British Constitution is the product of history and the result of evolution. It has grown with the growth of the English nation, changed with its wants, and adapted itself to the needs of various times. Jennings has aptly remarked, "If the Constitution consists of institutions and not of the paper that describes then the British Constitution has not been made but has grown and there is no paper[1]." The institutions necessary for carrying out the functions of the State were established from time to time as the need arose. "Formed to meet immediate requirements they (institutions) were then adapted to exercise more extensive and sometimes different functions. From time to time, political and economic circumstances have called for reforms. There has been a constant process of innovation, reform and amended distribution of powers. The building has been constantly added to, patched, and partly reconstructed, so that it has been renewed from century to century, but it has been never been razed to the ground and rebuilt on new foundation[2]." In other words, the British Constitution is "the child of wisdom and chances[3]"; it is the result of a process in which many elements, like charters, statutes, judicial decisions, precedents, usages and traditions, have entered piling themselves one upon the other from age to age and shaping the political institutions of the country according to the exigencies of time. The British Constitution is ever growing and always undergoing modifications. It is dynamic Constitution with its roots in the past and branches in the future. Lord Morrison cogently said, "but as a whole, ours has been a peaceful development, learning as we moved on establishing the foundation of further progress[4]." Gettel identifies four methods by which modern states have acquired their constitutions. One of them is by gradual evolution and this is how the British constitution has been created.

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[1] Jennings, W. Ivor, *The Law and the Constitution*, P. 8

[2] Ibid.

[3] F.A. Ogg, *English Government and Politics*, P. 68

[4] Morrison, Lord, *British Parliamentary Democracy*, P. 2

The pace of the development of the British Constitution may be divided into four periods which are as follows:

(1) First Phase: Middle Age: Early growth of Parliament;

(2) Second Phase: from 1485 to 1688: Struggle between the King and parliament;

(3) Third Phase: from 1688 to 1832: Beginning of the party system in parliament; the development of the principle of ministerial responsibility and the lying foundation of the cabinet system;

(4) Fourth Phase: from 1832 and continues up to the present day. Today the relationship between the House of Commons and the House of Lords and between Parliament and the other institutions of the Government, are so modified as to ensure that the legal sovereignty of Parliament is exercised in conformity with the wishes of the people.

First Period: Early Growth of Parliament

The development of the British constitution is said to have started from 1066. This is because of the widely held view among the experts that a new chapter in the development of British political institutions began in 1066 when William of Normandy conquered England after defeating the English King Harold. The foundation of this period is based on two principles, accepted by the King and his subjects in Saxon times:

(i) In important matters, such as the making of laws and imposition of taxes, the King should not act without first taking advice; and

(ii) In summoning counsellors, the initiative should rest with the King.

Out of the above principles the Saxon Kings used to call or summon conferences of wise and rich men like archbishops, barons,

Knights, tenants-in-chief etc. These conferences later came to be known as Great Council. To put in other words, to aid in running the government and to help the sovereign formulate his policies, two main agencies grew. One was the *Magnum Concilium* or Great Council; the other was the *Curia Regis*, the King's Court. Initially the *Curia Regis* was not a separate body, but as time passed, in effect it became such. The Council did not meet often and usually sat only a few days at a time. But public affairs called increasingly for more or less continuous attention, and the custom arose of calling together for such a purpose those members of the Council who as officers of the royal household were already following the King wherever he went. This smaller, more or less professionalised, group- a sort of inner circle of the Council- came in time to be known as the *Curia*.

With the lapse of time, as described by professor Zink[1], the Council and *Curia* grew farther apart. Each made its own important contribution to the country's governmental system of later centuries. During the days of Henry II (1154-1189) there grew tendency to split up the Curia's multifarious duties into segments. Nobody planned it, but by slow stages judicial work was separated from the tasks of general administration. One part of the *Curia* (known as the 'permanent council', and later as the 'Privy Council') operated as a council for general purpose. Another became the parent of four great judicial organs namely, the courts of exchequer, King's Bench, Common Pleas and Chancery (High Court of Justice).

The Arrival and Growth of Commons: The orderly and firm governmental authority established by Henry weakened in the hands of his sons, Richard and John. By his high-handed acts John provoked rebellion of the barons and clergy and on many occasions he was forced to accept humiliating surrenders. Apart form this weak position, the expense of wars pressed so heavily on the successive Kings that they were forced to seek fresh revenue. Not only were additional aids levied on the barons but the tax basis was extended to include a new

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[1] Zink, Harold, *Modern Governments*, 2nd edn, P. 6

class, the freeman of the county[1]. In 1213 King John, being in extreme need to raise money, directed that 'four discreet knights' be sent from each county to participate in the Great Council at Oxford. In 1254 Henry III, urgently needing money for war, summoned two knights from each county to participate in the meeting of the Great Council, and by this time the Great Council was coming to be known as Parliament[2]. The meeting in 1254 resulted in clash between the King and the barons which ended in the defeat of the King and the rise to power of Simon de Montfort, one of the rebel barons. Simon convened a 'parliament' in 1265 in the King's name which was attended not only by the barons, clergy and two knights but also by two burgesses from each boroughs. Simon is said to be the father of the House of Commons because of the revolutionary representative complexion he gave to his parliament.

Representation and Bicameralism: Henry III succeeded Simon and then came Edward I who summoned a Model Parliament in 1295 and since this time the basis of parliamentary representation began to develop. To this parliament were summoned the Lords by personal writ, two knights from each county, two citizens from each city, and two burgesses from each borough. The knights, citizens and burgesses were to have "full and sufficient" to act on behalf of the 'communities' they represented. Though such type of representatives were not summoned regularly until the middle of the fourteenth century, the council was fast developing a more national character, representing the three great classes of the time- the clergy, the barons

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[1] Against the background of these two factors the barons compelled King John to sign Magna Carta 1215, the 'Great Charter'. The very important rights granted in the Carta were that no freeman might be arrested, imprisoned, dispossessed, outlawed or exiled or harassed in any other way save by lawful judgment of his peers and law of the land. The Charter also stipulated that certain kinds of taxes could not be imposed by the King without the assent of the Great Council. This Charter is considered the first milestone in civil liberties in Great Britain.

[2] The term 'parliament' derived from the Frecnh *parle*, 'to speak', was for a time applied indiscriminately to meetings of the Council whether or not attended by knights and burgesses.

and the commons- "those who pay, those who fight, and those who work" (F.W. Maitland)[1].

Since then these three groups of people met and voted on many occasions. Again, these three groups were expected to tax separately. It was, therefore, expected the parliament to develop three chambers instead of two. However, the greater barons and clergy were drawn by community of interest into a single body. The result was two houses. One, the House of Lords, composed of men who attended in response to individual summons. The other, the House of Commons, composed of men who elected in counties and boroughs, attended in a representative capacity.

Increasing Power of the Commons: From 1376, the Commons began regularly to elect a Speaker to present their petitions and to convey their answers to the King and the Lords. Whereas the summons of the Lords to Parliament was based on their feudal claim to be the King's advisers, the Commons were called only because the King needed additional revenue. This placed the Commons in a strong position. This position began to be more formulated by the time and in 1395 this was expressed in a formula, "the grants were made by the Commons, with the advice and consent of the Lords". The position was confirmed in 1407 when Henry IV accepted that "any grant by the Commons granted and by the Lords assented to" should be reported only by the Speaker of the Commons, a principle which is still enshrined in modern practice.

Second Phase (1485 to 1688): Struggle between the King and Parliament

This period comprises the reign by Tudors (1485-1603) and then Stuarts (1603-1688). During this two hundreds years the constitutional development took the form of the rivalry of King and Parliament for control over each other. The Tudors period was more or less peaceful; Kings knew how to manage the parliament in order to obtain its consent to their wishes. However, the Stuarts periods marked hostility

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[1] Harvey, J and Bather L, *The British Constitution and Politics*, 5th edn, p. 20.

with the parliament. On the one hand, the Commons, through their control over finance, had established certain rights which they deemed fundamental. On the other, it was an undisputed fact that the Sovereign possessed many common-law powers under royal prerogative. These included the power to summon and dissolve parliament, the right to suspend or dispense with laws, the maintenance of an army, the issue of Proclamations having the force of law and imposition of certain taxes. However, James wanted to go beyond these. His doctrine of 'divine rights' placed him above the law and therefore beyond the authority of parliament. The issue was- should government be by the King, or by the King-in-Parliament, as in Tudor times? The civil war which resulted in because neither side would give way, settled once and for all the legal sovereignty of parliament, although not until 1689 was this conclusively demonstrated.

At one stage of the clash King Charles I by the power of his prerogative dissolved the parliament and began to administer the country without parliament for eleven years. Unable to meet the war finance he was compelled to summon the parliament to raise money. When parliament was summoned again in 1628, it presented the famous Petition of Rights to the King setting the ancient liberties of the people and denouncing the royal abuse of power. The king granted the Petition finding no other way to get out of the crisis. However, subsequently King Charles I began to ignore the provisions of the Petition of Rights and resorted to abuse of power of the prerogatives. This resulted in clash between the king and parliament and the parliament executed King Charles I in 1649. After this the parliament abolished monarchy and instead established republican system. For eleven years there were no monarchy in Britain. In 1660 it was again this Parliament which reestablished monarchy in Britain and made Charles II in the throne.

Subsequently conflict arose between King James II and the parliament and this conflict resulted in the glorious revolution of 1688 with the leadership of Oliver Cromwell. King James II was removed from the throne and the "convention parliament" was convened which made William and Mary on the throne as joint sovereigns on

conditions. Then the Bill of Rights of 1689 was passed which fixed the rules relating to the relationship between the parliament and the king. Then in 1701 the Act of Settlement fixed the rules as to the succession to the throne. Thus was established the supremacy of parliament and by the end of the seventeenth century, statutes came to be the supreme source of law and a statute could take away or amend a prerogative power meaning the omnipotence of the parliament.

Third Phase (1688 to 1832): Development of Modern Parliamentary Democratic Principles

Though the events of 1688-89 put the finality on certain outstanding principles of the constitutional system, some of the most notable features of the present-day government have arisen since that period. These are the growth of party system, cabinet system in parliament, ministerial responsibility, procedures in the parliament etc. It would be beyond the scope of this book to discuss the details development of all these principles. Most of these development will be discussed in relevant chapters.

Nature of the British Constitution

Briefly, the British Constitution is a body of basic rules indicating the structure and functions of political institutions and the principles governing their operation. It is just the same in nature as the constitution of any other country, the only difference being that British Constitution has never been systematically codified and put in an orderly form. It is categorically stated the British constitution has not been made but has grown[1]. Probably, no attempt will be made in future, too, to bring all these rules and principles together to make the Constitution a consistent and coherent whole. In fact, it is an impossible task; many of the principles are not sufficiently definite to be reduced to writing. Moreover, the Englishman as a political entity has never favoured a system of government based upon fixed principles involving the application of exact rules. Ogg says, it "is a constitutional structure which lacks symmetry, governmental system

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[1] Dicey, A.V. *Introduction to the Study of the Law of the Constitution*, p. 196

which abounds in the illogical." But it does not mean that it is a mere hotchpotch of heterogeneous elements. The rules and principles which govern the governmental machinery have been deduced from British experience and consciously adhered to and applied.

Thomas Paine and Alexis De Tocquveville were the two prominent among many writers who were of the opinion that the British Constitution did not exist. Thomas Paine, a great champion of written constitutions, categorically declared that where a Constitution "cannot be produced in a visible form, there is none." In a spirited reply to Burke, who eminently defined the British Constitution in his *Reflections on the French Revolution*, Paine asked, "Can Mr. Burke produces the English Constitution? If he cannot, we may fairly conclude that though it has been so much talked about, no such thing as a Constitution exists or ever did exist." De Tocqueville, the celebrated French writer on foreign Governments a generation later said that in "England the Constitution may go on changing continually or rather it does not exist." Whatever be their reasons for making these assertions, Paine and De Tocqueville were both wrong. There can be no State without a constitution. It is true that there is no single document intended to comprise the fundamental rules of constitutional practices to which a student of the British Constitution may turn for reference, as one does in the United States or in India. However, there is no constitution which is either wholly written or entirely unwritten.

Why was not the British Constitution written?

First, the British are essentially conservative and tradition loving people (Bailey, 9); they believe in evolution rather than revolution. At one stage of long struggle between the Parliament and the King, the Parliament deposed and executed King Charles; monarchy was abolished from England and in its place the Parliament introduced republican system. From 1649 to 1660 England was governed by the Instrument of Government written by Oliver Cromwell, the leader of the civil war (1642-9) against the King. However, after 11 years the monarchy was again restored in England by the Parliament. In 1660 when it became clear that chaos could best be avoided by restoring the

old traditional constitution, Cromwell's constitution was expunged from the official records; Charles II was restored as King to rule England. Thus Charles II and James III ruled on the basis of inheritance from Charles I as under traditional norms of constitutionalism. This incident itself sufficiently proves that British are tradition loving nation and they would not go for a revolution to make a written constitution.

Second, the British Constitution is the result of the ordinary law of the land which have grown out of judicial decisions for centuries (Dicey, 195). This unwritten evolutionary growth of the British Constitution is closely associated with the British politics and there is no cogent reasons from departing this tradition.

Third, though in theory the advantages of a written constitution are not available in the UK, they all are available and enjoyed by the British people in practice. It is contended that if constitution is written the powers of the government would be defined and government cannot turn despotic or autocratic. However, counter arguments are posed that though the British Constitution is unwritten, conventions of the constitution which are mandatory in nature prevent the government from becoming dictatorial. Though the British Parliament is supreme, it cannot do anything undemocratic because of the strong vigilant public opinion. Thus the safeguards provided by a written constitution are available in the UK though the Constitution is unwritten. There is another advantage of an unwritten constitution which is absent in the case of a written constitution. This is the flexibility of amendment. A written constitution cannot be amended as and when required like an unwritten constitution. Again, though the British Constitution is unwritten and flexible, the reality is different in the sense that normally neither constitution nor any of the conventions are amended unless urgently required. There seems in practice to be little reluctance to amend the Constitution; in a century and a quarter there have been six major Acts altering the electoral franchise (Bailey, 9). Thus given that the British people are enjoying all democratic rights and guarantees as enjoyed by a Nation with written constitution, there does not seem to be any need for making the British Constitution written.

Fourth, according to Harvey and Bather, Britain is a small unitary country. For nearly 900 years, no invasion or revolution or mass-upsurge has interrupted the slow evolution of the political institutions of this country giving any fertile background of making the constitution as has been done in most of the commonwealth countries like Bangladesh, Pakistan, India, Ceylon etc. While some special provisions are made for Wales, Scotland and Northern Ireland, the protection of a written constitution has never been felt to be necessary (Harvey, 476).

A Written Constitution for the UK?

Though the distinction between written and unwritten, in other words, documentary and non-documentary is one of form rather than of degree, the fact is that an entrenched written constitution has some valuable attitudes of its own compared to an unwritten constitution. An entrenched written constitution provides *inter alia*:

(i) stern and specific check on the exercise of Government power;
(ii) specific and concrete safeguards of fundamental rights;
(iii) power on the judiciary to be exercised for the protection of the Constitution and all its entrenched provisions;
(iv) defined power to be exercised by the legislative and executive so that they must not go beyond their limits.

Among developed democracies Britain has been unusual in having had no written constitution which has a higher status than the rest of the law in the land. We will see in the later that it is basically the historical set up which has made the UK unusual in having not a formal entrenched written constitution.

The body of rules relating to the structure, functions and powers of the organs of state, their relationship to one another, and to the private citizen is to be derived from common laws, statute and constitutional conventions. Therefore, the constitution does not impose limits on what may be done by ordinary legislation in the way that many constitution do. The legislative competence of the UK Parliament is unlimited. No parliament can bind its successor or be bound by its predecessors and the courts cannot question the validity of an Act of

Parliament. Therefore, no formal mechanism exists ensuring that the rights of minorities and individual citizens are not infringed by Parliament.

Against the background of this untrammeled power of the parliament and unwritten nature of the constitution arguments have been put forward by many in recent decades that there are some potential grounds for which the UK constitution should be made written and entrenched.

Some reformers urge for necessary change and not necessarily adopting a constitution. Again, some like the pressure group Charter 88 campaigned for a written constitution along with other reforms. The Institute for Public Policy Research drafted a 'Constitution of the UK' and the Liberal Democrats made the adoption of a written constitution their party policy. Behind this move the grounds may be summarised as follows:

(i) In 1976 Lord Halisham argued that the current constitutional arrangements amounted to an elected dictatorship for which the only remedy was a written constitution. The basis of this argument is that the House of Commons has become subordinate to the Government which controls it through the party machine. This along with its absolute power of legislation should be defined in a written constitution.

(ii) Parliamentary sovereignty as the safeguard of British liberties has proved inadequate in recent decades. The British traditional negative concept of liberty has not been enough to pressure the values enshrined in international rights instruments, particularly the European Convention on Human Rights. The positive guarantees of fundamental rights contained in the Convention have been found, by the European Court of Human Rights, to have been violated by the UK in a surprising number of cases.

(iii) The traditional checks on legislative and scrutiny powers have proved ineffective in many cases. The Criminal Justice (Terrorism and Conspiracy) Act 1998, the Prevention of Terrorism (Additional Power) Bill 1996 which were passed only after some hours of debate provide examples of brute majoritarian rule.

(iv) Checks by the House of Lords has been proved ineffective. When they oppose a bill sent up by the Commons, they tend to propose amendments on the Committee stage rather than vote against the second reading. Ultimately the Government can threaten to pass a Bill under the 1911 and 1949 Parliament's Act if the Lords appears minded to oppose it.

(v) The impact of incoming tide of European law and its viable conflict with national law, its impact on parliamentary sovereignty, on Government power, has a great potential for adopting a written constitution.

(vi) The devolution of power to Scottish Parliament, Welsh Assembly and Northern Ireland Assembly also provides greater grounds for written constitution, so that clear division of power may be delineated.

Does the UK need a written Constitution?

Given all the above arguments for a written constitution, it has also been argued form the other end of the spectrum that it is not necessary to adopt a written constitution. This is because of the following:

(i) In the long history of the British constitutionalism there has occurred no fertile background for adopting a written constitution. Because unlike the other nations having written constitution, the British have not suffered conquest or the loss of a major war or revolution for several

hundred years; the total development has largely been evolutionary.

(ii) The argument that absence of a written constitution has enhanced elected dictatorship and loosen check on the government and parliament is untenable. Because even the countries under parliamentary government with written constitution are facing the same problems. Though it may be possible to enhance those checks under a written constitution, the flexibility and convenience that are enjoyed from convention will be lost if constitution is made written.

(iii) The campaign for a bill of rights and views on the incorporation of the European Convention on Human Rights into domestic law for last 30 years have lastly culminated into the Human Rights Act 1998. Obviously the Act is not an entrenched one but people unlike earlier can see their rights better protected under an enactment. All measures in the Human Rights Act are reconcilable with the doctrine of Parliamentary Supremacy; judiciary has not been given any entrenched power or position to declare any primary legislation illegal. Like in New Zealand, if a bill of right is possible without adopting a written constitution then, as it has been argued, why the adoption of a written constitution for the UK?

(iv) It has also been argued that due to community influence the British courts are treating the European Communities Act 1972 as a fundamental law; they have also suspended or declared domestic law illegal. However, counter argument is mounted that behind this move it is British parliament which is holding the key. Judicial review of parliamentary legislation under the European Community legislation is not incompatible with parliamentary supremacy; the European Communities Act 1972 is an ordinary piece of legislation and the British parliament can change it any time. Thus while the whole arrangement

of European Union influence has been possible to be dealt with under compatibility of the parliamentary sovereignty, it seems unworthy of adopting a written constitution.

(v) If a written constitution is adopted, then all prerogatives and conventions will become law. As a result, by way of interpretation and enforcement judiciary will be involved into politics and there will no longer be impartial and independent judiciary as it is now.

All the above points make it clear that whatever changes have taken place, all have been done keeping compatibility with the parliamentary supremacy; the source of power in the UK is the parliament; not people nor a written constitution or any other higher order law. It has also been doubted whether entrenchment of a written constitution is at all possible in the UK. This is because to do that there needs a complete reversal; there needs to create an artificial discontinuity of power which would have the effect of modifying parliamentary sovereignty, after which, adoption of a written constitution might be possible. This would occur if parliament extinguished itself transferring its power to a new Constitution Assembly; oaths of judges would also have to be amended in order to make it clear that their allegiance had changed. However, it is argued that though such a reversal would not be legally impossible, politically it would be difficult to turn the clock back and also it is unlikely that British tradition loving people will accept such a reversal.

It is also argued that what impact and change in practice would be brought by the Human Rights Act, devolution of power and European Union influence still remains to be seen.

Sources of the British Constitution

Since the British Constitution is unwritten, the British people cannot point to a specific document as their 'constitution'. However, this does not mean that the British constitution does not exist. The British constitution exists but unlike in the countries with written constitution it does not exist in one specific document; it rather exists

in different documents or sources. The sources of the British Constitution are, therefore, many and diverse. The source or components of the British Constitution may be divided into two groups:

(a) Law of the Constitution; and
(b) Conventions of the Constitution.

Laws of the constitution are those statutory laws which the court can enforce whilst conventions of the constitution are those political rules which are obligatory in running the political system but are not enforceable in court of law.

A. Laws of the Constitution

1. Historical Charters and Constitutional Landmarks:

The most important sources of the British constitution are historical charters and documents. Most of these charters bear the testimony of the historical struggle between the despotic King and the citizens at different points of history. These include the Magna Carta, 1215, the Petition of Rights, 1628, the Bill of Rights, 1689 etc.

2. Statutes:

Important developments in the British constitution have often been brought about by different Acts of Parliament. However, it is to be borne in mind that not all Acts of Parliament are source of the constitution; only those Acts are recognised as source of the constitution which deal with the power of different essential organs of the government (Bailey, 2). Specific examples include Habeas Corpus Act, 1679; Act of Settlement, 1701; Acts of Union with Scotland, 1707, and Ireland, 1800; Electoral Reforms Acts of 1832, 1867, 1884; Parliament Acts of 1911 and 1949; Life Peerage Act, 1958; House of Lords Act, 1999; Human Rights Act, 1998; Northern Ireland and Scotland Acts of 1998 etc.

3. Judicial Decisions:

The British courts cannot examine the legality of laws passed by the parliament but they can interpret the same while enforcing them. When they adjudicate in cases, their judgments create precedents which succeeding judges respect and follow. Many of these judgments

relate directly to constitutional matters and precedents of these judgments are an important element in the British constitution. According to Professor Diecy, the British Constitution is judge-made constitution and general principles of the constitution, i.e. the right to personal liberty or the right of public meeting have developed out of judicial decisions determining the rights of private persons in particular cases brought before the courts (Dicey, 195). This is particularly evident in *Soammresett's* case ((1772) 20 St. Tr. 1) in which slavery from England was abolished; the Case of *Proclamations* ((1610) 12 Co. Rep. 74) in which Lord Chief Justice Coke prevented the King from creating any new offence by Proclamation; the *Bushesll's* (1670) case in which court gave immunity against legal action for words spoken by parties, counsel and witnesses in judicial proceedings.

4. Common Law:

Parts of the British Constitutional law have not been enacted by the Parliament but are simply based on ancient custom which have subsequently either been enforced by courts or recognised by the statutes of the Parliament. For instance, fundamental freedoms in England are essentially common law rights and these rights have been further guaranteed by a statute, the Habeas Corpus Act, 1679. The importance of these common law principles is two-fold. Their emphasis on the rights of the individual has contributed to the essential philosophy of our constitution; their application by the judges from the reign of Henry II determined the development of the constitution, for it established the supremacy of law and prevented any extension of the King's powers (Harvey & Bather, 482).

B. Constitutional Conventions

Conventions form an essential part of the British Constitution. So firmly the mechanism of government is erected on their foundation that without them the British Constitution becomes maimed if not absolutely unworkable. Conventions are those unwritten rules which have grown out of political understanding, habit or practices and which regulate some essential functioning of the government machineries (Dicey, 24). Some important fundamental principles of

the Constitution like parliamentary supremacy, ministerial responsibility, system of cabinet, relationship between the King and ministers, relationship between the two Houses of Parliament etc are governed by these conventions.

Apart form the above mentioned sources there are some fundamental books on British Constitution which are also regarded as sources of the Constitution; they include the *English Constitution* by Walter Bagehot, *the Law and Custom of the Constitution* by Anson, *Commentaries on the Laws of England* by Blackstone, *the Law of the Constitution* by Dicey etc.

The British System of Government is at once Monarchy, Aristocracy and Democracy

This statement is closely connected with the historical development of the British Constitution. Historically there had been absolute monarchy in England for centuries. Since the time of the Norman Kings state functionaries began to increase and the Kings began to call landlords and other influential class (aristocrats) of people to help them in law making and tax imposition. Out of this practice grew the Great Council and this Council gave rise to modern British Parliament. At one stage of the history this Great Council became an essential part of the Monarchy and the Monarch became bound to take advice from them. Thus the absolute monarchy became limited by the power of the aristocrats and in one sense the British absolute monarchy turned into aristocracy. From 1642 to 1649 the British Constitutional history marks the sign of clash of power between the King and aristocrats. This struggle ended with the aristocrats taking dominance over the monarch. Before 1832 aristocracy was the most powerful in the British constitutional system. This is because aristocrats had the majority in the Great Council.

The Reform Act, 1832 for the first time in the British history gave political sovereignty to the electorate by extending voting rights gradually to the general people as opposed to the aristocrats. Also were redistributed parliamentary seats among localities on a fairly equitable basis. On the evolution to further development the reform in

suffrage culminated in the Representation of the People Act of 1918 which gave rise to liberal democracy in Britain.

Like in the USA there is democracy in Britain but this democracy of the present day has come along the long road to evolution; the evolution from absolute monarchy to aristocracy and from aristocracy to democracy. However, though there is now full democracy still some elements of aristocracy and Monarchy exist in the system.

There is Monarchy in Britain but this monarchy is not absolute; it is just a figure-head the real head being the elected representatives in the parliament who exercises the real executive power of the state. Likewise, there is aristocracy in Britain and this is in the life and hereditary peers in the House of Lords; these Lords are not elected by the people and they are considered aristocrats. However, like the monarch these Lords have no real involvement in the real power of law making or administration. After the Parliament Acts 1911 and 1949 the House of Lords is no longer an obstacle to pass a bill. Thus though there is aristocracy in Britain, it is only in limited form and ornamental.

Devolution and Constitutional Issues

It has already been discussed above that the British constitution is a unitary constitution as opposed to federal constitution. There is no division of power between central government and provincial government as exists in the USA and India. The full title of state is the United Kingdom of Great Britain and Northern Ireland[1]. Great Britain[2] comprises only the mainland of England, Wales and Scotland and does not include Northern Ireland which is part of the United Kingdom.

The term 'devolution'of power has been characterised by the Royal Commission on the Constitution as 'the delegation of central

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[1] See foot note 1 of page 22.

[2] Se foot note 2 of page 22.

government powers without the relinquishment of sovereignty'[1]. Professor Munro also mentions that the Royal Commission described three models of devolution: legislative devolution, executive devolution and administrative devolution. Devolution is said not to affect the unity of the UK or the power of Westminster to legislate for all or any part of the UK, or to repeal or amend the devolution arrangements themselves. The term 'devolution' must be distinguished from 'decentralisation' (a method whereby some central government powers of decision-making are exercised by officials of the central government located in various regions) and federalism.

The issue of devolution in respect of the UK has to be considered from two aspects: devolution before 1998 and devolution after 1998. Within the unitary system there was a measure of devolution of administrative powers to Scotland, and to a lesser extent to Wales; they did not have any legislative or executive devolution of powers. On the other hand, from 1921 to 1972 Northern Ireland enjoyed an extensive degree of devolution with legislative and executive powers devolved to the Province's parliament and government.

From 1978 onwards the pressure for devolution of legislative and executive powers to Scotland and Wales was getting momentum. From 1972 pressure for devolution in Northern Ireland was also getting stronger against the background that no more it wanted to remain under the direct rule from the Westminster. In 1997 the Labour Government came to power with a commitment to institute a wide range of constitutional reforms. White Papers were issued in Scotland and Wales. And the Good Friday Agreement (Belfast Agreement) was singed to resolve the issues in Northern Ireland. On the basis of the White Papers and the Agreement referendums were held in both the countries. Positive results being counted for reform the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 were passed by the Parliament whereby legislative and executive devolution were implemented to meet the perceived different needs and circumstances of each country.

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[1] Kilbrandon Report, para 543.

Common Features of Devolution:

(i) In all three countries with new devolved power there is one legislative chamber and elections are by one of proportional representation method;

(ii) Though legislative powers have been devolved, the Westminster Parliament still remains supreme in all matters; Acts passed by assemblies of these countries are not supreme, and may be set aside by the courts if they exceed their legislative competence. The Westminster Parliament retains power to legislate for both countries, not only on matters specifically reserved to Westminster, but also on devolved matters;

(iii) Devolution issues are described in all three Acts as questions concerning the lawful exercise of power under respectively, the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. Each Act defines the term by listing the questions that are to be regarded as devolution issues for the purposes of that Act.

Sample Questions with Suggested Skeleton Solutions:

1. Compare and contrast, with example, the expressions 'constitutional law' and 'constitutional conventions' as applicable to the UK (University of London 2003).

   Suggested Skeleton for Solution: Here you start your answer with the discussion of the nature of the British constitution and then give much emphasis on the 'laws of the constitution' (sources of the constitution) and 'conventions of the constitution'.

   - British constitution is unwritten and not codified;
   - Constitution cannot be produced in a document and constitutional law is not fundamental or supreme law as in the USA;
   - So the constitutional law means those statutory laws, Charters, judicial decision and common law which the court can enforce (write details from pages 39-41);
   - Constitutional conventions are the second half of the sources of the British Constitution (write details from pages 41-42);
   - Give the differences and interrelation between laws and conventions (write details from pages 82-83).

2. Identify and explain the special characteristics of the constitution of the UK, making reference to any changes of major significance that have occurred since 1997 (University of London, 2003).

   Suggested Skeleton for Solution: Here you start your answer with the discussion of the characteristics of the British constitution and then give much emphasis on the constitutional developments since 1997 as the second part of your answer.

- Discuss last 9 characteristics out of 10 as detailed in pages 21-25;
- Discuss the recent constitutional developments since 1997 which will include the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 along with their short background (write from last two paragraphs at page 44);
- Also discuss the impact of the Human Rights Act 1998 in short (first three paragraphs from pages 137-138: Effect of the HRA);
- You must also discuss the change introduced by the House of Lords Act 1999 (paragraph 6 from pages 195-196).

3. Consider the view that the UK should now adopt for itself a written constitution. (University of London, 1998).

Suggested Skeleton for Solution: Here you start your answer with the discussion of the nature of the British constitution and then give much emphasis on whether Britain should have any written constitution or not (see pages 35-39).

CHAPTER II

THE BRITISH MONARCHY

The Evolution of the British Monarchy

The development of the British Monarchy and the development of the British Constitutionalism is coincidental and the present limited or constitutional monarchy is just the remnant of the past absolute monarchy which has been shaped and moulded over the centuries by changing circumstances. "No other institution illustrates more clearly the peculiar in which the British constitution has developed than the monarchy" (Harvey, 199). The oldest constitutional institution in Britain is the monarchy and the oldest person in the British constitution is the Monarch. The King in the earliest days was a personal ruler (Zink, 29). During the Anglo-Saxion period the King used to be elected but definitely not by any popular election; it was by virtue of military might, underwritten by formal election. There was no rule of succession to the throne by inheritance. As a result, when a King dead, there was in interregnum in the continuity of government until a new King was elected formally. Subsequently under the process of evolution the monarchy became hereditary. It was the thirteenth century when the right to reign was put on a common-law basis, making the succession to the throne hereditary and women eligible. Thus was born the monarchy as a constitutional institution. It was after the glorious revolution in 1688 that the difference between the King as a person and King as an institution, i.e. the Crown or Monarchy became clear. This difference was first identified by Blackstone when he stated that "Henry, Edward or George may die but the kings survives them all" (Zink, 29). Thus the King as a person is one thing and the King as an institution or office is different; the King as a person may die but the King as an institution or office never dies; as soon as a King is dead the throne is filled up by another King as a successor. This is why goes the constitutional proverb: "The King never dies." There is another proverb, "The King is dead, long live the King". Such a proverb is used in two senses: first, it means that the king as person may die; and second, 'Long live King' means that there cannot be any vacuum or interregnum in the continuity of the monarchy as a result of death of a King. When the monarch dies, the

successor immediately and automatically becomes monarch and this is determined by the law passed by the British Parliament. The Act of Settlement 1700 provides that the Crown is to be held by the direct descendants of Princess Sophia. This Act along with the Regency Acts 1937-53 provides for detailed rules as to who is eligible for throne.

The King Can do no wrong

The statement that 'King can do no wrong' apparently seems self-contradictory in the sense that a King being a human being is not above wrong and definitely can do wrongs. However, this proverb is not directed to the King as a person; it refers to the king as an institution, i.e. the Crown. According to common law a King cannot be blamed for any wrong done in the government; nor can a criminal suit be filed in the court against the King. This is because of the doctrine of ministerial responsibility. For every action of the government a minister must sign or authorise and hence that particular minister will take the responsibilities of all wrongs done. The King in British system is a titular head only the real head being the cabinet and the ministers. Though all functions of government is administered by the name of the King, the King does not have any real involvement. Since the King does not do any work, he or she cannot do any wrong. "The sovereign cannot act constitutionally so long as he acts upon the advice of a minister supported by a majority in the House of Commons. Ministerial responsibility is the safeguard of the monarchy" (Jennings, *Cabinet Government*, 338).

The Power and Functions of the Monarch

In theory the monarch is all powerful but in reality it cannot exercise this power independently. In the past all prerogatives of the King were his powers. However, along the evolutionary process of development of democracy in Britain the powers of the King began to be decreased gradually. The 1688 Revolution left the monarch in charge of running the executive but dependent upon Parliament for money and lawmaking power. The monarch retained substantial personal influence until the late nineteenth century, mainly through the power to appoint ministers. Until after the reign of George V (1910-1934) monarchs occasionally intervened in connection with

ministerial appointments and policy issues. The abdication of Edward VIII (1936) probably spelt the end of any political role for the monarch. Thus as pointed out by Lord Simon of Glasdale in *Town Investments Ltd v Department of Environment* [1978] AC 359 (HL) that the powers of the Crown denotes the collection of those powers as remain extant (royal prerogatives) together with such other powers as have been expressly conferred by statute on the Crown. Basically there are two sources of the King's power: royal prerogatives and statutes conferring powers on the King.

The overall power and functions of the King may be discussed under the following five heads:

1. Executive Powers

(i) titular head of the executive power of the state;
(ii) to appoint the Prime Minister and other ministers;
(iii) to dismiss ministers;
(iv) to appoint all higher executive and administrative officers, judges, bishops and the officers of the army, navy and air force;
(v) to regulate the conditions of service and suspend and remove these officers except judges and other employers of the government from service;
(vi) to hold the supreme command over the armed establishments;
(vii) to conduct foreign relations of Britain with other countries; sends and receives ambassadors or other diplomatic agents, and all foreign negotiations are carried on the name of the Crown;
(viii) to declare war and make of the peace;
(ix) to make and sign all international treaties and agreements;
(x) The Crown is the head of the British colonies;
(xi) The Crown is the head of the British Commonwealth.

2. The Legislative Powers

(i) to open and close the parliament;

(ii) to dissolve and summon parliament;
(iii) to give speech from the Throne in the House of Lords with the consent of the Commons;
(iv) to assent to a bill passed by parliament; without this assent no bill can become a law;
(v) to make subordinate legislation in the form of Orders-in-Council through the Privy Council.

3. Judicial Powers

(i) In theory the Crown is the fountain of justice; all judicial functions are administered by the name of the Crown; all criminal cases are lodged in the name of the Crown;
(ii) the Lord Chancellor supervises the entire judiciary in the name of the Crown;
(iii) The Crown exercises the prerogative of mercy and may grant pardon to persons convicted of criminal offences.

4. Ecclesiastical Powers

The Crown is the head of the churches in England and Scotland; all Archbishops and Bishops are appointed by the Crown.

5. Power relating to conferment of Honours

The Crown is the fountain of honour. In exercise of her prerogatives, Her Majesty confers peerages, baronetcies, knighthoods, and other honours. Most honours are, however, conferred by the Crown on the advice of the Prime Minister. Again, there are some honours which are the personal gift of the sovereign. These are the Order of Merit, the Royal Victorian Order, the Royal Victorian Chain etc.

The Theory and Realities of the Power of the Crown

All the powers of the Crown as mentioned above exist in theory and the reality is completely different. This is because none of these powers can the monarch exercise without the advice of someone else. In the past all these powers were exercised by the King absolutely and

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no consultation was necessary; they all were prerogatives of the monarch. However, with the increase of the power of the parliament and the cabinet these royal prerogatives are either abolished or have been limited by convention. In most of the cases of exercising these powers the King has to consult either the cabinet, Prime Minister or the Lord Chancellor. For example, in theory the King can veto a bill but in reality he cannot exercise that veto power because his veto power is abolished by convention since 1707. Professor Ivor Jennings has described this convention in the following words:

> "In the last resort the King has no option. If the constitutional doctrines of ministerial responsibility mean anything at all, the King would have to sign his death-warrant, if it was presented to him for signature by a minister commanding a majority in Parliament. If there is any tampering with this fundamental principle, the end of the monarchy is in sight" (*Cabinet Government*, 388).

Thus the institutional king is only a sort of fiction standing back of the actual supreme executive authority embodied in a complicated association of monarch, ministers and parliament. This is why Sidney Low has described the monarch as "a convenient working hypothesis" (Zink, 30). Likewise, Lord Esher has described it as "a magnificent cipher". Thus goes the saying that "the king reigns but does not govern". The king is the titular head and the real power is exercised by the cabinet. Though all functions are carried out by the name of the king, the king himself is not responsible for anything; it is the ministers who are responsible for every state functions.

Three Rights of the Monarch

(Right to be consulted, to encourage and to warn)

The primary duties and powers of the king have been discussed above. Among those powers the most important one is the appointment of the Prime Minister and other ministers with consultation of the Prime Minister. After the discharge of these primary functions, i.e. after the formation of the cabinet the relationship between the cabinet and the king is determined by three rights of the king as mentioned above. To put it more simple or to avoid confusion, the functions, powers and duties of the monarch may be divided into two broad categories: (1) Formal rights or functions;

and (2) Informal rights or functions. All the formal rights have been discussed in the preceding pages. The subject matter of the present heading is the discussion over three informal rights of the monarch which have been first identified by Walter Bagehot. He says that the sovereign under the British constitutional monarchy three rights- the right to be consulted, the right to encourage and the right to warn (Bagehot, 43).

According to a settled convention when the parliament is in session, the Prime Minister meets the monarch every Tuesday evening before the session of the day starts. The purpose of this meeting is to inform the monarch about different important policy and other matters in the parliament. Not only that, the monarch has by since 1835 right to be consulted on every major changes of policy before it is publicly announced (Jennings, *Cabinet Government*, 364).

The relationship between the monarch and the cabinet is very close. She has the right to be informed of the matters to be discussed or has been discussed in the cabinet. The task of informing the monarch is not left to the personal initiative of the appropriate minister or the Prime Minister. The cabinet agenda and papers are forwarded to the monarch by the appropriate official in the normal course of business. She receives copies of all important Foreign Office telegrams and despatches and can draw the attention of the Foreign Secretary or the Prime Minister to anything in them which she dislikes or about which she is doubtful. Anything which goes to the cabinet is reported to the monareh both before and afterwards. The monarch may ask for information on any items. If she desires, she may have even an informal meeting with a minister or the Prime Minister. While exercising this right to be consulted the monarch may exercise her opportunity of expressing views and, if necessary, of trying to convince the cabinet that the policy is wrong and thus she can warn the government. She is entitled to put his own views before the government and to ask the government to weigh them thoroughly. However, if ministers insist, she must give way. Likewise, when she discovers that the cabinet has taken a good decision, it is her duty to praise and encourage. This is because the monarch always expects well being of her subjects.

Though the monarch has three rights as mentioned just now, these rights are not at all absolute and at the end of the day the monarch has to give way to the decision of the cabinet. Even if the cabinet does not take her advice or does not pay a heed to her warning, still she has no right to go against the decision of the cabinet. In this regard Jennings says that while the Queen has in normal circumstances 'the right to be consulted, the right to encourage, the right to warn', she must, in the last resort give way to the advice of the cabinet' (*Cabinet Government*, 394).

However, these three rights of the monarch have great constitutional significance. First, the monarch is not a politician; she is not controlled by politicians; she is above the politics. As a result her views and opinion are impartial and above political controversy. As Lord Morrison says that the strength of the British Monarchy, particularly in the present century during which respect for it has grown and its popularity increased, rests upon the general acceptance of its impartiality (*Government and Parliament*, 99). Second, while Prime Ministers and ministers change but the monarch goes on until she dies. Cabinet business is thus continuous for her and a change of government is merely a change of personnel (Jennings, *Cabinet Government*, 353). This is why the monarch is regarded as the non-political store of political experience. And this impartial knowledge may act as a guide and help for the future governments. Lord Morrison says that the British sovereign, whilst divorced from party politics, acquires over the years as a result of intimate contact with the governments of varying parties and, indeed, with leading personalities in all parties, a rich experience of public affairs which in itself is an advantageous (*Government and Parliament*, 102).

CHAPTER III

THE ROYAL PREROGATIVES

It has already been mentioned that the sources of the British monarch are two: royal prerogatives and statutory laws. The subject matter of this chapter will be the royal prerogatives.

Royal prerogatives are those attributes of the Crown which have never been conferred by the parliamentary enactments but have grown out of common law powers, privileges and immunities of the monarch and which still survive. Blackstone says that royal prerogatives are that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course. Dicey says that the 'prerogatives appear to be both historically and as a matter of actual fact nothing else than the residue of discretionary powers and arbitrary power which at any time is legally left in the hands of the Crown' (Dicey, 424). This definition of Dicey has been recognised by courts in various cases ((*Attorney-General v De. Keyser's Royal Hotel Ltd* (1920), *Burma Oil Co. v Lord Advocate* (1965)).

According to Hood and Phillips, royal prerogatives is not any technical term; It is sometimes used to cover all the powers of the Sovereign, or at least those which the Sovereign does not share with is subjects (*Constitutional and Administrative Law*, 304).

Royal prerogatives are certainly essential feature of the British constitution. This is because some important parts of state functions and governance take place under these prerogatives. Though the use of these prerogatives are strictly limited by conventions, they provide a working balance in state functionaries.

Historical Evolution of Royal Prerogatives

The royal prerogatives originated in the special rights and powers available to the monarch under the common law. Historical development of royal prerogatives is very much clear in the definition of Dicey when he sys that prerogatives are the residue of discretionary and arbitrary power of the monarch. In reality prerogatives are

nothing but the common law arbitrary power of the ancient king. Mediaeval legal theory did not regard the Crown as the source of the law or as above the law, but did confer special rights on the monarch. Some of these were based upon the position of the monarch as chief landowner within the feudal system. Others derived from the responsibility of the monarch to keep the peace and defend the realm. This may have corresponded to the distinction drawn in seventeenth century cases between the 'ordinary' and the 'absolute' prerogatives, the latter being discretionary powers vested in the king and arguably beyond the reach of the courts (*Bates Case* (1606) 2 St. Tr. 389)).

Historically all prerogatives included all the absolute powers of the despotic monarch. An early King had three main functions: he was a figure of sacred significance; he was a warlord; and he was a law giver (Harvey, 201). Gradually, many of these functions of the King fell on the Parliament and the common law courts, only executive functions remaining with the King. With the rise of the Great Council and Parliament limitations began to be imposed on the prerogatives of the King. The Magna Carta of 1215 put limitations on the prerogatives of the monarch. During the middle of fifteenth century the Great Council was extended to two Houses: House of Commons and House of Lords and with this development royal prerogatives were more circumscribed. The period of the Stuarts marks the era of clash between the parliament and the monarchy with regard to the whimsical exercise of the royal prerogatives by the Kings. The Stuarts attempted to take the royal prerogatives further and to impose taxes and override the ordinary law by virtue of the prerogative alone. King Charles I by the power of his prerogative dissolved the parliament and began to administer the country without parliament for eleven years. Unable to meet the war finance he was compelled to summon the parliament to raise money. When parliament was summoned again in 1628, it presented the famous Petition of Rights to the King setting the ancient liberties of the people and denouncing the royal abuse of power. The king granted the Petition finding no other way to get out of the crisis. However, subsequently King Charles I began to ignore the provisions of the Petition of Rights and resorted to abuse of power of the prerogatives. This resulted in clash between the king and parliament and the parliament executed King Charles I. Subsequently

conflict arose between King James II and the parliament and this conflict resulted in the glorious revolution of 1688 with the leadership of Oliver Cromwell. King James II was removed from the throne and the "convention parliament" was convened which made William and Mary on the throne as joint sovereigns on conditions. Then the Bill of Rights was passed which fixed the rules relating to the relationship between the parliament and the King. With this establishment of parliamentary sovereignty in 1688 the royal prerogatives came to be completely limited and controlled by parliament. Thus, by the end of the seventeenth century, statutes came to be the supreme source of law and a statute could take away or amend a prerogative power. Whatever prerogatives are exercised by the king now-a-days are strictly controlled by conventions and there is no scope to abuse their application on behalf of the king. The King can exercise them only on the advice of the cabinet or the Prime Minister. Thus in reality all prerogatives are now exercised by the cabinet or ministers in the name of the King and the cabinet or ministers being directly elected by people it is stated that these prerogatives are now actually prerogatives of the people.

Features of the Prerogatives

Some characteristics of the royal prerogatives are as follows:

(i) These are powers which are inherent in and peculiar to the Crown;

(ii) These powers derive from common law;

(iii) These are recognised rather than created by the common law, for their source is in custom;

(iv) There are a residue, a remnant of what was possessed by medieval Kings and Queens;

(v) Prerogatives consist of legal attributes, not matters merely of practice;

(vi) The majority of the powers are exercised by the executive government in the name of the Crown;

(vii) No Act of Parliament is necessary to confer authority on the exercise of such power;

(viii) The courts will recognise them in appropriate cases that these attributes exist, and, when necessary, enforce them.

Types of Royal Prerogatives

There are differences of opinion as to the classification of prerogatives. However, widely held views are in favour of the following two categories:

(i) Personal Prerogatives; and
(ii) Political Prerogatives.

Personal Prerogatives

Personal prerogatives of the Crown may be of two types: some personal prerogatives are not political but exclusively personal in nature; again, there are some personal prerogatives which are political and governmental. The first category is discussed under this heading and the second category will be discussed later. Thus as a person the Crown exercises some privileges, immunities and property rights which are known as its personal prerogatives. They include the following:

(i) 'King can do no wrong', i.e. no proceedings can be brought against the king as an individual;
(ii) 'The King never dies', i.e. there cannot be any interregnum in the Throne;
(iii) 'The King is never an infant', i.e. whoever sits on the throne must be an adult;
(iv) Personal properties of the King.

Political Prerogatives

These are all the powers which the Crown exercises as the head of the state in consultation with the ministers. They include the Crown's executive, legislative, judicial, ecclesiastical, and relating to conferment of honours etc. These all have been discussed in the preceding chapter (Powers and Functions of the Crown) and there is no point of repeating the same here.

Personal Powers or Prerogatives of Government exercised by the Monarch

Personal prerogatives of the Crown have already been discussed in a heading above. However, all those prerogatives in strict sense are the prerogatives relating to the Crown's personal privileges and immunities. Those are not any prerogatives with regard to political powers or prerogatives. However, apart form those personal privileges there are some political or governmental prerogatives of the Crown which have also been categorised by many experts as personal prerogatives of the Crown[1]. To put simply all the political prerogatives of the Crown may be divided into two categories: first category includes those political prerogatives which the government, i.e. ministers and cabinet exercises on behalf of the Crown; and the second category includes some few of those political prerogatives which the Crown may exercise on its own and without any consultation with anyone. The first category has been discussed in the preceding chapter and the second category will be discussed below.

Thus personal political prerogatives are regarded to be exercised by the Crown on its own; though there are differing opinions, it is still believed by many that some prerogatives can still be exercised by the Crown without consulting anyone. These are following:

(i) Appointment of the Prime Minister;
(ii) Dismissal of a Government;
(iii) Dissolution of Parliament; and
(iv) Refusal of a Dissolution etc.

Appointment of the Prime Minister

In question of appointment of the Prime Minister the following six situations may occur:

(i) When a party wins majority in a general election for the Hose of Commons and the Prime Minister is to be appointed;

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[1] Jennings, Ivor, *Cabinet Government*, P. 394
Alder, John, *Constitutional and Administrative Law*, P. 177 and 186.

(ii) When not a single party wins majority in a general election;
(iii) When the government is defeated on the floor and the Prime Minister resigns;
(iv) When the Prime Minister resigns willingly;
(v) When the Prime Minister dies suddenly and there is no recognised leader of the party; and
(vi) During a national crisis.

First Occasion: In the first occasion mentioned above, there is no scope for discretion on the part of the Crown since she has to appoint the leader of the majority party.

Second Occasion: If a general election fails to produce an overall majority, the King will invite the existing Prime Minister to form Government either from his own party or with the support of other parties. Failing that the King should summon the leader of the next largest party. If that also fails, there is disagreement as to what should happen, and in particular as to whether the monarch has any personal discretion. On one view the Queen should attempt to find someone else capable of commanding a majority, but it is not clear whom if anyone she should consult for advice. If this fails, she should dissolve parliament causing another election. According to another view the Queen should automatically dissolve parliament (Alder, 177).

Third Occasion: In this situation the Queen has no option to exercise any discretion; she should first invite the leader of the Opposition to form Government (Jennings, *Cabinet Government*, 32). However, if the leader of the Opposition is unable or unwilling to form Government, the Queen may consult and appoint anyone she pleases.

Fourth Occasion: The willful resignation of the Prime Minister may be for two reasons: first, on the ground of physical or mental incapacity; second, on the ground of internal dissensions. Whatever the reasons, the Queen may appoint someone as the Prime Minister on her own discretion. In such a situation the Queen may, however, consult the leaving Prime Minister though such consultation is not

mandatory. For instance, in 1839 when Mr. Gladstone resigned Queen Victoria appointed Lord Rose Barry as Prime Minister and she did not consult anyone before this appointment. Likewise, in 1963 when Mr. Harold Macmillan resigned on account of ill health, the outgoing Prime Minister's views were considered to be so important that the Queen traveled to his sick bed to ascertain them. She accepted Mr. Macmillan's advice in sending for Lord Home to form Government (Harvey, 205). In 1957 when Sir Anthony Eden resigned owing to his ill health, the Queen did not at all see or consult Mr. Eden; she rather consulted Churchill and Lord Salisbury and appointed Mr. Macmillan as Prime Minister. However, it was thought that Mr. R. A. Butler was to be the obvious successor for he had been described as Deputy Prime Minister and had taken the chair at meetings of the Cabinet during the absence of the Prime Minister (Morrison, 90). According to Harvey and Bather, neither of the two situations (1894 and 1957) when the Queen acted on her own is likely to occur in the future for both major parties have now adopted a formal procedure for selecting their leader and the Queen would be bound to appoint them (P. 205). On the other hand, professor Hood Phillips, Jennings and Morrison opine that in such a situation the Queen may still act on her own and without consulting anyone. This is because, as they contend, even if a party selects a Deputy Prime Minister before hand, still this office has never been constitutionally recognised by the Sovereign and clearly there is no obligation on her to regard the title conferring in any way the succession[1].

Fifth Occasion: In such a situation also the Queen may act on her own without consulting anyone and as such may invite anyone to form the Government.

Sixth Occasion: In time of National Crisis or political unrest the Queen may apply her discretion to appoint the Prime Minister and in such a situation she is at liberty to consult someone or not. For example, following the economic crisis of 1931 when Mr. Macdonald

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[1] Jennings, *Cabinet Government*, P. 41-51
O' Hood Phillips, *Constitutional and Administrative Law*, 7th ed. P. 321
Morrison, Lord, *Government and Parliament*, 3rd ed. P. 90.

resigned because of want of majority support, the King in consultation with three main party leaders invited Mr. Macdonald to form a coalition national government (Morrison, 91, Jennings, 45-49).

Dismissal of a Government

Generally the Queen may dismiss a Government only after consultation with the cabinet or the Prime Minister. However, some authors hold views that the Queen still has the prerogatives to dismiss a government without consulting anyone[1] though no Government has been dismissed by the Sovereign since 1783 without consulting the Prime Minister (Jennings, *Cabinet Government*, 403, Harvey, 207). According to Harvey and Bather the Queen cannot dismiss a Government on the ground that it has lost its support in the House or that it appears to be out of favour with the majority of the people. She can neither dismiss a Government on the ground that it acted in an unconstitutional manner. This is because the Queen is not in a position to judge whether a particular act of the Government is constitutional or unconstitutional (Harvey, 207). Also because since the Reform Act 1832 the effective political power reposes with the Prime Minister and the Cabinet responsible to parliament and by convention the monarch is now above party politics (Padfield, 111).

However, some experts hold the view that a Sovereign could still invoke the prerogatives to dismiss a Government, which was acting unconstitutionally, for example, by subverting the constitutional basis of the Constitution, by unnecessary or indefinite prolongations of the life of parliament, by gerrymandering of the constituencies in the interests of one party, or by fundamental modifications of the electoral system to the same end (Jennings, *Cabinet Government*, 412).

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[1] Gladstone, Disraeli and Dicey, see Jennings, *Cabinet Government*, p. 406 and 407.

The Dissolution of Parliament

The life of a parliament following a general election is five years. However, the Queen may, on the advice of the Prime Minister, dissolve the parliament any time before the elapse of five years. Jennings says that experience suggests that few parliaments are likely to last much more than four years. Though past Kings had absolute power to dissolve parliament any time they wished, no parliament was dissolved in last 100 years without advice of the cabinet. The question is whether the Queen can dissolve a parliament without consulting anyone. There are differences of opinion on this point. Some experts hold the view that the Queen may dissolve parliament without consulting anyone[1]. On the other hand, experts like Laski, Jennings, Morgan hold the view that constitutionally the Queen cannot dissolve a parliament without the advice of the cabinet; the Queen may dismiss a Government but not the parliament (Jennings, *Cabinet Government*, 416).

Refusal of a Dissolution

The Queen can after consulting the Prime Minister dissolve parliament. However, the question is whether the Queen can refuse to dissolve a parliament which the Prime Minister has advised to dissolve. There is no precedent in last hundred years history of the British Constitution that the Sovereign has rejected advice to dissolve, though there have been examples in other Commonwealth countries. However, still some experts hold the view that the Queen may in some extreme situations refuse a dissolution. For instance, the Queen may refuse a dissolution if the Prime Minister is acting clearly unconstitutionally, for example, if a Prime Minster whose party lost a general election immediately requested a second dissolution or where a Prime Minister falls personally foul of his party. Harvey and Bather (208) points out three conditions the fulfillment of which may entitle the Sovereign to refuse a dissolution:

(i) the existing parliament is vital, viable and capable of doing its job;

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[1] Keith, Anson, Dicey, see Jennigns, *Cabinet Government*, pp. 415-416

(ii) a general election would be detrimental to the national economy;

(iii) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.

Control over Royal Prerogatives

Prerogatives have their history in arbitrary and discretionary powers of the Crown. Once upon a time Kings exercised these powers in an uncontrolled arbitrary way but after revolution in 1688 the absolute monarchy gradually turned into constitutional monarchy, parliament and the courts began to exercise control over arbitrary exercise of royal prerogatives. Though the Revolution of 1688 left many important prerogatives in the hands of the Crown, it opened up two clear avenues of control in case of further abuse. In conformity with the principle of supremacy of parliament, there was the threat in the background of a statute, to abolish or regular the exercise of prerogative powers. Moreover, in conformity with the rule of law, there was the subjection of executive power to what was accepted as law by the courts. Apart from this control by courts and parliament there is another means of control which is conventional limitations.

A. Conventional Limitation of Royal Prerogatives:

It was Bagehot who first saw the change that most of the prerogatives of the government, which in the seventeenth century had been in the hands of the monarch, were being exercised by or in accordance with the advice of the leaders of the majority in parliament[1]. The process of transformation happened through the operation of constitutional conventions. The greater dependence of the monarch upon parliament; continuing growth of the House of Commons; the beginning of the party system; the practice of holding of cabinet meetings after 1717 rarely attended by the monarch; emergence of the office of the Prime Minister; development of individual and collective responsibility of ministers- all these

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[1] Bagehot, Walter, *The English Constitution* (1867), See also, Munro, *Studies in Constitutional Law*, 267.

happened in fits and starts shaped the today's limited conventional exercise of royal prerogatives by the government on behalf of the Crown. As to the largest class of prerogatives, the monarch today is little more than a cipher (Munro, 268). Some prerogatives have gone out of the Monarch's hand altogether, e.g. the court's power to make an infant a word of court. Most of the remaining prerogatives are exercised upon the advice of ministers and generally through ministers. There are at most a few prerogatives where the monarch's personal discretion remains important. These are the situations where the normal convention of acting on ministerial advice does not govern or may be set aside. These have just been mentioned above. Thus as far as largest number of prerogatives are concerned with regard to day to day administration of the country, the monarch has retained only, as mentioned by Bagehot, 'the right to be consulted, right to encourage and right to warn'.[1] And conceivably this may occasionally be significant, depending on such factors as the personality of the monarch and the receptiveness of the ministers (Munro, 269).

B. Statutory Control over the Prerogatives:

With the establishment of parliamentary supremacy from 1688 onwards prerogative powers could now undeniably be controlled, or even abolished by parliamentary enactments. The Bill of Rights itself was such an enactment. It abolished some prerogatives and regulated others. There is no doubt that parliament can expressly abolish or restrict prerogative. For example, with the passing of the Crown Proceedings Act 1947 the Crown's immunity in tort and contracts was taken away.

To the extent that a prerogative power is inconsistent with statutory powers, the former is abrogated by necessary implication. This was held in *De Keyser's Royal Hotel* [1920]AC 508 case. Likewise, it was held in *Ex p Fire Brigade* (*R v Secretary of State for the Home Department, Ex p Fire Brigades Union,* [1995] 2 AC 513) that the executive cannot exercise the prerogative power in a way which would derogate from the due fulfillment of a statutory duty. It

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[1] *The English Constitution* (1963 ed with Introduction by Richard Crossman) p. 111

was also held in *Ex p Northumbria Police Authority* (*R v Secretary of State for the Home Department, Ex p Northumbria Police Authority,* [1989] QB 26, [1988] 1 All ER 556) that statutory powers and prerogatives may co-exist without any inconsistency.

Finally parliament may allow a particular prerogative to survive; it may prescribe the way how a particular prerogative is to be exercised etc.

C. Parliamentary Scrutiny over Prerogatives:

Prerogatives which have been allowed to survive have passed to ministerial hands. After that happened, their employment was subject to parliamentary scrutiny, for the exercise of these powers by ministers could give rise to question and debate in parliament as part of the general responsibility of government to parliament. However, the practical problem is that it is of the essence of the prerogative that its exercise needs no parliamentary authority. In practice, the supervision of prerogative powers seems to be attended by difficulty. The very nature of these powers makes them less readily subject to challenge. Questions cannot be asked which bring the name of the Sovereign or the influence of the Crown before parliament. The advice given to the Sovereign about some wider matter has been ruled out of bounds. Apart from the subjects of specific rulings, more generally ministers may simply refuse to answer questions if there are reasons of national security, confidentiality, foreign relations, public policy etc. Exercise of prerogative powers figure prominently in the 'no-go' areas. The picture is similar with regard to the parliamentary Ombudsman as well who is barred from investigating a large number of listed matters. Thus the exercise of prerogative powers is imperfectly subject to parliament control.

D. Prerogatives and the Courts:

In following two ways the courts exercise control over prerogatives.

a. Determination of the Existence of a Prerogative Power:

(i) The courts have long asserted that it is for them to determine whether a particular prerogative power actually

exists and whether the decision taken falls within its scope (*Case of Proclamations* (1611) 12 Co Rep 74));

(ii) The court will determine the present status of a particular prerogative; it will see whether a prerogative has been vanished as a result of long time non-use etc (*Mc Kendrick* v *Sinclair* [1972] S.L.T. (HL) 110);

(iii) Since prerogatives are creatures of common law, the courts will not allow any prerogative which is not recognised by common law; nor will it allow new prerogatives to be created by the executive (*BBC v Johns* [1956] Ch. 32);

(iv) In *Prohibitions Del Roy* ((1607) 12 Co. Rep. 63) it was held that judicial prerogatives are no longer prerogatives of the Crown; they have been turned into judges' prerogatives.

b. Judicial Review of Prerogatives:

The traditional role of courts over prerogatives was that they could determine the existence of a particular prerogative but they lacked the jurisdiction to review the manner of exercise of prerogative powers, or the adequacy of the grounds upon which they had been exercised. However, in the later part of the last century the courts undertook the role of judicial review to determine the extent and manner of the exercise of the royal prerogatives.

(i) Courts have been prepared to allow a recognised prerogative to broaden and in adapting itself to new situations (*Malone v Metropolitan Police Commissioner* [1979] Ch. 344);

(ii) Whether an order given in exercise of a prerogative is legal or not is to be determined by the courts. It was held in GCHQ (*The Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) case that

reviewability depends not on the source of executive power but on its subject-matter. In this case it was also held that a number of prerogative powers which, by virtue of their nature and subject matter, were not amenable to the judicial process e.g. treaty making, disposal of armed forces, prerogative of mercy, dissolution of parliament etc;

(iii) Notwithstanding excluded categories in *GCHQ* case, in a number of cases since *GCHQ* the courts have begun to whittle away those excluded categories suggesting a readiness in principle to review all prerogatives other than those which relate to matters at the heart of the political process such as treaty making, deployment of armed forces, appointment and dismissal of ministers, matters of foreign policy etc. In *Exp Rees-Mogg* (1994) (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457) it was held that prerogative of mercy should be subject to judicial review (Munro, 284);

(iv) A more generalised attack on the scope of the excluded categories was made in *Exp Smith* (1996) (*R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257) where it was held that even government policy in relation to armed forces is susceptible to judicial review.

It may, therefore, be concluded that a general move to bring the exercise of the prerogative within the remit of judicial review and then gradually extend the remit to cover areas previously thought to be immune can be discerned. While a number of important areas remain largely immune from review, overall, there has been a significant extension of the scope of legal accountability of the executive and hence a restriction on governmental arbitrary action. Thus the courts' willingness to assume a greater role in the control of governmental action under prerogative is understandable.

Impact of the Human Rights Act 1998 over Prerogatives

Section 6 of the Human Rights Act 1998 states that "it is unlawful for a public authority to act in a way which is incompatible with a convention rights." Thus as with other areas of judicial review, the Act will widen greatly the grounds of review which the courts may consider; it will also allow the courts to look much more directly at the impact on protected rights of a given decision than at present.

Furthermore, it should be noted that the Human Rights Act specifically protects acts of the prerogative from being annulled by the courts where they are expressed as Orders in Council. This is because such Orders are included within the definition of 'primary legislation' (S. 21 (1)) which, by virtue of 6 3 (2)(b) and (6) may not be struck down by the courts if found to be incompatible with Convention rights.

Abolition or Reform of Prerogatives?

The fact is that there are both deficiencies in political accountability and limits to the courts willingness and capability to intervene. This is why it is sometimes said that "prerogative is a paradox in a modern domestic state" and legislation to either abolish or reform them is a must.

However, most of the scholars are on the opposite view. Reforms of the prerogative through legislative change is gradually coming about. Sometimes the ordinary course of law reform has resulted in legislation which incidentally pushes the prerogatives to the background, e.g. the Treasure Act 1996 abolishes the rights of treasure trove in English law, Wild Creatures and Forests Laws Act 1971 etc., Security Service Act 1989, Intelligence Service Act 1994- all these altered or rationalised prerogative powers.

The political impetus of trying to exercise some control on the executive has caused parliament to seek to limit the Crown's treaty making power to some degree. Since British involvement in the European Commission is based on the European Communities Act 1972, it is not quite accurate to say that membership has transferred

law-making to the executive in a manner which uses the prerogatives on a scale not seen since 1649. Because, the approval of each House is needed before a new treaty becomes enforceable as a Community Treaty under the 1977 Act (s 1 (3)). These piecemeal abolition and reforms should be recognised and welcomed.

There has, however, been move for abolition of royal prerogatives and adoption of a written constitution as a sole source of all executive power. However, abolition will mean the loss of balance and flexibility which are provided by prerogatives in state functions. Exercise of prerogative powers in forming national government, coalition government, sudden dissolution of parliament if needed etc. are more flexibility provided by prerogatives than laws. Like convention prerogatives provide easy ways to adapt constitution with changing of time and society.

There is also no immediate proposal of the adoption of written constitution for the UK and continuance of the more gradualist path to reform seems more likely.

It is also argued that there would be several advantages in replacing the existing prerogatives with statutory powers. The purposes and extent of the power could be clearly set out whereas much of prerogative law is obscure and derived from ancient precedents. Supervision of the exercise of powers could be more efficiently carried out in parliament and by courts. However, notwithstanding these arguments it is contended as well that British constitution will be in favour of royal prerogatives because of constitutional significance and tradition which are hidden in the term.

Sample Questions with Suggested Skeleton Solutions

1. Consider the view that royal prerogatives is insufficiently controlled by either Parliament or judiciary (University of London 2002).

   Suggested Skeleton for Solution: Here you start your answer with the definition of prerogatives with one or two illustrations. (See page 55 for definition; summoning parliament, forming government, dissolving parliament, government, appointment of the PM etc all are prerogatives).

   - Discuss the controls available for prerogatives; both judicial and parliamentary (see page 64, 66-68);
   - Remember to mention relevant cases while discussing both the types of controls;
   - Evaluate how strong are those control (see 'abolition or reform' part at page 69-70);
   - Any reform needed for prerogatives? (see 'abolition or reform' part at page 69-70).

2. Is the royal prerogatives an essential attribute of the British Constitution? Illustrating your answer with case law, discuss the extent to which the courts are willing and able to control the exercise of prerogative powers. (UL, 1999).

   Suggested Skeleton for Solution: Here you start your answer with the definition of prerogatives with one or two illustrations.

   - Discuss the essential features of the prerogatives (see page 57);
   - Discuss different available control for prerogatives (see pages 64, 66-68);
   - Discuss in detail the judicial control (see pages 66-68);
   - Remember to mention relevant cases while discussing judicial controls (see pages 66-68);

3. Illustrating your answer with case law, critically consider the arguments for and against placing the royal prerogative under the statutory authority. (UL, 2000).

Suggested Skeleton for Solution: Here you start your answer with the definition of prerogatives with one or two illustrations.

- Discuss the statutory and judicial control not in details but in short notes with relevant cases (see pages 65, 66-68);
- Discuss that it is because of deficiency in control that calls for prerogatives on statutory footing (see pages 69-70);
- Discuss in detail the arguments against codification (see pages 69-70);

CHAPTER IV

CONSTITUTIONAL CONVENTIONS

The sources of the British Constitution are mainly two: constitutional laws and constitutional conventions. Conventions which are regarded as inseparable part of the administration have occupied the largest part of the British Constitution. Historically all the powers of the executive government has effectively and gradually been transferred from the sovereign to the ministers responsible to the parliament. This has been achieved largely by the growth of conventional limitations on the royal prerogatives. (Munro, 56). For example, the whole system of Cabinet government rests upon rules and practices which have no legal force. The office of the Prime Minister is a creation of convention. There is no law which requires that a Prime Minister be appointed or specifies how one is to be chosen. It is a convention that the Sovereign must invite someone to be the Prime Minster and head the Government. By convention the Sovereign must choose as Prime Minister that person who appears best able to command the support of a stable majority in the House of Commons. Ministerial responsibility is another example of convention. The concept involves a group of conventional rules regulating the relationship of government to parliament.

A.V. Dicey was the first to use the term 'convention' in his book 'the Study of the Law of the Constitution'; he has termed them as 'the conventions of the Constitution'. Before Dicey John Stuart Mill in 1865 termed them as 'the unwritten maxims of the constitution[1]'. Later Professor Anson termed them as 'customs of the constitution[2]'. However, the term used by Dicey 'convention' has been recognised by all quarters in constitutional law.

Dicey defines convention as a set of rules consisting of understandings, habits, practices which though they may regulate the

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[1] Representative Government, p. 4, See Jennings, *The Law and the Constitution*, p. 81.

[2] Anson, *Law and Custom of the Constitution*, 1908

conduct of the several members of the sovereign powers are not in reality laws at all since they are not enforced by the courts (P.24).

Professor Hood Phillips defines convention as rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the House of Parliament (P. 113).

Nature of Constitutional Conventions

First, they all are political practice relating to the administration of the state[1]. Since they are all political practice, they are not enforceable and as such they are different from mere pracice or usage, non-political rules or judicial rules or precedent. Any rules or pracice which are not connected to the administration of the Government can never be said to be constitutional convention.

Second, constitutional conventions are obligatory in nature. Though these are not law in strict sense of the term, the perosns upon whom they are imposed have to abide by these as like as law.

Third, conventions have developed from long time constitutional practices. Though it is not possible to trace the time or date from which these practices began to grow as constitutional convention, the widely held view is that they began to grow since 1688[2]. For example, in the past the King used to preside over the cabinet meeting. However, in 1714 King George due to his lack of knowledge in English did not attend any meetings of the cabinet. This practice of not being present in the cabinet meeting was followed by King George II and III and was not breached by any subsequent King. As a result it is now a settled constitutional convention that King or Queen will not attend a cabinet meeting.

Fourth, conventions are not law in true sense of the term and as such they are not enforceable in a court of law. Thus if any person

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[1] Hood Phillips, 113

[2] Ibid, 120

upon whom they are imposed violate any of the convention, there will be no penalty for the breach.

To be mentioned here that Professor Ivor Jennings has identified two general characteristics of the conventions: (i) they provide the manner in which the constitution works in practice; and (ii) these conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time (*The Law and the Constitution*, 83). However, a closer investigation will reveal the idea that the two characteristics identified by Jennings are not in true sense characteristics of the conventions; they are in essence two functions of the conventions.

Functions or Importance of Conventions

The importance and significance of conventions are easily understandable:

1. **Conventions are the integral part of the British Constitution**

Conventions are regarded as the celulus of the British Constitutional system. Ogg and Zink opine that Britain is called the historical land of conventions and without a proper understanding of these conventions no one can understand the British system of government. Professor Anson says that without these conventions the British system of Government would not only be unknown but also be unworkable. The reasons are as below:

First, the British cabinet is the real head of the government power. However, all rules relating to this cabinet, i.e., the history, development and working of the cabinet system etc all are based on convention and nothing of this can be found in the law. Likewise, the power and functions of the Prime Minister, ministerial responsibility etc are all based and founded on conventions and not law.

Second, though there is parliamentary government in Britain, in law all powers are vested in the King or Queen. However, the exercise of these powers and prerogatives of the King are largely based on and controlled by conventions. Conventions had to come into being to

ensure that powers and prerogatives of the Queen are exercised in accordance with the legal supremacy of parliament. Hence, today, the Sovereign's assent to legislation is purely formal; parliament must be convened at least once a year; ministers must be chosen from the party supported by the House of Commons, and so on (Harvey and Bather, 484).

Third, while much of the procedure of the two Houses is embodied in standing orders and is, therefore, part of the law and custom of Parliament, many important practices regularly observed rest merely on conventions. Examples are: agreements on business through the usual channels; pairing; the understanding that the government will always find time for a vote of censure; the occupation of the front benches by leading members; and in the Lords, the non-participation of lay peers in judicial proceedings.

Fourth, Commonwealth relations have been moulded by conventions.

It is because of these functions of conventions of controlling the main governmental powers, professor Jennings and Harvey and Bather comment that these conventions fulfill an essential role in the working of the British Constitution.

2. **Conventions keep the Constitution adaptable and flexible**

Conventions being more flexible in nature compared to law, they are a means of bringing about constitutional development without formal changes in the law (Hood Phillips, 119). For example, conventions often regulate the exercise of a discretionary power conferred on the Crown by the law. Likewise, while it is recognised rule that certain ministerial posts should be filled from the House of Commons, there is sufficient elasticity to allow the Prime Minister to depart from it when circumstances require. Mr. Harold MacMillan found it convenient to appoint Lord Home as Foreign Secretary in 1960 although many had assumed that such a key post would not again be held by a peer. Above all conventions are the means by which the constitution is made adaptable. As new needs arise, so old conventions can easily be modified or fresh ones developed. Some

may even be dropped. The Home Secretary did not attend the birth of Prince Charles in 1948, thereby ending a practice first established in Charles II's reign. On the other hand, it can now be recognised that 'interested bodies' are consulted over legislation which concerns them. In extreme cases, conventions may be given the force of law, as, for instance, when the Parliament Act formalised the power of the Lords with regard to money bills. The part played by conventions is summed up by Sir Ivor Jennings: "They provide the flesh which clothes the dry bones of law; they make legal constitution work; they keep it in touch with the growth of ideas" (*The Law and the Constitution*). To be mentioned here that professor Jennings has mentioned two important functions of conventions. In the first place, it is at these conventions that we must look if we would discover the manner in which the constitution works in practice. In the second place, these conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time (*The Law and the Constitution*, 82-83).

Purposes of the Conventions

Constitutional conventions serve two types of purposes in the working of the British Constitution. First, as an essential part of the constitution they have some primary purposes and second, they have some ultimate or philosophical purposes.

Primary Purpose: As an essential component of the constitution, the primary objectives of conventions are to make the legal constitution work by providing means for co-operation in the practice of government. In particular the Cabinet system co-ordinates the work of the various government departments among themselves, and promotes co-operation between the departments and parliament and between the Ministry and the Queen. Similarly, the conventions governing inter-Commonwealth relations enable the members of the Commonwealth, although independent, to co-operate to a great extent in their defence and foreign policy (Hood Phillips, 120). Another primary purpose of convention is to make the constitution adaptable with the changing circumstances, social needs and political ideas. In this regard Professor Jennings says that conventions serve two

objectives. In the first place, they enable a rigid legal framework to be kept up with changing social needs and changing political ideas. In the second place, they enable the men who govern to work the machinery of the power *(The Law and the Constitution*, 101-102).

Philosophical Purpose: The ultimate object of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors. The reason why the Ministers must be chosen from the party or parties enjoying a majority in the Commons reflect the views of the majority of the electors; a Ministry so selected will be most likely to give effect to the will of the nation as a whole. And this is also the reasons why the Queen should act on the advice of Ministers; why Ministers should resign if they lose the confidence of Commons; and why the House of Commons should have a political ascendancy over the House of Lords, especially in matters of finance (Hood Phillips, 119).

Why are the Conventions obeyed? Sanctions behind the Conventions

The conventions are not laws and the court cannot enforce them in case of their breach. However, these conventions have been obeyed for centuries with the same force and sanctity of law though they themselves are not laws. What is it that induces obedience to these extra-legal or conventional rules? There are, however, differences of opinion as to the answer to this question.

Views of Professor Dicey: Professor Dicey refers to some past available views that obedience to the conventions of the constitution is ultimately enforced by the fear of impeachment (Dicey, 442). Another view as mentioned by Dicey is that obedience to the conventional precepts of the constitution is ensured by the force of public opinion (Dicey, 444). However, Dicey disagreeing with both of the views came to his own conclusion that the sanction which constrains the boldest political adventurer to obey the conventions is the fact that the breach of convention would produce ultimately a breach of law. Since the courts enforced the law they would, indirectly, enforce the conventions. He showed that if the convention

providing for the yearly meeting of parliament were not obeyed, the Army and Air Force (Annual) Act would not be passed and as a result it would become illegal to maintain army and air force. Likewise, if no session of parliament is called annually, the financial legislation of the year would not be passed and as a result taxation and some items of government expenditure would become illegal (Dicey, 445-449).

Views of Lowell and Jennings: That the breach of conventions would amount to the breach of law is not maintained by some experts like Lowell and Jennings. Their view is that since parliament is supreme, it may make permanent laws regarding the finance and army etc and if that is done, it would not be necessary to summon parliament every year. Again, even if the parliament does not sanction money for the government expenditure, the Crown has powers by permanent legislation to raise money by way of loan as indeed it did when the House of Lords refused to pass Mr. Lloyd George's budget in 1909. Further, there are some conventions the breach of which will not amount to breach of law. For instance, no breach of law would follow if ten lay peers decided to sit with the law lords while they were deciding an appeal from the Court of Appeal. Likewise, no breach of law would follow if the Speaker does not resign from the membership of his party after his election to that office; or if the Government refused to recognise Her Magesty's Opposition; or if the well developed conventions relating to ministerial responsibilities are not obeyed. Similarly, there is no breach of law if the Prime Minister is taken from the House of Lords. In 1932 the members of the National Government, in violation of settled convention of collective responsibility, agreed to differ, so that some spoke in favour of the majority decision of the Cabinet and some against it; some voted for the Government and other against it, though they were members of it.

According to Professor Jennings conventions like many other constitutional principles are obeyed because they rest essentially upon general acquiescence (*The Law and the Constitution*, 117). Jennings also says that conventions are obeyed because of their political philosophy, i.e. they are generally recognised to be sensible adaptations of existing conventional rules to meet changes or changing political conditions (*The Cabinet Government*, 8). Professor

De Smith also holds the same view (*Constitutional and Administrative Law*, 39).

According to Lowell, conventions are supported by something more than the realisation that their violation may mean the violation of some law. Unlike the laws of the constitution, conventions go to constitute a moral code for the guidance of public men in the field of practical politics. "In the main," he says, "the conventions are observed because, they are a code of honour; they are, as it were, the rules of the game" (*Government of England*, Vol-I P. 12).

Harvey and Bather, Hood Phillips and Ogg hold the view that the question why conventions are observed is a political or a psychological question and this lies in the public opinion which expects politicians to behave in the true spirit of the constitution[1]. The conventions are really obeyed because of the political difficulties which follow if they are violated. If one is at all violated, as it was done by the House of Lords in 1909, by rejecting the famous Lloyd George budget, there is an immediate demand to have this convention enacted into law. As a result of this rejection the parliament passed the Parliament Act 1911 which made it impossible for the Lords to delay Money Bills for more than one month; the same Act also limited the House of Lords legislative power.

Differences between Convention and Law

Though both law and conventions are integral part of the British Constitution, there are some important differences between the two.

First, law is enforceable in a court of law whereas court cannot enforce a convention. The court can impose penalties for breach of law whereas it cannot impose the same for breach of a convention.

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[1] O' Hood Phillips, *ibid*, p. 123
Ogg, F.A. *Modern Foreign Governments* (1953), P. 31
Harvey and Bather, *Ibid*, P. 485

Second, there is a definite source of law; either parliament or a subordinate authority makes law whereas there is no definite legal source of conventions. Conventions are regarded as extra-legal elements of the British constitutional system. They are the result of a long time political practice but it is never quite certain at what point practice becomes or cease to be convention (Jennings, *The Law and the Constitution*, 133).

Third, the amendment of law requires a definite procedure and as such it needs time and the process is formal whereas no procedure is required for change of a convention and as such if any change is required, that would be informal. Conventions grow out of political practice and can be changed out of another political necessity. Thus conventions allow more flexibility than law. For example, while it is a recognised rule that certain ministerial posts should be filled from the House of Commons, there is sufficient elasticity to allow the Prime Minister to depart from it when circumstances require. Mr. Harold Macmillan found it convenient to appoint Lord Home as Foreign Secretary in 1960 although many had assumed that such a key post would not again be held by a peer. Likewise, in 1932 the members of the National Government, in violation of settled convention of collective responsibility, agreed to differ, so that some spoke in favour of the majority decision of the Cabinet and some against it; some voted for the Government and other against it, though they were members of it. This breach was allowed out of a national 'economic crisis' and once the crisis was tackled, the cabinet went back to the convention of collective responsibility.

Fourth, laws are obeyed because of coercive force of the state whereas conventions are obeyed because of public opinion.

The Insignificance of the Differences

Though there are some differences between law and convention as mentioned above, most of the differences are of less significance. Dicey has emphasised the difference between the two on point of their enforcement. However, modern experts like Jennings, Harvey and Bather, De Smith hold the view that the difference between law and

conventions is a matter of form rather than substance. As far as substance is concerned, there is no significant differences between the two. John Alder says that from the point of view of the lawyer working in the courts the distinction between the two is of course vital. However, from the point of view of the political scientist bent on understanding how the constitution works, the distinctions between law and convention may be less important. Many conventions are as important as law and they are often inextricably interrelated (*Constitutional and Administrative Law*, 29).

According to professor Jennings there is no distinction of substance between law and convention. The formal distinction drawn by Dicey that "law is enforceable whereas conventions are not enforceable in court of law" has been countered by Jennings to the effect that though courts can enforce law, there are many laws which court cannot enforce. For instance, no penalty can be imposed against the Queen; there are many provisions in the Parliament Act 1911 which are determined by the Speaker of the House of Commons and the court cannot question their validity. Likewise, though conventions are not enforceable, they are as important as laws; they cannot be ignored or violated as and when wished by the politicians. Thus the difference between conventions and law is largely a matter of form rather than substance.

Interrelation between Law and Convention

Law and conventions are closely interlocked. Conventions presuppose law and they do not exist in a legal vacuum (De Smith, 37). Law may exist without support of anything but conventions cannot exist without support of a law. For instance, the Queen has legal right to veto a bill. On the basis of this law emerged a convention that though the Queen has legal right to veto a bill, she would not in practice veto a bill. Likewise, the Queen has legal power to convene or dissolve parliament. To make this law democratic a convention developed that though the Queen has legal right to convene or dissolve parliament, she will not exercise either of these power without the consent of the cabinet or the Prime Minister. Similarly, all conventions relating to the working of the cabinet

presuppose the existence of legal relationship between the Queen and the parliament. The Queen has the legal power to appoint and dismiss cabinet ministers including the Prime Minister. To make this power democratic some conventions developed that the Queen will appoint the leader of the majority party as the Prime Minister; she will appoint other cabinet ministers after consulting the Prime Minister; she will not dismiss any minister or the cabinet without consulting the Prime Minister etc. Thus most of the conventions have grown as a necessary outcome of the arbitrary powers of the monarch and this is why professor Jennings says that the conventions provide the flesh which clothes the dry bones of law and they keep in touch with the growth of ideas (*The Law and the Constitution*, 81-84).

Seen from the other side of the spectra, there are some laws which presuppose the existence of conventions. For instance, Ministers of the Crown Act, 1937, Ministerial and other Salaries Act, 1975, Parliamentary and other Pension and Salaries Act, 1976 have recognised terms like Prime Minister, Leader of the Opposition, Party Wheep etc. These terms and concepts have never been defined or created by any law; they all are the creation of convention.

Again, there are evidences that laws are made on pure basis of conventions. For instance, under the Parliament Act 1911, a money bill passed by the Commons is sent to the Lords. The House of Lords has legal power to reject the bill but as a result of long time non-use of this power by the House of Lords, this power is now lost by convention. However, all on a sudden in 1909 a constitutional crisis was created when the Lords rejected a money bill violating a long-time convention. As a result of this the Parliament Act, 1911 was passed which abolished the Lords power to reject a money bill. Thus a convention was turned into law by the parliament. This is why professor Jennings states that though conventions are built in the first instance on the foundation of law, when once they have been established they tend to form the basis for the law (*The Law and the Constitution*, 84).

Classification of Conventions

Constitutional experts have divided conventions into three categories which are as follows:

A. Conventions relating to the exercise of royal prerogative and the working of the cabinet system: The most important of these are as follows:

(i) The Queen must assent to every bill passed by the Houses of Parliament;

(ii) The Queen must appoint the leader of the party or group commanding a majority of the House of Commons as the Prime Minister and invite him/her to form a Ministry;

(iii) The Queen must appoint as her other Ministers such persons as the Prime Minister advises her to appoint;

(iv) The Queen is bound to exercise legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister;

(v) The cabinet is collectively and ministers are individually responsible to the parliament;

(vi) The government is entitled to continue in office only so long as it enjoys the confidence of a majority in the House of Commons; once it loses confidence it must resign;

(vii) Parliament must be summoned to meet at least once each year;

(viii) The Queen dissolves parliament in accordance with the advice of the Prime Minister; etc.

B. Conventions regulating the relations between the Lords and Commons and proceeding in parliament.

(i) In case of conflict the Lords should ultimately yield to the Commons;

(ii) Proposals involving the expenditure of public money may only be introduced on behalf of the Crown by a Minister in the House of Commons;

(iii) The business of the House of Commons is arranged informally between the Prime Minister and the Leader of the Opposition in consultation with the speaker;

(iv) The majority in Parliament must not stiffle minorities;

(v) The political parties are represented in parliamentary committees in proportion to the number of their adherents in the House;

(vi) Peers who do not hold or have not held high judicial office do not take part when the House of Lords is sitting in its judicial capacity; only the Law Lords will discharge judicial functions.

C. Conventions regulating the relations between the UK and Members of the Commonwealth.

A number of conventions have grown up regulating the relations between the UK and the independent members of the Commonwealth, providing methods of cooperation and communication among its members. However, most of these conventions have been turned into law by the Statute of Westminster 1931. Few of the conventions which were left unaffected by the statute have lost their significance by now because most of the Commonwealth countries are now independent.

Codification of Conventions

As mentioned above there is no difference between law and conventions with regard to their substance. All persons connected with the governmental functions have to abide by conventions as like as law. It is against this background argument is posed that all conventions should rather be transformed into law. Arguments in favour of codification are as follows:

(i) While from the viewpoint of their significance there is no difference between law and conventions, it is better to turn all convention into law. While persons associated with government functions have to abide by conventions as like as laws, there is no significance of keeping

conventions under their present nature; it would be better to codify them.

(ii) Codification would lead to greater certainty and strengthen obligation. This is because they would be precisely formulated and there could be authoritative judicial interpretation of them when necessary.

(iii) When it is important to serve obedience to convention, there is a danger of disobedience since they are unwritten and unenforceable. So there is a strong case for codification.

Consequences of Codification

(i) The most important feature of convention is their flexibility; they are adaptable to changing ideas and circumstances and can bring about constitutional change without the need for formal enactment or repeal of law. If conventions are codified, this flexibility and adaptability would be lost at the expense of certainty.

(ii) If codified, all conventions will become enforceable law; both parliament and courts will have to employ a substantial part of their time for their interpretation and enforcement; but now they can employ this time in other areas of rule of law.

(iii) Codification will give rise to problem of definition of a particular convention.

(iv) If conventions are codified, they would become law and law must be followed in every case. But conventions allow discretion and can be waived if particular circumstances demand. This made 'agreement to differ' easy and possible in 1931 with regard to formation of national coalition government.

(v) Unlike law, conventions concern matters of political nature and their non-legal nature helps to keep the judiciary out of politics and controversy. Once conventions are codified, this convenience will be lost.

(vi) In Australia some conventions have been codified into the constitution. However, evidence shows that though codification seems to clarify things, it arguably raises more questions than in answers as the nature, status and exclusivity of the declared rules remains unclear. In rather similar view, there seems to be a growing tendency in the UK to put rules, understanding and instructions together in documents such as the Civil Service Code, Ministerial Code etc. It would be inaccurate to represent these as being entirely composed of conventions but they do include statements of conventions along with other materials.

Will the Conventions be turned into law?

Though there are arguments both for and against codification of conventions, arguments against hold the weight. This is because of the following reasons:

First, British people are tradition-loving. Like prerogatives and monarchy conventions provide a special feature, status and significance under the constitution. It is unlikely that people will accept their radical codification; if changes come, it will come along the road to evolution.

Second, it has strongly been argued that there has occurred no background for turning all convention into law. Conventions are obeyed as like as rules of games with respect. As long as they are obeyed, there is no need for legal codification. Since 1688 no King has shown arbitrary exercise of royal prerogatives and as such there has been no necessity to turn conventions into law. Again, there are instances that when a particular convention was disregarded, it was turned into law. Parliament Act, 1911 provides an example.

Third, even if attempts were made to incorporate all the conventions into legislation or into a constitution, this would not, in the nature of things, prevent the growth of further non-legal practices and rules. In almost every system with written constitution there are some unwritten rules which have developed to keep the constitution up to date with changing circumstances. There is evidence with regard to House of Lords as well because there are exceptions of what the House should or should not do, going beyond the provision of the Parliament Acts 1911-49.

Courts and Conventions

When a set of rules is not legal rules, courts of law will not respond to them as they do in case of legal rules. This is why Dicey said that the 'conventions, understandings, habits or practices.....are not in reality laws at all since they are not enforced by the courts' (Dicey, 24). The evidence of case law seems to vindicate Dicey's view. On rare occasions when courts have been asked to enforce conventional rules, they have refused. In *Adegbenro v Akintola*, the Privy Council held that 'conventions were not legal restrictions which the court of law ....can ...make it his legal duty o observe' ([1963] AC 614 at 630, PC). Same view was taken by the Privy Council in *Madzimbamuto v Lardner-Burke* ([1969] 1 AC 645 at 723). The Crossman Diaries case (*A-G v Jonathan Cape Ltd* [1976] QB 752) provides another instance of court's stand. Richard Crossman, a minister in the Labour governments from 1964 to 1970, had kept a political diary with a view to its publication. After his death in 1974, his literary executors went ahead to publish the diaries. The Attorney-General decided to prevent the publication on the ground that the convention of collective responsibility involved an obligation to preserve cabinet secrecy. However, court held that cabinet proceedings could be protected by the law of confidence, but only for a limited period, and the publication of the diaries ten years after the events had taken place was unobjectionable. These above cases suggest that courts will not provide redress simply because there has been a breach of a conventional rule.

Sample Questions with Suggested Skeleton Solutions:

(1) Consider what would be advantages and consequences of codifying the most important 'constitutional conventions' operating in Britain today. (University of London, 1999).

Suggested Skeleton for Solution: Here you start your answer with the definition of conventions with one or two examples (see first paragraph of page 73).

- Discuss most of the important conventions in Britain (see pages 84-85);
- Discuss their importance that they are the working force of the constitution (pages 75-77);
- Arguments for codification and consequences (write details from pages 87-88);

(2) Consider the theory and practice of Cabinet government in the UK, making reference to the constitutional conventions governing the accountability of the Prime Minister and government ministers collectively to parliament (University of London, 2003).

Suggested Skeleton for Solution: This question calls for discussion over more than one subject: functions of the cabinet and ministerial responsibility.

- Start with the four types of functions and practices of the cabinet (see pages 153-156);
- Discuss on cabinet collective responsibility with particular reference to the Prime Minister's power and influence over this device (see pages 157-159);
- Discuss also collective responsibility with its difficulties and reforms (see pages 173-174).

(3) Define what is meant by the term 'constitutional convention'. How are constitutional conventions enforced? (UL, 1998).

Suggested Skeleton for Solution: Here you start your answer with the definition of conventions with one or two examples (see first paragraph of page 73).

- Discuss that constitutional convention is one of the two sources of the British constitution (see pages 41-42);
- Discuss the characteristics of the conventions (see pages 73-74);
- Discuss the role and functions of conventions (see pages 75-77);
- Discuss that enforcement is not done by the courts but by constitutional practice; they are observed as like as rules of games and sports; if they are not observed in the functioning of the constitutionalism, the working edifice of the constitutional structure of the British government will collapse (write details from pages 78-80);

CHAPTER V

PARLIAMENTARY SUPREMACY AND THE EUROPEAN COMMUNITY

Two types of supremacy are found in the constitutional systems in different countries. One is parliamentary supremacy and the other is constitutional supremacy or judicial supremacy. The term Parliamentary supremacy means that parliament is supreme over the Constitution. It is also called legislative supremacy because the legislature is not a body created by the constitution; neither is the power of the legislature limited by the Constitution; the legislature exercises an unlimited and supreme power in law-making. Such legislative supremacy is possible only where the Constitution is unwritten and flexible.

The doctrine of parliamentary supremacy has historically been accepted as on of the most fundamental principle of the British Constitution. Its status was confirmed by Blackstone in 18th century and by Dicey in 19th century. It is a legal principle expressing the relationship between Parliament and the Constitution. It was Dicey who for the first time discussed details about this doctrine in his book *The Law of the Constitution*. While discussing the principle he says that parliament means the Queen, the House of Commons and the House of Lords; these three bodies acting together may be described as the 'Queen in Parliament' and constitute Parliament. While defining the concept of parliamentary supremacy he states that the principle of parliamentary supremacy means that Parliament has under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament (PP. 39-40). Dicey also says that this doctrine has two aspects: positive aspect and negative aspect which are as follows:

A. Positive Aspect

The positive aspect of the doctrine of parliamentary supremacy is that, as commented by Sir Edward Coke, the power and jurisdiction of

the parliament is so transcendent and absolute that it cannot be confined, either for causes or persons within any bounds. It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations; it can change and create afresh even the constitution of the kingdom and of parliaments themselves; it can do everything that is not naturally impossible; what the British Parliament can do, no authority upon the earth can undo. And this is why this untrammeled power of the British Parliament has been described as the 'omnipotence of parliament'[1]. In this regard De Lolme has summed up that the British Parliament can do everything but make a "woman a man, and a man a woman."[2] Another attribute to the positive aspect of the supremacy of parliament is that no parliament may be bound its predecessor or bind its successor, in other words, the present parliament can abrogate or amend any law passed by any previous parliament; each parliament must enjoy the same unlimited power as any parliament before it; no parliament can enact rules which limit future parliaments. It is because of this power that the parliament can make a previous illegal act legal by giving it retrospective effect; it may, likewise, declare any previous legal act illegal; it may indemnify any person for his misdeeds. This positive aspect of the supremacy may be substantiated from some instances. It was the parliament which, by Act of Settlement 1700, fixed the rule as to succession to the throne; in 1715 the parliament by the Septennial Act extended its life from three years to seven years; again in 1911 it reduced it life to five years; in 1939 on the outbreak of war it extended its life indefinitely.

As to the positive aspect of this supremacy professor Jennings says that parliament can legislate for all persons and all places. If it enacts that smoking in the streets of Paris is an offence, then it is an offence. Naturally, it is an offence by English law and not by French law, and therefore it would be regarded as an offence only by those

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[1] Blackstone's Commentaries, referred to by Dicey, *The Law of the Constitution,* 41-42.

[2] Dicey, *Ibid*, P. 43.

who paid attention to English law (*The Law and the Constitution*, 117).

B. Negative Aspect

(i) There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament or which will be enforced by the courts in contravention of an Act of Parliament (Dicey, 40);

(ii) Neither any courts of the UK nor international courts such as the European Court of Human Rights have the power under English law to declare an Act of Parliament invalid (Alder, 65);

(iii) In the event of a conflict between an Act of Parliament and other laws, the statute, i.e. the Act of Parliament will prevail (Dicey, 65);

(iv) Absence of any legal distinction between constitutional law and other laws (Munro, 132).

Three Traits of Parliamentary Supremacy

Having discussed the two aspects of parliamentary supremacy Dicey has again pointed out three features of parliamentary supremacy (pp. 88-89). These are as follows:

(i) There is no law which parliament cannot change or modify by ordinary law making process;

(ii) There is no distinction between constitutional law and ordinary law; and

(iii) There is no body or authority which can declare the law passed by parliament invalid.

How was the Sovereignty of Parliament established?

Royal prerogatives, limited monarchy and parliamentary supremacy- these three concepts in the British constitutional system have almost the same historical background and development. The seventeenth century clash between the King and Parliament gave way to the victory of the parliament over the King and this supremacy of parliament over the monarchy was complete in eighteenth century.

Three major historical events worked behind the development of the supremacy of the Parliament.

First, the period of the Stuarts marks the era of clash between the parliament and the monarchy with regard to the whimsical exercise of the royal prerogatives by the Kings. The Stuarts attempted to take the royal prerogatives further and to impose taxes and override the ordinary law by virtue of the prerogative alone. King Charles I by the power of his prerogative dissolved the parliament and began to administer the country without parliament for eleven years. Unable to meet the war finance he was compelled to summon the parliament to raise money. When parliament was summoned in 1628, it presented the famous Petition of Rights to the King setting the ancient liberties of the people and denouncing the royal abuse of power. The King granted the Petition finding no other way to get out of the crisis. However, subsequently King Charles I began to ignore the provisions of the Petition of Rights and resorted to abuse of power of the prerogatives. This resulted in clash between the King and parliament and the parliament executed King Charles I in 1649. After this the parliament abolished monarchy and instead established republican system. For eleven years there were no monarchy in Britain. In 1660 it was again this Parliament which reestablished monarchy in Britain and made Charles II in the throne.

Second, subsequently conflict arose between King James II and the parliament and this conflict resulted in the glorious revolution of 1688 with the leadership of Oliver Cromwell. King James II was removed from the throne and the "convention parliament" was convened which made William and Mary on the throne as joint sovereigns on conditions. Then the Bill of Rights of 1689 was passed which fixed the rules relating to the relationship between the parliament and the King. Then in 1701 the Act of Settlement fixed the rules as to the succession to the throne. Thus was established the supremacy of parliament and by the end of the seventeenth century, statutes came to be the supreme source of law and a statute could take away or amend a prerogative power meaning the omnipotence of the parliament.

Third, the last force which worked behind the establishment of the supremacy of parliament was the development of cabinet system. In 1983 when Younger Pitt became the Prime Minister cabinet system was fully developed; appointment and dismissal of ministers came to be exercised by the parliament instead of the King.



Legal and Political Sovereignty

The omnipotence of the British Parliament as propounded by Dicey is a legal and not a political doctrine. However, at one point of discussion Dicey himself has differentiated between the concepts of legal supremacy and political supremacy of parliament (pp. 72-73). Legal supremacy means the power of the parliament's law making unrestricted by any legal limits. On the other hand, political supremacy is associated with a body of the state the will of which is ultimately obeyed by all citizens; and in this sense the electors are politically supreme.



Legal Supremacy: The legal supremacy of parliament means the unrestricted legislative power of the British Parliament. In this sense the British parliament can make whatever laws it pleases. Dicey while discussing the legal supremacy has followed Austin who holds the view that the law making authority in the state has legal supremacy over any other authority. Dicey also refers to Leslie Stephen who states about the legal supremacy that if a legislature decided that "all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal" (Dicey, 81). Speaking in almost similar vein De Lolme says that "the Parliament can do everything but make a make a man and a man a woman" (Dicey, 43). The second aspect of legal supremacy is that parliament is not bound by its predecessor nor can it bind its successors. Another aspect of this legal supremacy is that judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament; and judges will not examine the validity of an Act passed by the parliament; the British Parliament may invalidate any decision of any court. Thus the legal supremacy is retained by the British Parliament and not the people or the any other body. Professor Jennings says that legal supremacy of the parliament means two things. First, it means that parliament can

legally enact legislation dealing with any subject matter whatever. Secondly, it means that parliament can legislate for all persons and all places (*The Law and the Constitution*, 170).

Political Supremacy: Recognising the concept of legal supremacy as explained by Austin, Dicey noted that 'sovereignty' as used by Austin is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. However, the term 'sovereignty' is sometimes employed in a political rather than in a strictly legal sense. That body is politically sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense electors are the politically sovereign under the constitution (Dicey, 73). The parliament, though it is omnipotent in law making, cannot do anything going beyond the wishes of the electors. This is why Leslie Stephen states that if a legislature decided that "all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law and subjects be idiotic before they could submit to it." While discussing the difference between legal and political supremacy professor Jennings states that if the difference between legal and political supremacy is to be accepted then legal supremacy is not supremacy at all. It is not supreme power. It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts (*The Law and Constitution*, 149).

Limitations on the Sovereignty of Parliament

Legality and Reality

It must be emphasised that Diecy's principle of parliamentary supremacy only expresses certain legal rules. There is a distinction between legal authorities and political realities. As Jennings and Leslie say, there are many things which parliament cannot do; it never passes any law which any substantial section of the population violently dislikes. Parliamentary Supremacy denotes only the absence of legal limitations, not the absence of all limitations or inhibitions on parliament's actions. Jennings says that the supremacy of parliament

is a legal fiction, and legal fiction can assume anything; though it is true that parliament cannot in fact change the course of nature, it is equally true that it cannot in fact do all sorts of things (*The Law and the Constitution*, 170). According to Austin and Holland there are three types of limitations on the supremacy of parliament and these are as follows:

First, parliament cannot make a law which is opposed to the principles of morality or to the doctrines of international law;
Second, parliament cannot make a law denying the rights of prerogatives of the monarch; and
Third, one parliament cannot invalidate the laws passed by another previous parliament (Dicey, 61-66).

Having discussed these three limitations Dicey came to a conclusion that these three limitations are not in true sense any limitation since they cannot control parliament. In support of his assertion Dicey has given some examples that the parliament has from time to time curtailed prerogatives; the Act of Union 1800 is a permanent law but the parliament has amended it many times and hence it is not true that one parliament cannot invalidate laws passed by a previous parliament; again, whether a law passed by parliament is against morality or not all courts are duty bound to enforce it. Dicey, however, has pointed out that there are, in true sense, two types of limitations on the sovereignty of parliament. The actual authority by parliament is bounded or controlled by two limitations. Of these the one is an external, the other is an internal limitation (Dicey, 76).

External Limits: Dicey refers to public opinion as external limit to the sovereign power of parliament. He says that even if the parliament is omnipotent in law making, it certainly will not make any law which will go against public opinion. The parliament's power is limited on every side by the possibility of popular resistance. Dicey has also given some examples that parliament might legally tax the Colonies; parliament might without any breach of law change the succession to the throne or abolish the monarchy; but everyone knows that in the present state of the world the British Parliament will do none of these things (Dicey, 79).

Internal Limits: Dicey says that the internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives. In law making the parliament cannot ignore the social values, standard and moral feelings. This sort of limitation is evident also from a statement of Leslie Stephen who says that 'if a legislature decided that all blue-eyed babies would be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it' (Dicey, 81).

Other Limits

Apart from Dicey constitutional experts like professor Jennings, Hood Phillips, Harvey and Bather etc hold the view that there are some practical limitations on the sovereignty of parliament which are as follows:

Public Opinion: The Parliament, though it has power, will not make any law which the public opinion will not support. This is because the public opinion or the electors are the political basis of the legal sovereignty of parliament.

The Mandate or Party Manifesto: The government is expected to carry out the policy indicated at the last general election and is not expected to act contrary to that policy. It is because of this mandate that the majority party or the government cannot make the parliament do anything it like. As professor Jennings says, "The doctrine of mandate is part of the political cant. It is a stick used by the Opposition to beat the Government (*Cabinet Government*, 506)."

International Law: There is a presumption that parliament does not intend to legislate contrary to the principles to international law, and a statute would be interrelated as far as possible so as not to conflict with them (Hood Phillips, 57). Thus international law limits the power of Parliament through the operation of a constitutional convention.

Consultation of Organised Interests: In modern times the government does not in practice introduce legislation affecting well-defined sections of the community without first consulting pressure groups. In matters affecting industry or trade, for example, the Minister proposing to initiate legislation would consult the employees association, chambers of commerce and the trade unions etc (Hood Phillips, 57).

Parliamentary Supremacy and the British Courts

The UK has a constitutional system with parliamentary sovereignty and without a written constitution. Parliament is both a legislative body and constitutional assembly; hence what parliament enacts is a part of the constitution. Consequently no distinction is made between fundamental law and ordinary law and the same parliament can change or abrogate any law whatsoever by the same procedure. There is no touchstone to justify the validity of Acts of parliament, for no law exists in the UK higher than that made by the British parliament. This is why there is no judicial review in strict sense in Britain. Cockburn C.J. in *Ex p Cannon Selwyn* (1872) 36 JP Jo 54 said—

> "No court or judicial body in the country can set aside an Act of parliament on the ground that it is illegal, immoral or unconstitutional as can, easily be made by the US Supreme Court."

Sometimes questions are posed like—How do the British courts treat the sovereignty of parliament? Or, How far British courts are prepared to test the validity of law made by British parliament? The answer to these questions can be found in some important judgments of British courts.

At the initial stage of judicial treatment Sir Edward Coke in 1610 held in *Dr. Bonham's* case that courts could intervene if parliament enacted outrageous legislation. Same was also held in *Day v Savage* by Hobert CJ. But those notions form no part of modern law; they became obsolete when the supremacy of parliament was finally established in 1688. Since then there has been no instance of an Act of Parliament being held invalid. No court in the UK has ever claimed that it could exercise such a power.

First, in the *Prince's* case (8 Co. Rep. 1a (1606)) in 1606 the court decided that in considering the legality of an Act of parliament the court would examine two conditions:

i) The law in question must be entered on the Parliament Roll; and

ii) It must pass both the Houses (House of Lords and Commons) and then receive the Royal Assent.

The court decided that if any of these two conditions were not fulfilled or if any of the three bodies' (Lords, Commons & King) approval lacked, the court would not regard it as an Act of Parliament.

Similarly it was held in *Edinburgh & Dalkeith Railway Co.* v *Wouchope*[1] in 1842 that if an Act was expressed to have been enacted by the Queen, Lords and Commons, the courts would not inquire whether it was passed properly following the strict procedure or whether it represented the will of parliament ('Enrolled Bill rule'). The famous dictum of Lord Campbell was—

> "All that a court of justice can do is to look to the parliamentary roll ; if from that it should appear that a bill has passed both the Houses and received the Royal Assent, no court can inquire into the mode in which it was introduced into parliament, nor into what was done previous to its introduction, or what passed in parliament during its progress in its various stages through both the Houses."

In this respect Professor Dicey says that the principle of parliamentary sovereignty means that parliament has under the English constitution, the right to make or unmake any law whatsoever; further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.[2] As Colin Turpin says that the legislative supremacy of parliament was assured by the Glorious Revolution of 1688 which established the primacy of statute over prerogatives. Academic lawyers, drawing on works of political science, embraced it as orthodox doctrine and the courts have pronounced it as law. It is at once historical reality, theory of the constitution and a fundamental principle of the common law. In

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1 (1842) 8 CI & Fin. 710

2 Dicy, A.V , *Introduction to the Study of the Law of the Constitution,* 10th ed., (London : ELBS), P. 39–40

accordance with this principle the courts hold that statutes enacted by parliament must be enforced and must be given priority over rules of common law, international law, subordinate law and earlier enactments of parliament itself.[1]

Second, even if an Act of parliament comes into conflict with or is contrary to international law, no court can declare it illegal. This was affirmed in *Chenny v Conn*[2]. The court held—

"What the statute itself enacts cannot be unlawful ..... It is the law which prevails over every form of law and it is not for the court to say that parliamentary enactment, the highest law in this country, is illegal .... The Finance Act prevails over an international convention (Geneva Convention) ..... and that what parliament enacts can not be unlawful."

Third, no British court can declare an Act illegal even if it comes into conflict with the principle of natural justice. Willes J. in *Lee v Bude & Torrington Rly Co.*[3] said—

"If an Act of parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it."

Likewise, Lord Reid in *British Railway Board* v *Pickin*[4] held—

"In earlier times many learned lawyers seemed to have believed that an Act of parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete."

Lord Simon of Glassdale said—

"If there is evidence that parliament may have been misled into an enactment, parliament might well indeed, would be likely to wish to conduct its own inquiry. It would be unthinkable that two inquiries – one parliamentary and the other forensic– should proceed concurrently."

Fourth, even if an Act of parliament conflicts with another Act, no court has any power to declare the conflicting Act illegal. It was held

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1 Turpin, Colin, *Ibid,* P 25
2 (1968) I All ER 779
3 (1871) LR6 CP 576
4 (1974) AC 765 (HL)

in *Vauxhall Estate Ltd. v Liverpool Corporation* that in law-making parliament can neither bind its successors nor bound by its predecessors. If it is found that a present Act is in conflict with a previous one, the relevant provisions must be regarded as impliedly overridden by the inconsistent provisions of the present Act. Similarly it was held in *Godden v Hales*[1] —

> " If an Act of parliament had a clause in it that it should never be repealed, yet without question the same power that made it may repeal it."

It was held by House of Lords in *Duport Steels Ltd v Sirs*[2] —

> "..... it is not for the judiciary to decide whether any changes should be made to the laws as stated in the Acts ..... to meet the judge's idea of what justice requires ..... In controversial matters ..... there is room for differences of opinion, as to what is expedient, what is just and what is morally justifiable. ..... the judges may say so and invite parliament to reconsider its provisions. But he (the court) must not deny the statute ..... Under our constitution it is parliament's opinion on these matters that is paramount."

The above discussion makes it clear that in no way the doctrine of judicial review, as it is understood in its substantive or strict sense, applies to the British constitutional system. And the British courts are in no way prepared to examine the validity of law passed by parliament. The case law of the last hundred years offers support for, rather than denial of Dicey's view, even for the proposition that it is impossible to bind future parliament.

Judicial Review and the Human Rights Act 1998

It is contended that under the Human Rights Act the scope of judicial review will be greatly widened both from the view point of administrative actions and constitutionality of legislation.

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1 (1686) 11 St. Tr. 1165, 1197

2 (1980) 1 WLR 142 (HL)

As far as administrative action is concerned, action, inaction and the use of discretion by the executive will have to be exercised within limits of the European Convention on Human Rights.

As far as constitutionality of legislation is concerned, though the Act maintains the theory of parliamentary supremacy, nonetheless, in practice, the courts will inevitably become involved in political-constitutional issues. As result of the secondary nature of the legislation produced by the Scottish Parliament, the court will have the power to quash such Acts invalid for lack of compatibility with the ECHR. This is evident from a recent decision by the Court of Appeal in *R v Secretary of State for the Home Department* (2003). In this case the Court of Appeal held that the policy to refuse support to asylum seekers unless they claimed asylum at the port of entry under section 55 of the National, Immigration and Asylum Act 2002 was unlawful. The Court also went out of its way to provide the Home Secretary with advice on how to make the Act and the procedures under it, compatible with ECHR rights. This case shows that the introduction of the Human Rights Act has greatly increased the judicial power in relation to the other two branches of the Constitution i.e. the executive and the legislature.

There is also suggestion that the House of Lords will have to come forward to act as a constitutional court. Apart form the issue of declaration of incompatibility, the issue of devolution of power will give rise to disputes as to the relationship between Westminster Parliament and Scottish Parliament. Eventually these issues will have to be resolved in the courts.

In view of parliamentary supremacy and liberties in the negative sense, the British courts have traditionally lacked any power to question the laws produced by Parliament on their substance, as constitutional courts in other systems could; they could only question the formal or procedural properties of such legislation. There was, however, an alternative forum capable of challenging the substance of English law since 1966 when the UK recognised the power of the European Commission on Human Rights to hear complaints from individual UK citizens and at the same time, recognised the authority

of the European Court of Human Rights to adjudicate in such matters. After the enactment of the Human Rights Act 1998 now it is believed that eventually the UK domestic courts will increasingly be involved into deciding constitutional matters.

Parliamentary Supremacy: The 'Continuing Theory' and the 'Manner and Form' Argument

One might think that questions of Parliamentary Supremacy should be taken as settled, in view of the predominance of authority in favour of Dicey's case. However, for last 50 years there has been a swelling chorus of dissent and the experts who have joined this chorus of dissent are Huston[1], Jennings[2], Marshal[3] and Munro[4]. On the plinth of the difference between legal doctrine of Parliamentary Supremacy and its practical limitations, the theory of 'self-embracing' sovereignty emerged as opposed to Diceyan 'continuing sovereignty'. Dicey held the sovereignty of the UK Parliament to be of a continuing nature, but did not particularly consider whether any distinction should be drawn between the substance of legislation and the composition or procedures of legislative body (Munro). However, Jennings, Huston, Munro and Marshall came up with the theory of 'self-embracing' sovereignty as opposed to Diceyan 'continuing' theory of supremacy. This self-embracing theory claims that parliament may change the procedures governing law-making and this change of 'manner and form' in effect bind future parliaments. This view has been based on the decisions in some cases from different jurisdiction:

(1) Bribery Commissioner v Ranasighe[1965] AC 172 (a decision of the Privy Council which concerned an Act of the Parliament of Ceylon);

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[1] *Essays in Constitutional Law*, 2nd edn, 1964, pp.6-7

[2] *The Law and the Constitution*, 5th edn, p. 152

[3] *Parliamentary Sovereignty and the Commonwealth* (1975); *Constitutional Theory* (1971)

[4] *Studies in Constitutional Law*, 2nd edn, pp. 155-1171.

(2) *A-G for New South Wales v Trethowan* [1932] AC 526 (a decision of the Privy Council which concerned the New South Wales legislature);
(3) *Harris v Minister of the Interior* [1952] (2) SA 428.

In these cases it was held that a legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself results its power to make law. It has been argued that the same will apply to the UK parliament as well. The opponents of this view argue that these decisions are not applicable to the UK parliament. Secondly, proponents of this new school of thought seem to be confused with difference between legal theory and practicality. The powers and forms of law-making by the UK parliament are not prescribed by any higher law. As to whether parliament may alter these so as to restrict future parliaments, the suggestion has not been supported in British cases and was denied in *Vauxhall Estates Ltd v Liverpool Corpn* and *Ellen St Estates Ltd v Minister of Health etc.*

Redefinition:

Example is often given as to the change in the rules by the Parliament Acts 1911 and 1949. These Acts allow Bills to become law notwithstanding the descent of the House of Lords and so many have seen in them a 'redefinition' of Parliament. Likewise, the House of Lords has been altered by the statutory introduction of new elements, such as the holders of life peerage (Life Peerage Act 1958) and by the statutory removal of the larger part of its membership (House of Lords Act 1999).

These changes, it has been suggested, have to be regarded as 'binding future parliaments'. Parliament in these instances was able to 'redefine itself' or alter the 'manner and form' required for legislation (Munro, 164).

Though these are the facts in favour of limiting and redefining future parliament, the theory of legal sovereignty still remains intact in the sense that it can change the 'manner and form' any time it likes.

Judicial Supremacism in Domestic Jurisdiction: Extra-Judicial Claims by Judges

In line with the 'incoming tide' of European Community influence recently three English judges have challenged the supremacy of parliament in their extra-judicial writings and have claimed that in certain purely domestic circumstances the court may hold invalid statutes dully passed by parliament. Lord Wolf has claimed that there are limits on the supremacy of parliament and the courts could justifiably refuse to recognise and give effect to legislative actions which sought to undermine the rule of law by removing of substantially impairing the powers of review of the High Court[1].

In almost similar vein, Sir John Laws has asserted that 'the doctrine of parliamentary sovereignty cannot be vouched by parliamentary legislation; a higher-order-law confers it and must of necessity limit it.'[2] He also maintains that sovereignty lies not in parliament but in the constitution which consists of a framework of principles, such as democracy and respect for human rights, which are fundamental and cannot be denied, even by Act of parliament[3]. Further, Sedley L.J has claimed that traditional Diceyan concept of sovereignty of parliament has given way to 'a bi-polar sovereignty' which he describes:

> "We have today a new and still emerging constitutional paradigm, no longer Dicey's supreme parliament but a bi-polar sovereignty of the crown in parliament and the crown in the courts, to each of which the Crown's ministers are answerable- politically to parliament and legally to the courts."[4]

Though all these views have flashback to the language of Chief Justice Coke in 1610 in Dr. Bonham's case, even today these views have not met unconditional acceptance among commentators. Attack has been mounted against these three judges, particularly, Sedley, L.J

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1 *Droit Public- English Style*, [1995] PL 57 at 69

2 *Law and Democracy*, [1995] PL 72 at 87

3 *Ibid*

4 *Human Rights: A Twenty First Century Agenda*, [1995] PL 386 at 389 (emphasis added)

that their arguments exhibit a lack of sensitivity to the continued silence of the doctrine of parliamentary sovereignty and that the body of case law on which Sedley L.J. bases his claims can be reconciled with the doctrine of parliamentary sovereignty[1]. Whatever might be the merits behind the these recent views, it is arguable that 'they are contrary to the established laws and constitution of the UK and have been since 1688.' Again, it is undenying that a significant change has occurred in the administrative law context in judicial attitudes in the later part of this century. It is also the fact that the European influence has made a dramatic change to the traditional concept of parliamentary sovereignty; 'the orthodox doctrine of parliamentary supremacy is no more an immutable part of British Constitutional law'[2]; of course, it is to be born in mind that apart from the European context, court has not yet come forward to declare illegal an Act of parliament which has purely domestic context. Even in EC law matters the court has no power to declare an Act illegal; it just does not give effect a law which is found to be inconsistent with EC law.

Parliamentary Supremacy and the EC Law

The doctrine of parliamentary supremacy has historically been accepted as on of the most fundamental principle of the British Constitution. Its status was confirmed by Blackstone in 18th century and by Dicey in 19th century. It is a legal principle expressing the relationship between Parliament and the Constitution. The doctrine as explained by Dicey has three basic limbs:

(i) There is no law which parliament cannot change or modify (theoretical unlimited power to legislate);

(ii) The is no distinction between constitutional law and ordinary law; and

(iii) There is no body which can declare the law passed by parliament invalid.

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[1] Mullender, Richard, *Parliamentary Sovereignty, the Constitution and the Judiciary*, Northern Ireland Legal Quarterly, vol. 49, no. 2, p. 138

[2] Bradley, *The Sovereignty of Parliament- in Perpetuity?*, In Jowell, Jeffery and Oliver, Dawn, *The Changing Constitution, 3rd edn,* (Oxford: Clarendon Press, 1994), p. 81.

The UK courts accepted this doctrine and thus they declined to exercise the power of judicial review in favour of the concept of parliamentary supremacy. This is evident from a number of cases e.g. *Exp. Cannon Selwyn*, *Edinburgh & Dalkeith Railway Co.*, *Lee Bud and Torrington*, *Ellen Street* etc as mentioned above.

UK's EU Membership and the Question of Parliamentary Supremacy

UK's European Union membership was effected by the European Communities Act 1972. Section 2 of this Act and article 5 of the Treaty of Rome require English courts to give EU law rights direct applicability in the UK without further enactment (both through the principle of direct effect). No express declaration of the Supremacy of the Community law is contained in the Act; the Act was enacted in the ordinary way. There is nothing in its term to suggest that it is or was intended to be any kind of 'higher order law' and there is nothing to suggest that the Act is intended to protect against repeal by the ordinary process (implied repeal).

The European Communities Act, 1972

Provisions in section 2 are the most fundamental provisions of the Act. Section 2(1) provides for the direct applicability of community law into the UK domestic law. Such community law comes into effect in the UK without any further legislative action being taken by parliament.

Section 2(2) provides for making of delegated legislation in order to implement European Community obligations.

Section 2(4) provides that subsequent legislation is to be construed and to have effect subject to section 2(1) and 2(2).

Section 2(4) has posed the greatest threat to the doctrine of parliamentary supremacy. If the sovereignty of parliament meant that no parliament could bind its successor, section 2(4) would be ineffective in so far as it purports to limit the capacity of future parliament to legislate on any matter or repeal any law (thus *implied or express repeal* would be impossible now).

At its initial stage the British courts were not prepared to accept the primacy of community law. In *Maccarthy's v Smith* and *Garland v British Rail Engineering* the British court took the view that community law was to be given priority only where the it was clear that the British Parliament intended to comply with community law. However, after a considerable confusion and hesitation about the exact effect of Section 2(4) lastly the courts found their way towards an accommodation which damages neither primacy of European Community law nor the sovereignty of the British Parliament. The courts now gives section 2(4) a radical interpretation and regard European Community law as having primacy over UK domestic law so long as the UK remains a member state of the Community. We will see that the final result in the *Factortame* litigation is an unequivocal acceptance of the primacy of community law by the British courts.

Section 3(1) provides that questions as to the meaning or effect of community law are to be determined in accordance with the principles laid down by any relevant decisions of the European Court of Justice. In this respect, it is clear from the Treaty and from the statements made by the ECJ in *Costa v ENEL* [1964] ECR 585, *Simmenthal* (*Amministrazione delle Finanze dello Stato v Simmenthal SpA*) [1978] ECR 629, *Marleasing* (*Marleasing SA v La Commercial International de Alimentacion*) [1990] ECR I-4135 etc that community law should prevail over both subsequent and previous national law.

Fate of the Doctrine of Implied Repeal:

It was held in *Vauxhall Estate Ltd. v Liverpool Corporation* that in law-making parliament can neither bind its successors nor bound by its predecessors. If it is found that a present Act is in conflict with a previous one, the relevant provisions must be regarded as impliedly. overridden by the inconsistent provisions of the present Act. Similarly it was held in *Godden v Hales* that if an Act of parliament had a clause in it that it should never be repealed, yet without question the same power that made it may repeal it. This is the doctrine of implied repeal which means that any later statute that was inconsistent with an earlier one would prevail and the earlier inconsistent statute would be treated as impliedly repealed by the later statute.

Section 2(4) of the EC Act 1972 has posed the greatest threat to the doctrine of implied repeal and parliamentary supremacy. If the sovereignty of parliament meant that no parliament could bind its successor, section 2(4) would be ineffective in so far as it purports to limit the capacity of future parliament to legislate on any matter or repeal any law (thus *implied or express repeal* would be impossible).

At its initial stage the British courts were not prepared to accept the primacy of community law. In *Maccarthy's v Smith* and *Garland v British Rail Engineering* the British court took the view that community law was to be given priority only where the it was clear that the British Parliament intended to comply with community law. However, after a considerable confusion and hesitation about the exact effect of Section 2(4) lastly the courts found their way towards an accommodation which damages neither primacy of European Community law nor the sovereignty of the British Parliament. The courts now gives section 2(4) a radical interpretation and regard European Community law as having primacy over UK domestic law so long as the UK remains a member state of the Community. The final result in the *Factortame* litigation is an unequivocal acceptance of the primacy of community law by the British courts.

In a recent decision in *Thoburn v Sunderland City Council and Others* [2002] 3 WLR 247) it has been held that the doctrine of implied repeal had no application to constitutional statutes. The 1972 Act was clearly a constitutional statute since it incorporated the whole body of substantive Community rights and obligations and gave overriding domestic effect to the judicial and administrative machinery of Community law. Laws LJ explained that for the repeal of a constitutional Act to be effected by a statute, the court would apply this test: is it shown that the legislature's actual- not imputed, constructive or presumed- intention was to effect the repeal or abrogation? Such a test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. It is, therefore, clear that courts are coming out of the bounds of traditional Dicean bounds of parliamentary supremacy.

Factortame:

It was in 1989 when for the first time the House of Lords in *Factortame*[1] case recognized the primary of EC law over UK parliamentary Acts. Subsequently in 1994 the House of Lords applied the *Factortame* principle in *Exp. EOC* (*R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 2 WLR 409) case. Thus now it is almost settled that the UK courts clearly have the power to refuse to obey an Act of parliament and the parliament is, therefore, effectively constrained in its freedom to legislate on any subject. If it does legislate inconsistently with community law, its legislation may be disapplied by the court or an amendment may be forced upon it by the European Commission as was done in *Re Nationality of Fishermen: EC Commission v UK* (C-248/89R [1989] 3 CMLR 601 with regard to granting an interim relief under section 169 of the Merchant Shipping Act 1988. This was

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[1] *R v Secretary of State for Transport ex parte Factortame Ltd* [1989] 3 CMLR 1 (This is *Factortame* No. 1 where the House of Lords sought a preliminary ruling on point of relationship between national law and community law). Subsequently in *R v Secretary of State for Transport ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603 the House of Lords considered the application for interim relief and decided to grant it as sought by the vessel owners. In *R v Secretary of State for Transport ex parte Factortame Ltd (No. 3)* [1991] 3 CMLR 589 the ECJ ruled on the Divisional Court's questions about the compatibility of the Merchant Shipping Act 1988 with Community law and ruled that Article 52 of the EC Treaty had been infringed because of the local national residence requirements for registration of owners of fishing vessels. In *R v Secretary of State for Transport ex parte Factortame Ltd (No. 4)* 2 WLR 506 it has been held that Member states are obliged to make good the loss sufficient by individuals when the national legislature is responsible for the breach of community law provided that (i) the rule of community law relied on must be intended to confer rights on individuals; (ii) there must be direct causal link between the breach and the damage sustained; (iii) where a member state has a discretion to in adopting national rules the alleged breach must arise from a manifest disregarding of the limits of its discretion; (iv) the breach must be sufficiently serious. In *R v Secretary of State for Transport, Ex parte Factortame Ltd, and Others (No. 5)* [2001] 1 A.C. 524 the House of Lords considered the decision in *Factortame No. 4* and some other decisions and confirmed the decision in *Factortame No. 4*. However, it held that UK's breach of Community law did not entitle the applicants for punitive damages.

implemented by the Merchant Shipping Act (Amendment) Order 1989 (SI 1989 No. 2006). Observing this development Professor Bradely has commented that the doctrine of supremacy of Parliament can no longer be regarded as an immutable part of British Constitutional law[1].

Purposive Approach:

The doctrine of purposive approach has a great significance in relation to the sovereignty of British Parliament. Since the UK has no written constitution, courts have traditionally been using strict interpretation as opposed to purposive approach. In the field of European Community law, it is common to look at the purpose in the legislative history. In *Von Colson & Kamann* (*Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 and also in *Marleasing* the European Court of Justice held that in applying national law in relation to European Community law, national courts were to interpret it as far as possible, in the light of wording and purpose of EC directives. After a considerable hesitation the House of Lords expressly accepted the position in *Webb v EMO Air Cargo (UK) Ltd (No. 2)* [1995] 1 WLR 1454. Then it was *Pepper v Hart* [1993] AC 593 where the long established convention that courts were not permitted to refer to parliamentary materials when construing legislation was reversed.

So the willingness of courts to give preference to Community law, either by giving it priority directly or by 'purposive construction' of domestic law, cannot be denied; rather it is now a settled principle. The treatment of doctrine of parliamentary supremacy now needs modification. Earlier once a piece of legislation was recognised as an Act of parliament, no court could refuse to obey or question its validity which is no longer correct. The present position requires two conditions to be fulfilled. First, the court will see whether a piece of legislation is an Act of parliament; and second, the court will also see whether that legislation is compatible with the community law. It is

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[1] "The Sovereignty of Parliament- in Perpetuity?" in Jowell and Oliver, *The Changing Constitution*, (3rd edn, 1994)

only after the fulfillment of these two conditions that the courts will not be in a position to refuse to obey it or question its validity.

Reconciliation between the EC Law and Parliamentary Supremacy

Given the above arguments for the supremacy of the community law over the concept of parliamentary supremacy, there are, however, strong arguments that parliamentary supremacy is not affected and the two concepts are not in conflict at all, rather they are perfectly reconciliable.

First, Lawton LJ observed that 'Parliaments recognition' of European Community law and of the jurisdiction of the European Court of Justice by one enactment can be withdrawn by another. There is nothing in the case law to prevent Parliament from legislating to repeal the European Communities Act or even from overriding community law by expressly stating that it intends to do so.

Second, it should be noticed that in cases like *Fractortame, Exp. EOC* the courts are not holding an Act of parliament void or unconstitutional. They are merely denying its effect to the extent that EC law is inconsistent. This means that it will still apply in other respects and if not repealed, would apply in the ordinary way if the relevant EC law were repealed.

Third, it should always be remembered that it is only by virtue of the European Communities Act, 1972 that EC law enjoys the status it has in the UK. The judges have often emphasised that what they are doing, are doing on the authority of Parliament itself and not under an entrenched written constitution; and the EC Act 1972 is not a higher order law.

Fourth, parliamentary supremacy is a legal principle; reality might impose restriction on parliament's power. What parliament did in 1972 was merely to provide for an order of priority as between competing orders of law. But it did so on its own term and it did not incapacitate itself from changing its mind.

Against the background of the above arguments it is argued that what governments and parliament have done since is to refrain from legislating in deliberate disregard of community obligations. They have adopted a self-denying ordinance. Undoubtedly it constitutes a serious inhibition in practical terms. But still there is no concrete evidence that in theory doctrine of parliamentary supremacy has been impaired though it has been commented by Bradley that 'the orthodox doctrine of parliamentary supremacy' is not an immutable part of British constitutional law and by Lord Wolf that "ultimately there are limits on the supremacy of parliament which it is courts inalienable responsibility to identify and uphold." Till the British system will not have an entrenched written constitution as a higher-order-law, it would remain unworthy of an argument that courts have inalienable responsibility to impose limit on the supremacy of Parliament. Judicial review of parliamentary legislation under the European Community compatibility may be described as a necessary factual reality not incompatible with parliamentary supremacy.

Area of Irreconcilability:

However, given the European Union impact, Human Rights Act, 1998 and recent devolution of parliament's powers having affected significantly the scope of parliament's law-making power, the doctrine of omnipotence of parliament, even on a legal principle, has come under attack, and has lost much of its significance. The domestic courts exercising their powers under the Human Rights Act 1998 have already started to disapply primary legislation and this disapplication will virtually amount to declaring laws void notwithstanding the fact that disapplication is not taking place under a written constitution and that the parliament will be forced to correct the law not by courts technically but by European Union Convention European Commission and political pressure. This is already evident in cases like *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* (2001) The Times, 3 April, AC, *R v Secretary of State for the Home Department* (2002), and *Bellinger v Bellinger* (2003) with regard to the Human Rights and the European Convention on Human Rights. Likewise, in the field of European Community law the courts have come forward

to held that the doctrine of implied repeal had no application to constitutional statutes. The 1972 Act was clearly a constitutional statute since it incorporated the whole body of substantive Community rights and obligations and gave overriding domestic effect to the judicial and administrative machinery of Community law (*Thoburn v Sunderland City Council and Others* [2002] 3 WLR 247).

It seems, therefore, that time has come to redefine the doctrine in the light of practical limitation.

How does the European Court of Justice ensure Supremacy of Community Law over National Law

With the Maastrich Treaty in 1993 the European Union emerged which is directly founded upon the European Communities, in particular, the European Economic Community created by the Treaty of Rome 1957 (European Economic Community Treaty or European Community Treaty).

Article 5 of the European Community Treaty requires national courts to give community law rights effective in their national jurisdiction without further enactment. And Article 234 of the European Community Treaty requires national courts to make references for preliminary rulings to the European Court of Justice where a question is raised concerning the interpretation of community law.

The European Court of Justice is the highest court within the community. Though the general function of the European Court of Justice as specified in Article 220 is to ensure that in the interpretation and application of European Community Treaty the law is observed, the singlemost important jurisdiction in terms of harmonisation of laws is that conferred on the court to give preliminary rulings under Article 234 (formerly Art. 177). It is this Article which raises directly (i) the nature of the legal system of the Community and (ii) the relationship between Community law, the European Court of Justice and domestic law and (iii) the role of

judges in national courts. Article 234 is, therefore, very crucial to the development of Community law.

Before we proceed to discuss on how the European Court of Justice ensure supremacy of community law, it seems relevant to point out sources of community law. Community law is special in its type; it cannot be altered by national legislatures and imposes rights and obligations which are binding without the member states intervention. There are two major sources of community law:

(i) The primary source is the treaties and their subsidiary enactments; these include the original European Economic Community Treaty and its protocols as amended by later treaties; and

(ii) Secondary sources include secondary legislation made by the Community institutions. These include regulations, directives and decisions.

Regulations are binding in their entirety and directly applicable in all Member States.

Directives are binding as to the object to be achieved but leave a measure of discretion to the member states as to how to implement the required objectives. Normally a time limit will be set for the implementation of directives which will usually require new legislation.

A decision is binding in its entirety upon those to whom it is addressed who may be member states or natural or legal persons.

Supremacy of Community Law

It was soon realised by the European Court of Justice that the proper functioning of Community as a body depended on the coherent body of law and uniform application of its rules throughout the community's territory and in a series of wide ranging judgments the European Court of Justice developed some principles to harmonise the

whole legal system and enforce it throughout the community. The principles are as follows:

(i) Direct effect;
(ii) Doctrine Supremacy of Community law over national law; and
(iii) Doctrine of purposive approach.

Direct Effect:

Article 249 (formerly 189) of EC Treaty of 1957 states that Regulations are directly applicable but it is silent as to the legal consequence of this applicability i.e. whether a Treaty provision or Regulation or a Directive can have direct legal effect on individuals.

Article 10 (formerly 5) of the Treaty forms the basis of much of the jurisprudence of the European Court of Justice and the foundation for the enforcement of individual rights against Member States.

In 1963 the ECJ articulated the basis for the principles of direct effect in *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1. The European Court of Justice held that both the provisions in the Treaty and Regulations are capable of having direct effect if they satisfy the requirements laid down by the European Court of Justice.

By their very nature Directives are not directly effective. However, *Von Calson* in 1984 set the pace by emphasising that in some cases Directives may have direct effect depending on their wording, clarity etc. in the sense that they could be relied upon by individual against the State. This principle was heavily relied upon and developed in many subsequent cases like *Marleasing* (*Marleasing SA v La Commercial International de Alimentacion SA* [1990] ECR I-4135), *Marshall* (*Marshal v Sothampton Area Health Authority* [1986] ECR 723 etc.

Vertical and Horizontal Effect:

In addition to the concept of direct effect community law utilises the notion of vertical and horizontal effect of legal provisions. Vertical effect means that a community measure whether Treaty

provisions, Regulations or Directives is directly enforceable by an individual against the Member States.

Horizontal effect means that community measure is directly enforceable not only against the Member State but also against an institution or individuals within the State.

Community measures which are directly effective enjoy vertical direct effect as well. Given the development of 'vertical direct effect', individual litigants have since raised the question of the extent to which Treaty provisions, Regulations and Directives can have 'horizontal effect'.

The horizontal effect of Treaty provisions and Regulations was recognized by the European Court of Justice in *Sabena* (*Gabrielle Defrenne v Sabena* [1978] ECR 1365) case. But the horizontal effect of directives was denied in *Marshsall.* However, the *Marleasing* and *Francovich* (*Francovich v Italian Republic* [1991] ECR I- 5357) decisions seem to have brought in horizontal effect of directives 'by the back doors'. It was held that whilst directives were not of themselves capable of having direct effect between individuals, the national courts or institutions were obliged to interpret domestic law so as to ensure conformity with European Community directives, whether the domestic law originated before or after the incorporation of the directive. This backdoor style horizontal effect is also called 'indirect horizontal effect'

The unwillingness of the European Court of Justice to recognise the horizontal direct effect of directives has to be seen in the light of two other factors- availability of indirect horizontal effect and of damages and injunction as remedies for non-compliance with community law (*Factortame*).

Doctrine of Supremacy:

The primacy or supremacy of community law has been consistently proclaimed and promoted by the European Court of Justice, although it is not expressed in terms anywhere in the Treaties. It was laid down in *Costa v Enel* (*Flaminio Costa* v *ENEL* [1964] ECR

585) and then widened in *International Hadefegesellschaff*, (*International Handelgesellschaff mbH* v *Einfuhr-und Vorratsstelle fur Getreide and Futtermittel* [1970] ECR 1125), *Simmenthal* and *Factortame*. These cases emphasised that community law always prevails over national law; conflicting domestic law had to yield and it became clear that it mattered not whether the legislation in question was passed before or after the European ruling.

At the outset domestic courts were ambivalent in their reaction. The UK courts were very slow to fully recognize the supremacy of community law. *Duke* (*Duke v Reliance Systems* [1988] AC 618), *McCarthys, Bulmer* (*Bulmer v Bollinger* [1974]2 All ER 1226) robustly defended the supremacy of parliament. It was in *Factortame* where supremacy of community law was fully accepted by the House of Lords. It was reapplied by the House of Lords in *Ex EOC*.

Purposive Approach:

In the field of European Community law it is common to look for the purpose in the legislative history. The European Court of Justice in *Von Colson* and *Kamann* held that in applying national law national courts were required by article 189 of the EEC Treaty to interpret their national law in the light of the wording and purpose of the Directives. More emphasis on the same line was given in *Marleasing*.

The traditional strict interpretation followed by UK courts came to be in direct clash with the European Court of Justice's purposive approach. Though in *Duke*, and in *Finnegan*[1] the House of Lords seemed to be not at all inclined to give effect to purposive approach, it was done in *Pickstone* (*Pickstone v Freeman plc* [1989] AC 66). The approach was subsequently followed in *Lister, Webb* etc and it was *Pepper v Hart* where the long established convention that courts were not permitted to refer to parliament materials when construing legislation was reversed.

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[1] *Finnegan v Clowney Youth Traning Programme Ltd.* [1990]2 AC 407

Sample Questions with Suggested Skeleton Solutions:

(1) With reference to decided cases, discuss the extent to which the doctrine of parliamentary sovereignty and the supremacy of European Community law has been reconciled, if at all, in the courts of the UK. (University of London, 2000)

Suggested Skeleton for Solution:

- Start with short description of parliamentary supremacy (page 107);
- Introduction of European Union law; discuss the provisions of the European Communities Act 1972 (see page 108);
- Discuss the domestic case law on the interpretation of sections 2 and 3 of the EC Act 1972 (see pages 108, 110, and domestic cases like *Factortame, Exp EOC, Pepper v Hart, Thoburn* etc);
- Discuss the points of reconciliation and then the areas of irreconciliability (see pages 113, 114);

(2) To what extent, if at all, is Dicey's analysis of parliamentary sovereignty still accurate? (University of London, 2002).

Suggested Skeleton for Solution:

- Start with Dicey's legal and political sovereignty (see page 95);
- Point out various aspects of legal supremacy (see pages 95-96);
- As to the second part of the answer, discuss the theories ('manner and form', 'redefinition', 'self-embracing theory' and impact of EC law along with case laws) which have come to attack the traditional

Dicean supremacy theory (write details from pages 104 and 105);

(3) Making reference to decided cases, explain whether European law or UK law has the higher legal status and priority (University of London, 2001).

(4) Illustrating your answer with case law, discuss the methods by which the ECJ ensures the supremacy of community law over national law (University of London, 2003).

Suggested Skeleton for Solution: The above two questions will have almost the same answers.

- Start with the emergence of the European Communities with particular reference and role of the ECJ (see page 115);
- Ephasis Articles 220 and 177 of the Treaty (see page 116);
- Discuss the methods of ensuring supremacy, i.e. direct effect, supremacy and purposive approach with case references (write details from pages 116-119);

CHAPTER VI

SEPARATION OF POWERS

The doctrine of separation of powers is not a legal principle; it is a political theory. It is regarded as a doctrine which is fundamental to the organization of a state and to the concept of constitutionalism in so far as it prescribes the appropriate allocation of powers and the limits of those powers to the organs of the state- the legislature, the executive and the judiciary. The theory of separation of powers was propounded by Montesquieu in the eighteenth century (*The Spirit of Laws*). He advances the view that the best foundation for individual library and good governance is to separate the three branches of the government. The three branches will have distinct functions and none will be powerful enough to dominate or interfere the others.

It is said that Montesquieu wrongly believed that this doctrine applied to British constitution of his time, but it served to influence greatly the founding fathers of the American constitution which does apply the doctrine in practice.

The concept of separation of power has further been explained by professor Wade who says that the concept of separation power means at least three different things:

(i) that the same person should not form part of more than one of the three organs of government, for example, that ministers should not sit in Parliament;

(ii) that one organ of government should not control or interfere with the work of another, for example, that the judiciary should be independent of the executive; and

(iii) that one organ of government should not exercise the functions of another, for example, that ministers should not have legislative functions[1].

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[1] *Constitutional and Administrative Law*, 11th end (London: Longman), P. 58.

Writers on the British constitution seem to speak almost with one voice in denying that the separation of powers is a feature of the constitution. It has been typically commented that no writer of reputes would claim that it is a central features of the modern British constitution. However, some leading judges seem to have begun to support the doctrine as a characteristic of British constitution. Lord Scarman remarked in a case that 'the constitution's separation of powers must be observed if judicial independence is not to be put at risk.' Likewise, in M *v Home Office* [1993] 1 All ER 537 Lord Templeman said that "Parliament makes the law, the executive carries the law into effect and the judiciary enforces the law." In *Dupport Steels Ltd v Sirs* [1980] 1 All ER 529 Lord Diplock also says that "the British constitution, though largely unwritten is firmly based on the separation of powers."

Thus on one side of the spectrum their is distinguished judicial support for the view that British constitution is firmly based on the separation of powers but on the other side, there is strong weight of academic judgment which is predominantly to the opposite effect. However it is to be emphasised here that recent academic judgment is also becoming more sympathetic to the applicability of the doctrine. Hilaire Barnett says that "Separation of Powers together with the rule of law and Parliamentary Supremacy rums like a thread throughout the constitution of the UK" (*Constitutional and Administrative Law*, 4th edn, p. 105).

Now we need to evaluate the extent to which in the constitution of the UK, the legislature, executive and judiciary are separated or mixed. Before we do that we need to know that even Montesquieu did not speak absolute separation of power which is neither desirable nor workable. Montesquieu gave support to the notion of there being 'checks and balances' by which the branches of government might legitimately influence or even impose certain limits on each others actions. The independence of the judiciary was not to be compromised in such a way but he thought that the chief executive should have a veto over legislation; likewise the legislature should have the power to examine the manner in which its laws are put into effect. We will now

proceed to examine how this doctrine with necessary checks and balance fits into the UK constitution[1].

Legislature and the Executive

The UK constitution is characterised by the blending of the executive and the legislative. Being a parliamentary democracy the real executive comes from within the legislature. The first is the sovereign who is at the head of the executive and who is a necessary part of parliament, i.e. the legislature.

Secondly, the Prime Minister and his cabinet members are at the same time members of one or other House of Parliament. There is no law that ministers must be parliamentarians but this became the practice in the eighteenth century and is a firmly established convention today.

Does the parliament perform any executive functions? British parliament has four functions. Enactment of legislation is the main function which occupies about half of its time. The other three being the scrutiny of the activities of the executive, the control of finance and the ventilation and redress of grievances. Cabinet members being members of parliament do the main executive functions.

Likewise, the executive does legislative functions. Much of the legislative output consists of subordinate or delegated legislation which are made mostly by minister or government departments or the Privy Council which is effectively under ministerial control.

Checks and Balances exercised by Legislative and Executive upon each other:

First, by law the meeting of parliament is depended on the will of the Sovereign who summons it and dissolves it.

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[1] Munro states that the principle of checks and balances is not inconsistent with the doctrine of separation of powers; rather represent the doctrine of separation powers in its highest form.

Second, when parliament is in session and a government has been formed, parliament, i.e., the House of Commons ultimately controls the government. It is a fundamental convention of the constitution that a government is entitled to continue in office only so long as it enjoys the confidence of a majority in the House of Commons.

Third, while the House of Commons retains control over the executive, the paradox is that there is another sense in which the executive often appears conversely to control the whole House of Commons. The reason is that one party normally has an overall majority in the House of Commons and the government with its working majority is usually able to get its own say in parliament.

Fourth, it is also the fact that whatever majority a government enjoys, the doctrine of ministerial responsibility means that it is subject to check of continuing scrutiny in the Houses through the traditional means of motions, debates, parliamentary questions and committees.

Executive & Judiciary

First, the Sovereign who is the head of the executive is nominally involved in the administration of justice but there is no real involvement.

Second, the Lord Chancellor is indisputably a member of the executive as a cabinet minister, and of the judiciary of which he is the head.

Third, overlaps between the personnel of the executive and the judiciary would be found in the Privy Council also. Privy Council acts as a court to hear appeals from colonies and some commonwealth jurisdictions. The same persons being Privy Councilors are also members of that body which is technically an instrument of executive government.

Though judiciary sometimes performs some non-judicial or extra-judicial functions at the behest of the government, it is very rare to find that judiciary performs executive functions in real sense.

The Problems with the functions of the Home Secretary: Do the members of the executive perform any judicial function? Under the present system the administration of justice is split between different Government departments: the Lord Chancellor's Department, the Home Office and the Law officers. However, the Home Office, under the Home Secretary, is responsible to reform of the criminal law and procedure, sentencing policy, prisons and the probation service. The Home Office is also responsible for the police and the maintenance of law and order. It is also responsible for matters connected with immigration and civil rights. And these contradictory functions of the Home Office have come into question in recent times from the viewpoint of separation of powers.

In this regard the Home Secretary's judicial functions have recently come under huge judicial attack in view of the Human Rights Act 1998 and the ECHR. In *Benjamin and Wilson v UK* (Times LR 9 October 2002) the Court of Human Rights ruled that Article 5 of the Convention was violated through a procedure which involved having one's continued detention reviewed by a mental health tribunal which did not have the power to release, a power which lay with the Home Secretary. The Curt ruled that the issue impinged on the fundamental principles of separation of powers. The functional separation of the judiciary from the executive is fundamental since the rule of law depended on it. To be consistent with Article 5, the decision-making body had to be independent of the executive and competent not only to decide on the lawfulness of the detention but also to order release where the detention was unlawful.

In line with the doctrine of separation of powers the House of Lords in *R v Secretary of State for the Home Department* (Times LR 26 November 2002) removed the power of the Home Secretary to determine the tariff term to be served for punitive purposes by defendants convicted of murder and sentenced to life imprisonment under section 1(1) of the Murder (Abolition of Death Penalty) Act 1965.

The Home Secretary's judicial discretion and power has also been criticised and questioned by the Court of Human Rights in *Stafford v*

UK. The Court held that the Home Secretary had no power to keep murderers in prison once the Parol Board had decided that they can be safely released.

Checks and Balances exercised by the Executive and Judiciary upon each other:

First, judges owe their appointment to the executive. The Sovereign appoints them on the advice of the Prime Minister.

Second, security of tenure of judges as against the executive has not really been an issue since the Act of settlement was passed in 1700.

Third, the judiciary checks the executive by reviewing its action, to decide whether they are lawful or not.

Legislature and Judiciary

First, the Sovereign who is a constituent of parliament is also nominally involved in the administration of justice but there is no real involvement.

Second, the Lord Chancellor is a part of the legislature; he is the head of the judiciary as well.

Third, Law Lords may sit as judges in the House of Lords and in the Judicial Committee of the Privy Council. However, as members of the House of Lords they may also participate in the law making activities of that body.

Fourth, there is one respect in which both Houses participate in a process of a judicial nature and that is enforcing parliamentary privileges.

Fifth, if definition of legislation is confined to enactment, then it applies only to Acts of Parliament and the European Commission and subordinate legislation. The judges are involved in the passing of Acts

only to the extent that the Lords Chancellor and other judges in the House of Lords participate in law making.

Checks and Balances exercised by the Legislature and Judiciary upon each other:

First, the Sovereignty of Parliament entails that the courts have the duty to ascertain and give effect to the will of parliament and no power on any ground to declare an Act of Parliament invalid.

Second, Parliament has the last word in any event. If parliament disapproves of judicial lawmaking or interpretation, it can change the law retrospectively or prospectively.

Third, Parliament provides by legislation for the court structure and for judicial office holding and so in a sense regulates and may check judiciary.

Fourth, Parliament is not involved in the appointment of judges nor in the disciplinary or removal from office of the lower judiciary. Lords of Appeal and judges of the House of Lords and Court of Appeal are removable by the Crown upon an address presented by both the Houses but it has only happened once in the history of British constitutionalism.

The House of Lords and Separation of Powers

It is argued that the position of the Law Lords is in breach of the doctrine of separation of powers in the sense that they sit in the highest court to adjudicate disputes and at the same time they sit in the House of Lords to take part in legislative deliberation.

A case in 1998-99 concerning the extradition of General Pinochet caused the Royal Commission on Lords' reform to recommend that the Law Lords should publish a statement of principles to be observed by them when participating in debates and votes, and when considering their eligibility to sit on related cases (June 22, 2000). These events have had an effect on the Law Lords' participation in the non-judicial functions of the House.

Along with this there is a critical debate with regard to the position of the Lord Chancellor as one of the Law Lords. The Lord Chancellor's position is most objectionable in respect of separation of powers. He plays key role in each of the three branches of the state. He is the head of the judiciary; he is the most senior judge in the House of Lords. The Lord Chancellor is a party political appointment; he is also one of the important members of the cabinet and as such responsible for the operation of his own government department. He is also the speaker of the House of Lords in its general role as a legislative forum.

However, it is interesting to note that the Royal Commission chaired by Lord Wakenham concluded that Law Lords should continue to enjoy membership of the second chamber by virtue of office. Similarly, the 2001 White Paper envisaged that at least 12 Law Lords would continue to sit as members of the second chamber.

Conclusion

The above discussion makes it clear that strictly speaking there is no absolute separation of power in British constitutionalism. This is most markedly manifested in the position of the Lord Chancellor who is at the same time a member of the Parliament, an important member of the cabinet and the head of the judiciary. He has been portrayed as "certainly the spectacular exhibit in the museum of constitutional curiosities." There are substantial overlaps between the legislative and the executive. The overlaps in the role of the Home Secretary with regard to his judicial functions has also been a great concern for rule of law and protection of human rights.

However, this is not to show that the separation of power doctrine has been without effect. True, members of the government may sit in the Commons but only up to a statutorily limited number. True, a large volume of legislation emanates form the executive. But by convention both over primary and subordinate legislation parliament retains a number of controls. Thus even where the doctrine is apparently breached, it has had an important effect in limiting the

extent of the breach. It is contended that the theory of separation of power is more honoured in the breach than in the observance. Thus the separation of British constitution, although not absolute, might not to be lightly dismissed.

When some one convincingly says that the British constitution is formally based on the separation of power what is emphasised by this is the adherence to the concept of the independence and separation of the judiciary. The Act of Settlement 1700 provides that the superior court judges should hold office upon good behaviour rather that 'the King's Pleasure' as had been the case. The independence of the judiciary and the inability of the executive to remove them is one of the hallmarks of the separation of powers. (Since 1700 superior court judges can only be removed by the Crown on the address presented to it by both the Houses of Parliament. Circuit judges and Recorder may be removed from office by the Lord Chancellor for 'inability' or misbehaviour).

It is also clear from the above discussion that the idea of separation powers is of importance in the British constitution. But to claim that the constitution 'rests upon a separation of powers' surely goes too far. Similarly, while there is certainly a degree of 'mutual recognition of those powers', the overlap in functions between, executive, legislative and judiciary suggests that although each organs functions primarily within its own sphere, none is supreme therein. It is hard, therefore, to dissent from the view of the Donoughumore Committee in 1932 that the doctrine of Separation of Powers is no more than 'a rule of political wisdom which must give way when sound reasons of public policy so require'. It cannot be elevated as Lord Donaldson seeks to do, to a fundamental of the constitution.

In *Pepper Vs. Hart* the House of Lords approved of the use of Hansard as an aid to the interpretation of statutes. One issue raised by this decision is whether this represents a breach of the separation of power. The court held that looking at the parliament record was different from questioning a proceeding in parliament which is prohibited by article 9 of the Bill of Rights 1689.

Sample Questions with Suggested Skeleton for Solution:

(1) Explain the extent to which the doctrine of separation of powers is a feature of the UK Constitution. (University of London, 1998).

Suggested Skeleton for Solution: Here the question is very straightforward and what you need to do is just to produce various aspects of the doctrine of separation of powers and finally conclude whether separation of powers is a feature of the UK constitution or not (see pages 122 to 129).

(2) "If the separation of powers was a reality in the British Constitution, governmental and judicial arrangements would require major modification." Discuss. (University of London, 2002).

Suggested Skeleton for Solution: Here you should be careful to start your answer because this statement calls for discussion of the totality of the separation of powers and not only two aspects of it. Separation of powers is not a reality of the British constitution and hence no major modification in governmental and judicial arrangements would be necessary; this is because of how the doctrine works in a system with parliamentary supremacy.

- Discuss the main points of separation of powers between the legislative and judiciary; between the executive and legislative and between executive and judiciary (see pages 124-128);
- Finally discuss what changes would have been needed had there been separation of powers a reality in British constitution (a written constitution, absence of parliamentary supremacy, supremacy of the constitution, judicial supremacy, a supreme court and courts power to examine the validity of the law

passed by the parliament etc fundamental changes would have been required).

(3) "In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's court in interpreting and applying the law, (Lord Bridge of Harwich, 1991).

Suggested Skeleton for Solution: Here you should be careful to start your answer because this statement calls for discussion of not only two principles as stated by Lord Bridge but many others as well. This is because the rule of law in Britain rests not only two principles but also on principles like 'separation of powers', 'judicial review' and also the 'supremacy of parliament';

- Discuss in short the rule of law as propounded by Dicey (see page 271);
- Discuss Dicey's traditional doctrine of parliamentary supremacy; try to evaluate its necessary modification due to the primacy of the European Community Law (see pages 107-109);
- Discuss the role of judges in interpretation of law and applying law; here you will discuss whether judiciary is separate in discharging its functions under the doctrine of separation of powers. Discuss that the judiciary is not fully separate; judicial role of the Home Secretary has been questioned; executive and legislative functions of the Lord Chancellor have also been questioned (see pages 126, 128);
- Finally discuss in short how judges apply law and keep the administration under legal control under the doctrine of judicial review (write about *ultra vires* rules, see pages 249; significance of judicial review).

CHAPTER VII

THE HUMAN RIGHTS ACT 1998

Pre-HRA Era: Freedom and Civil Liberties

In traditional Dicean parliamentary system 'civil liberties' as opposed to 'civil rights' have all along dominated the UK constitutionalism; common law was the safeguard of civil liberties; no entrenched right-based system or constitution would be needed. 'Liberties' is used in two senses: in the negative sense they are not 'rights'; for nowhere in the law was it stated as such that individuals had the right to assemble peacefully. In the positive sense they are meant as liberties or freedoms; this is because of the principle that whatever was not unlawful might lawfully be done (Munro, 334). Liberties could be regarded as residual, because they existed in so far as legal limitations did not impinge on them and individual enjoyed them freely. This was the position of civil liberties in the UK under Dicean rule of law until the European Convention on Human Rights (ECHR). For Dicey there was no need for any statement of fundamental principles operating as a kind of higher order law because political freedom was adequately protected by the common law and by independent and supreme parliament acting as a watchdog against any excess of zeal by the executive (Wade and Bradley, 1993). Thus, Dicey based his assertion on two propositions: the first that common law provided adequate protection and second that parliament was an effective check on the executive.

Long before Dicey asserted his view Sir Edward Coke, the Chief Justice of England declared in *Dr. Bonham* case (1610) "that in many cases the common law will control Acts of parliament and sometimes adjudge them to be utterly void; for when an Act of parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void." But for this bold pronouncement the brilliant Chief Justice was removed from his office. A few years later Hobart CJ observed in *Day v Savage* (1614) that 'even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself.

However, by the time when Dicey wrote his book, the decision in *Bonham's case* and dicta in *Day v Savage* became obsolete; sovereignty of parliament was affirmed and established with legal consequence that the validity of any law passed by the parliament could not be questioned by any person or body. The supremacy of parliament and the absence of any judicial review power with regard to an Act of parliament has been recognised by the courts in cases like *Chenny v Conn* [1968] 1 All ER 779, *Exp Cannon Selwyn* [1872] 36 JP 54, *Lee v Bude & Torrington Rly Co.* (1871) LR 6 CP 576 etc. It came to be accepted that under the doctrine of parliamentary supremacy there are no individual rights or liberties that may not be curtailed or suspended by an Act of Parliament. The House of Lords decided in *Libersidge v Anderson* [1942] AC 206 that "in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved." This system of traditional civil liberties has three main defects: first, there is no single document to use it as a sword or shield against government action or inaction for protection of freedoms; second, law books must be studied to see if an alleged right exists; and third, if new situation arises not covered by existing legal authorities, then citizens remain in doubt as to their rights.

Apart from the above traditional defects of liberty based system, we will see further that in the context of the European Convention of Human Rights and the development of the European Law, the Dicean protection of freedoms and liberties has proved ineffective in many aspects. The gradual development of rights-consciousness as distinct from liberty-consciousness has been influenced by the UK's closer association with European institutions.

Effects and Impacts of the European Convention on Human Rights

The ECHR was signed by the state parties in 1950 and entered into force in 1953. However, the UK Government did not enforce the convention until 2000 when the Human Rights Act 1998 was given effect. Since 1966 when the UK ratified the convention, the UK has

been bound, as a matter of treaty obligation under international law[1], to conform to the requirements of the ECHR. However, the Convention being an international or regional treaty had no direct effect on English law and the English courts were unable to enforce the rights protected under it.

1. **Persuasive Effect:** The courts were able to treat the ECHR as having persuasive effect rather than as being of no effect. For example, when ambiguity arose in the course of statutory interpretation the construction which was consistent with the Convention could be preferred to the other (*Waddington v Miah* [1974] 2 All ER 377). Likewise, in *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011,HL where earlier common law precedents were ambivalent, the Court of Appeal was helped towards its conclusion that the local authority should be unable to sue for libel by reliance on the ECHR Article 10 (on freedom of expression).
   In *Exparte Brind* (*R v Secretary of State for the Home Department, ex p Brind*, [1991] 1 All ER 720) the Home Secretary issued a notice prohibiting the broadcasting on television or radio of the voice of any person speaking on behalf of a "proscribed organisation." The challenge to this prohibition was based primarily on the argument that it was contrary to the UK's obligations under Article 10 of the Convention guaranteeing freedom of expression. This ground failed as it was held that the primary legislation in question was not ambiguous; therefore, the Convention need not be taken into account as an aid to construction.

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[1] The practice of the British Courts with regard to law laid down by treaties is however quite different from that adopted in case of customary rules of international law. With regard to treaties affecting private rights of British subjects or which require the vesting of additional powers in the Crown, it is recognised that they must receive parliamentary assent for their enforcement. (UK adheres to the theory of 'dualism' as opposed to 'monism' in international law). To this extent treaties even if ratified or signed between the UK and any other country, are not the part of the law of the land unless they are expressly assented to by Parliament by an enabling Act.

2. **Inadequacy of Common Law Protection:** Invasion of privacy (right of privacy) has never been declared by the parliament a legal wrong and the judges could not create one. In. *Melone v Metropolitan Police* [1979] 2 All ER 620 the antique dealer found that his telephone calls were being bugged. However, he was left without a remedy in English court when Sir Robert Megarry V-C held that it was 'no function of the courts to legislate in a new field'[1]. When Mr. Malone was unsuccessful in the English court, he took his complain to Strasbourg where he was successful in arguing that his rights under Article 8 of the ECHR (respect for private life) have been infringed (1984) 7 EHRR 14. Same was held by the English courts in *Kaye v Robertson* [1991] FSR 62 CA when the judges considered that the right of privacy had been 'so disregarded here that it can be recognised now only by the legislature.' Thus some rights protected under the Convention could not be claimed and enforced in the domestic courts. This had three impacts: first, traditional common law could not give protection to some important rights; second, citizens would have to travel to the long and costly route to Strasbourg to get their Convention rights enforced; and third, the UK as signatory of the Convention had failed to fulfill its obligation under international law to 'secure to everyone within its jurisdiction the rights and freedoms' defined in the Convention by Article 1.

3. **Changes in existing Laws:** As a response to the decisions of the Strasbourg jurisdiction some alterations had been made by the British Parliament in some laws. For instance, legislation to abolish corporal punishment in state schools; law on contempt of court was redefined; as a result of the decision in *Malone* case law was amended by the Interception of Communication Act 1985 etc.

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[1] You must differentiate between *Malone* and *Entick.* In *Entick v Carrington* (1765) 19 State Tr 1029 the act involved amounted to trespass whereas in *Malone* the question was over telephone tapping and it was found by the court not unlawful.

4. **Treatment by the Courts to Rights:** Some other recent cases such as *Exp Simms* (*R v Secretary of State, ex p Simms*, [1993] 3 All ER, per Lord Hoffman at 412) *Exparte Witham* (*R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, *Exparte Leech* (*R v Secretary of State for Home Department, ex p Leech*, [1993] 4 All ER 539 show that courts have began to interpret statutes to respect fundamental human rights as 'basic' or "constitutional rights" unless statutes clearly indicates otherwise. However, the inability of the British courts to consider and develop English law with the Convention has been due to the fact that the Convention did not have legal force domestically.

By 1997, the UK had been found to be in violation of the Convention by the European Court of Human Rights in over 50 cases. Also from individual's perspective, taking case to the European Court of Human Rights has been costly and lengthy. The rights which were denied in domestic courts could be obtained from European Court of Human Rights but after a long journey and long process in Strasbourg. Sometimes the impact of the Convention has certainly been seen in alternatives of the law as responses to decision in Strasburg.

Against the above background views on incorporation of the Convention into domestic law for last 30 years have culminated into the Human Rights Act 1998. Proposals for the enactment of a Bill of Rights in the UK became commonplace from the late 1960's onwards. The Government which took office in 1997 decided to incorporate the Convention and this was effected by passing the Human Rights Act 1978.

Effect and Implications of the Human Rights Act 1998

(i) The Human Rights Act has been regarded as the most significant document of domestic human rights law in the UK since 1689 Bill of Rights. The Act came into effect in October 2000 with a move from the traditional Dicean model of the common law to a right-based system. Instead of liberties and freedom in the negative sense people will

enjoy now 'positive rights' protected and guaranteed in a statute;

(ii) Unlike earlier, protected rights system will be able to preserve the values enshrined in international rights instruments particularly the ECHR. The Human Rights Act 1998, will enable the UK to conform to its international obligations under the European Convention and will mean that citizens can obtain redress from the UK courts without needing, except as last resort, to apply to Strasbourg;

(iii) The jurisdiction of English courts have changed from being one in which the court may use the Convention as an aid to interpretation but not to enforce the Convention, to one of declaring whether or not English Law conforms to the Conventional requirements;

(iv) There will be another benefit. The British judges will be able to make a distinctive British contribution to the development of the jurisprudence of human rights in Europe;

(v) The Act reflects a move towards the entrenchment of rights protected under the Convention. However, against the background of the sensitivity of relationship between the elected parliament and the unelected judiciary, a balance has been maintained in the Act with regard to the constitutional relationship of parliament and the judiciary. To that effect, the Act expressly states that the courts cannot invalidate any primary legislation which are found to be incompatible with the Convention; they can only make a declaration of incompatibility and leave it to the legislature to remedy the situation through new legislation (section 4).

(vi) The Act has the effect of altering the function of the judiciary by introducing a political dimension into it.

Judges will assume the role of reviewing primary legislation incompatible with ECHR and thus it will involve some political role. Though parliamentary supremacy is preserved, it has been, in fact, drastically curtailed. The legitimacy of this new enlarged role of the judges has been questioned. It is argued that judges are unelected and therefore any assumption of political function is considered undemocratic.

(vii) It is contended that the effect on the protection of convention rights also called civil rights would be much more beneficial. Under the Act the scope of judicial review of administrative action will be greatly widened; administrative discretion will have to be exercised within Convention limits.

Parliamentary Supremacy hampered?

(i) The HR Act is not a higher or fundamental law. There is no attempt to entrance its provisions by protecting them against any repeal. So future legislation may repeal the Human Rights Act like any other ordinary statutes;

(ii) Like the New Zealand Bill of Rights, the Human Rights Act has been made unentrenched. Section 3 of the Act expressly preserves incompatible legislation. It says that previous primary and subordinate legislation must, as far as possible, be read and given effect in a way which is compatible with Convention rights. However, this does not affect the validity, continuing operation or enforcement of any incompatible primary legislation or any incompatible subordinate legislation if primary legislation prevents the removal of the incompatibility. Thus the Act via the Convention cannot be used to strike down any part of an existing statute as unconstitutional. This also ensures that Parliamentary Supremacy is not hampered;

(iii) Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. However, parliamentary supremacy is preserved by limitation imposed by sections 6(2) and 6(3)(4) to the effect, in particular, that the 'parliament' is excluded from the definition of 'public authority';

(iv) If a particular legislation cannot be read in compliance with the 'convention rights' as incorporated by the Act, it may be struck down as invalid if it is a subordinate legislation, provided that the primary legislation does not prevent removal of the incompatibility (Section 3(2)). However, if the primary legislation prevents removal of the incompatibility, then the subordinate legislation cannot be struck down and in this case the validity of such subordinate legislation will not be affected. In such a case, the court may issue 'declaration of incompatibility' under section 4 (Section 4(3),(4)).

(v) If courts cannot read primary legislation to comply with the Convention rights, then its validity and operation is not to be affected; in this case the higher courts will have the power to issue 'declaration of incompatibility' and a 'fast track' procedure will follow whereby the government will legislate or amend to remedy such incompatibility (Ss 4,10,19 and Sch 2). There is a provision for 'remedial orders' in Section 10 which empowers ministers to legislate by Order in Council which may amend any primary legislation. However, a minister may only employ it when there are 'compelling reasons' to do so, and resolutions of both the Houses of Parliament are needed to approve an order. It, therefore, seems probable that it will more often be found convenient for parliament to legislate in the usual way when there is a question of amending legislation. Thus final responsibility lies with parliament and not with the courts;

(vi) If a lower court cannot read a primary legislation compatible with a particular Convention rights, it must simply apply the domestic legislation[1];

(vii) Section 19 of the Act provides for declaration by the promoter of a Bill in the parliament that the Bill is in compatible with the convention rights;

(viii) Section 14 allows for derogations from Convention rights, as exercised in relation to the Immigration and Asylum Act 2000 and Article 5.

Is the Human Rights Act 1998 a Constitutional Bill of Rights?

(i) As mentioned above, from the view point of legal document the Human Rights 1998 is not an entrenched constitutional statute. This is because like any other thousands statutes it is just an ordinary enactment. No attempt has been made to make it entrenched (section 3).

(ii) However, from the viewpoint of importance and significance the Human Rights Act 1998 is certainly a Constitutional Statute and it is to be treated as one of the legal sources of the constitution. Though the Act is an ordinary piece of legislation, Holfman LJ recognised in *R v Secretary of State ex parte Simms* [2000] that it does indeed have a special status as a constitutional Act and accordingly it is unlikely that the doctrine of implied repeal will operate to defeat its provisions.

(iii) It has also been suggested that though the Human Rights Act 1998 is not subject to any formal restraints against its amendment or repeal, in a moral and political sense it would prove to be very difficult to amend or repeal.

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[1] Declaration of incompatibility is done only by the House of Lords, Privy Council, Court of Appeal and the High Court.

(iv) The Act makes it unlawful for all public bodies to act in contravention of Convention rights (section 6) and the definition of public bodies includes courts and tribunals. Initially it was thought that the Act would operate only vertically against government bodies. However, by including courts and tribunals within the definition of public bodies, the Act seems to allow for horizontal effect, which extends the scope of the Act to include non-state bodies. Example is the *Venables* case in which the Court of Appeal granted an indefinite injunction against the press preventing the disclosure of the identity and whereabouts of the child-killers Thompson and Venables in order to protect their right to life under Article 2.

(v) The domestic courts exercising their powers under the Human Rights Act 1998 have already started to disapply primary legislation and this disapplication will virtually amount to declaring laws void notwithstanding the fact that disapplication is not taking place under a written constitution and that the parliament will be forced to correct the law not by courts technically but by European Commission and political pressure. This is already evident in cases like *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* (2001) The Times, 3 April, AC, *R v Secretary of State for the Home Department* (2002), and *Bellinger v Bellinger* (2003) with regard to the Human Rights Act and the European Convention on Human Rights.

The Human Rights Act 1998: Parliament and Judiciary

(i) As has already been mentioned the Human Rights Act preserves parliamentary sovereignty and as a result the judiciary has not been given any new power of judicial review as is understood under an entrenched constitution. Therefore, the balance of power still remains with the British parliament.

(ii) Given the limited power of the judiciary, it will not be possible for citizens to come to the court to challenge an Act of parliament with a view to protecting their rights and freedoms which might be under attack by any alleged enactment.

(iii) To give balance to the judiciary the constitutional set up in Britain would have to be changed, e.g. by adopting a written constitution with a constitutional court which, it is suggested, would be unlikely against the historical background of constitutionalism.

(iv) However, though judiciary has not been given any express powers to declare an Act of parliament invalid, the domestic courts exercising their powers under the Human Rights Act 1998 have already started to disapply primary legislation and this disapplication will virtually amount to declaring laws void notwithstanding the fact that disapplication is not taking place under a written constitution and that the parliament will be forced to correct the law not by courts technically but by European Commission and political pressure. This is already evident in cases like *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* (2001) The Times, 3 April, AC, *R v Secretary of State for the Home Department* (2002), and *Bellinger v Bellinger* (2003) with regard to the Human Rights Act and the European Convention on Human Rights.

(v) As far as constitutionality of legislation is concerned, though the Act maintains the theory of parliamentary supremacy, nonetheless, in practice, the courts will inevitably become involved in political-constitutional issues. As result of the secondary nature of the legislation produced by the Scottish Parliament, the court will have the power to quash such Acts invalid for lack of

compatibility with the Convention. This is evident from a recent decision by the Court of Appeal in *R v Secretary of State for the Home Department* (2003). In this case the Court of Appeal held that the policy to refuse support to asylum seekers unless they claimed asylum at the port of entry under section 55 of the National, Immigration and Asylum Act 2002 was unlawful. The Court also went out of its way to provide the Home Secretary with advice on how to make the Act and the procedures under it, compatible with Convention rights. This case shows that the introduction of the Human Rights Act has greatly increased the judicial power in relation to the other two branches of the Constitution i.e. the executive and the legislature.

(vi) There is also suggestion that the House of Lords will have to come forward to act as a constitutional court. Apart form the issue of declaration of incompatibility, the issue of devolution of power will give rise to disputes as to the relationship between Westminster Parliament and Scottish Parliament. Eventually these issues will have to be resolved in the courts.

Effect over Statutory Construction

Although the Human Rights Act is not entrenched, a far reaching effect of it would be the 'interpretative obligation' in Section 3.

(i) Section 3 requires legislation to be 'read and given effect in a way which is compatible with the Convention rights, not merely when it is reasonable to do so, but so far as it is possible to do so.' Since domestic courts and tribunals are to interpret legislation in a manner consistent with the Convention Rights and to take account of the decisions, declarations or opinions of the Strasburg institutions under section 2, the common law approach to statutory interpretation will not be the same again. The interplay of

section 2 and 3 will inject the Strasbourg method of judicial reasoning into English Law practice; doctrine of precedent will be abrogated to the extent that is necessary to give effect to Convention rights.

(ii) Strasbourg case law has consistently held that the Convention is a living instrument which must be interpreted in the light of present day condition. Thus traditional literal interpretation will no longer haunt the judges.

(iii) The purposive approach of statutory construction has already began to permeate English judicial reasoning in relation to European Community law and it is very much likely that this construction will be transferred relatively easily from the European Community to the European Convention context. Thus though the Human Rights Act is an ordinary unentrenched legislation, Lord Lester of Herne Hill has commented that from interpretative perspective it will work as a constitutional measure designed to make Convention rights part of fundamental law in the UK.

(iv) Apart from the rule of construction imposed on the courts as mentioned above, the Act has also imposed legal obligation on 'public authorities' to comply with convention rights. This obligation has created an opportunity for litigation by making the same directly enforceable in the courts. In this respect the Act creates a new cause of action. However, if actions are brought by way of judicial review or other proceedings to claim that a public authority has acted unlawfully, then there is standing only for someone who is or would be a victim of the allegedly unlawful action (Section 7(1),(3),(4)). This adopts the Strasbourg test which is narrower than the test for standing in judicial review generally. Pressure groups, for instance, would be less likely to qualify as having standing on the basis of Strasbourg case law.

Weakness of the Human Rights Act

(i) The most obvious weakness in the eyes of critics lies in the fact that Convention rights are not higher law in any event and as such the protection provided in the Act may be withdrawn any time by the parliament;

(ii) Courts and tribunals are instructed under section 2 that they 'must take into account' the case law of the Strasburg institutions, wherever made. They are not, however, legally bound by the Strasburg case law. This distinction necessarily involves the potential for differences of interpretation. For these, it is highly likely, there will still be occasions for aggrieved victims to go to Strasbourg as a last throw.

(iii) Another criticism is that no measure has been taken in the Act to establish a Human Rights Commission to oversee and keep under review the adequacy of protection. It is, however, thought that this omission will probably be remedied before many years have passed. In the meantime the Houses of Parliament will have opportunity to develop their role with regard to civil rights, perhaps though Select Committees.

(iv) The Human Rights Act preserves parliamentary sovereignty and as a result the judiciary has not been given any new power of judicial review as is understood under an entrenched constitution. Therefore, the balance of power still remains with the British parliament.

(v) Given the limited power of the judiciary, it will not be possible for citizens to come to the court to challenge an Act of parliament with a view to protecting their rights and freedoms which might be under attack by any alleged enactment.

(vi) The Act has imposed legal obligation on 'public authorities' to comply with convention rights. This obligation has created an opportunity for litigation by

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Joint Committee on Human Rights and Declaration of Incompatibility:

This Committee was set up in January 2001 following enactment of the Human Rights Act 1998 to consider and report on:

(a) matters relating to human rights in the UK (but excluding consideration of individual cases);

(b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and

(c) in respect of draft remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in standing orders 73 (Joint Committee on Statutory Instruments).

This committee comprises twelve members, six from each House. Usually the committee does not have a government majority. The committee took oral evidence on the implications of the Criminal Justice and Police Bill 2001 (now Act) and made a substantive report on this shortly before the 2001 election. It also took evidence of the Human Rights Act and began to consider the case for a Human Rights Commission in the UK.

The first remedial order to be considered by the committee was the Remedial Order on Mental Health Tribunals, to rectify a declaration of incompatibility under section 4 of the Human Rights Act 1998, that sections 72(1) and 73(1) of the Mental Health Act 1983 are incompatible with Articles 5(1) and 5(4) of the ECHR. This first declaration was made in *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health ex p H* (2001) The Times, 3 April, AC.

A recent declaration of incompatibility was made by the House of Lords in *R v Secretary of State for the Home Department* (2002). The House made a declaration under section 4 of the HRA that section 29 of the Crime (Sentences) Act 1997, which conferred on the Home Secretary control of the release of mandatory life sentence prisoners, was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal.

Another declaration was made in *Bellinger v Bellinger* (2003). The House of Lords admitted their incompetence as regards deciding issues relating to the rights of transsexuals. For that reason, they issued a declaration of incompatibility under the Human Rights Act 1998 and thus passed the matter to parliament for review and appropriate reform.

Judicial Review and the Human Rights Act 1998:

Please see page 264.

Sample Questions with Suggested Skeleton Solutions:

(1) Discuss the respect in which the Human Rights Act 1998, is and those in which it is not, equivalent in law to an entrenched constitutional Bill of Rights (University of London, 2003).

Suggested Skeleton for Solution:

- Start with the background of the Human Rights Act 1998 (see pages 135-137, four impacts of the European Convention on Human Rights);
- Evaluate how the Act is not entrenched (see paragraphs (i), (ii) and (iii) at pages 139-140);
- Evaluate how the Act can be treated as an entrenched constitutional bill of rights (see paragraphs (ii), (iii), (iv) and (v) at pages 141-142).

(2) Discuss whether the Human Rights Act 1998 represents the first step towards a constitutional Bill of Rights for the UK (University of London, 2001).

(3) To what extent, in your view, can the Human Rights Act be regarded as providing citizens with a 'fundamental charter of rights'?

Suggested Skeleton for Solution: The above two questions will have almost the same answers.

- Start with the pre-Human Rights era: liberty based society under Dicean rule of law (see pages 134-137);
- Evaluate how courts faced problems in enforcing rights guaranteed under the ECHR and how individuals had to travel to Strasbourg to get their Convention rights enforced (see pages 135-137);
- Evaluate how the UK as a member state of the Convention has been found in breach of Convention rights (see page 137);

- Evaluate the balance between the parliament and the judiciary under the Act (see paragraphs (i)-(iv) of pages 142-144);
- Signify the future of the Act (see paragraphs (i)-(iv) of pages 142-144).

(4) "The Human Rights Act 1998 seeks both to preserve Parliament's sovereignty and the separation of powers between Parliament and the judiciary. As such, it fails to provide an absolute protection of rights and freedoms" Discuss. (University of London, 2002).

Suggested Skeleton for Solution:

- Start with the background of the Human Rights Act 1998 (135-137);
- Evaluate how parliamentary supremacy has been kept intact (see pages 139-140 (i), (ii), (iii), (iv));
- Evaluate the balance between the parliament and the judiciary under the Act (see pages 142-144 (i), (ii), (iii), (iv)).

(5) "In Dicey's view, individual rights are best protected under the Common Law". To what extent does the record of the UK under the ECHR uphold or deny this view?

Suggested Skeleton for Solution:

- Start with the pre-Human Rights era: liberty based society under Dicean rule of law (see pages 133-134);
- Evaluate how courts faced problems in enforcing rights guaranteed under the ECHR and how individuals had to travel to Strasbourg to get their Convention rights enforced (see pages 134-137);
- Evaluate how the UK as a member state of the Convention has been found in breach of Convention rights and how the Human Rights Act 1998 now protects these rights (see pages 137 and 138).

CHAPTER VIII

THE MINISTRY AND THE CABINET

Ministers of the Crown:

Those who on behalf of the Crown exercise the executive power of the Government are known as the Ministers of the Crown. In theory ministers are the servants of the Crown. In the past all ministers were both appointed and dismissed by the Crown. All ministers were responsible to the Crown. However, with the growth of parliament along with party system the power of the Crown began to diminish. After 1832 the appointment of ministers came to be the function of the Prime Minister and the King's role became just ceremonial. The ministers of the Crown may be Secretaries of State (Full Ministers), Ministers of State (Deputy Ministers), Under-Secretary, or Parliamentary Secretary (junior ministers).

The Cabinet and Cabinet Ministers:

The first and most important non-departmental Minister is the Prime Minister[1] himself. He is the chairman of the cabinet and head of the ministry. The cabinet consists of such members of the ministry as the Prime Minister invites to join him in 'tendering advice to the King on the government of the country.' Thus a member of the cabinet has, as such, no office; he is simply a minister who attends cabinet meetings because he has been asked by the Prime Minister to do so. Most cabinet ministers are heads of the chief government departments, for example, the Chancellor of the Exchequer, the Foreign Secretary and the Home Secretary, but a number of heads of departments will be outside the Cabinet, and the Cabinet will include

[1] The term 'Prime Minister' was long unknown to the Constitution; the person holding the post was officially the First Lord of the Treasury. It was not until 1905 that the term 'Prime Minister' was given official sanction, and then only by a Royal warrant conferring precedence on the Prime Minister. In 1917 the words 'Prime Minister' first appeared on the Statute Book in the Schedule to an Act granting the Prime Minister the free use of a country house (Baily, Sidney D, *British Parliamentary Democracy*, 1966, p. 169).

some ministers whose offices involve few or no departmental responsibilities.

Other Ministers: Secretaries of State are the heads of the largest departments. For instance, the Secretary of State for Foreign Affairs, Secretary of State for Defence etc. Then comes the 'Ministers of State' who are 'deputy ministers' in Government Departments and are usually allocated particular areas of responsibility. Two Law Officers, i.e. the Attorney General and Solicitor General are also under this category. Finally, there are the Parliamentary Secretaries or junior ministers. Each departmental Minister has usually a Parliamentary Secretary, but in some of the larger Departments there may be two. A Parliamentary Secretary may not be confused with the Permanent Secretary who is a senior member of the Civil Service. A Parliamentary Secretary may take three forms: Parliamentary Under-Secretary of State (where the head of the department is a Secretary of State), Parliamentary Secretary (where the head of the department is not a Secretary of State) and Parliamentary Private Secretary (they are MPs but not counted as ministers; they act as unpaid assistants to ministers).

Differences between Ministry and Cabinet

First, all cabinet members are ministers but all ministers are not cabinet members.

Second, ministry is bigger than the cabinet in size. In general the cabinet has 20 to 25 ministers whereas the ministry might have over 90 members. Thus the cabinet is the inner circle of the ministry. The cabinet is also called the nucleus of the Ministry[1].

Third, all cabinet ministers are given the membership of the Privy Council whereas all members are not given this status.

Fourth, when the parliament is in session, the cabinet meets normally twice a week and when the parliament is not in session, the

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[1] O' Hood Phillips, *Ibid*, p. 303

cabinet meets once a week or less than that. On the other hand, the meetings of the ministry is held irregularly.

Fifth, there is no legal basis of the cabinet system as it is based on convention whereas the ministry is a legal institution recognised by common law.

Sixth, the functional difference between the cabinet and the ministry is very important. The main functions of the cabinet is to advise the Queen relating to governmental activities but the ministry cannot advise the Queen. Again, it is the cabinet which decide and determine the policy of the government; the ministry does not do this. Ministers has only responsibility to execute policies determined by the cabinet. This is why professor Zink states, 'the cabinet officer deliberates and advises; the privy councilor decrees; and the minister executes'[1].

Seventh, whereas ministers have duties as individual officers of administration, cabinet members have, in addition, collective responsibilities in the parliament.

Eighth, the duration of the ministry depends on the duration of the cabinet. If the cabinet resigns, the whole ministry will have to resign.

Functions of the British Cabinet

The British cabinet system which is considered the wheel-power of the government has grown and developed on the basis of conventions. As stated by Sidney D Baily the cabinet minister has four major tasks. First, they have the heavy responsibility of belonging to the supreme executive body of the land, Secondly, they are normally Ministers in charge of Departments of State. Thirdly, they are Front Bench members of parliament, with Bills to introduce and pilot through parliament, quite apart from their share of local constituency business. Fourthly, they are usually leaders of a political party and are frequently called upon to serve on party committees and address party meetings (P. 179). The main functions of the cabinet

[1] Zink, *Modern Governments*, p. 48.

were set out in the Report of the Machinery of Government Committee (Halden Committee) (1918) as:

(a) the final determination of the policy to be submitted to parliament;

(b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and

(c) the continuous co-ordination and delimitation of the authorities of the several Departments of State.

Although this definition is not entirely satisfactory, it does bring out the essential features of the functions of the cabinet[1]. If we explain these three functions basing our discussion on Jennings, Harvey and Bather, and Bagehot we will find the following four heads of functions of the cabinet.

Determination of Policy:

The cabinet is the main body to determine the policy of the government. It decides on the major policy to be followed in both home and foreign affairs. Normally the policies in the cabinet are determined on the basis of programmes and pledge advanced by the ruling party at a general election and this is why it is sometimes said that in policy making the cabinet works as a committee of a party. When a matter of policy is discussed in the cabinet, individual ministers may disagree among themselves but they must present to Parliament and to the world a united front. If an individual minister finds it difficult to agree with the conclusion of the cabinet, the only course left for him is to resign. When the cabinet has determined on a policy, the appropriate department carries it out either by administrative action, within the framework of the existing law, or by submitting a new Bill to Parliament so as to change the law in conformity to the policy. The 'Speech from the Throne' is determined and adopted by the cabinet and it contains the main policies of the government. It is rare for a majority in parliament to challenge cabinet policy. The cabinet only takes office if it thinks it enjoys the

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[1] Bailey, Sidney D., *British Parliamentary Democracy*, p. 176

confidence of parliament, and once in office cabinets tend to act as masters rather than servants of parliament.

Law Making Functions:

The law making functions of the cabinet is correlated to its policy determination. This is because of the fact that to implement major policies corresponding legislation is a must and the initiator of that legislation is the cabinet. It is the cabinet which plans the legislative programme at the beginning of each session of Parliament; public Bills are introduced and piloted in Parliament usually by a Cabinet Minister or by some Minister acting on cabinet's approval. When the cabinet has determined on a policy, the appropriate department carries it out, either by administrative action within the law or by drafting a Bill to be submitted to Parliament so as to change the law. Legislation is, thus, the handmaid of administration and cabinet is the instrument which according to Bagehot, links the Executive branch of government to the legislative. Ogg has aptly said that Cabinet Ministers formulate policies, make decisions and draft Bills on all significant matters. The cabinet directs the parliament for action in a certain way and so long as it can command majority in the House of Commons, it gets the approval of the parliament. This is how the Cabinet asks parliament to take necessary steps with a view to carrying the policies determined into effect. As long as the Government has a majority in parliament, it is rare to challenge cabinet policy. This is because the cabinet consists of leading ministers of the majority party in the parliament and as such once in office cabinet tends to act as master rather than servants of parliament.

Controlling the Executive:

From legal point of view, the Queen is the head of the executive though there is little scope for the Queen to exercise this executive power individually; she cannot exercise this power without consulting the cabinet. And this is why it is said that the Queen reigns but does not govern the country; the country is governed by the cabinet under the leadership of the Prime Minister. The cabinet is to exercise control over the executive in various ways. First, the cabinet is to observe whether ministers and other departments are carrying out the policies determined by the cabinet and approved by the parliament. In carrying

out the work of every department ministers have to follow the directions of the cabinet. Any deviation therefrom is against the rigid discipline of the party government and may consequently lead to the removal of Ministry. Second, with the increase of scope of activities the parliament just make the main framework of law leaving the details to be done by the ministers and their respective departments by way of delegated legislation. The cabinet is to observe the compliance as it is the cabinet which is collectively responsible to the parliament. Third, individual ministers are answerable to the parliament for all acts or omissions and the cabinet as a whole is to make sure the efficient management of departmental business and see that it is responsive to the needs of the people. Fourth, all departmental ministers and their respective departments are to follow and adopt new policies or change in the policies by the cabinet. An individual minister cannot change or modify any policy without the permission of the cabinet, as the cabinet is responsible to the parliament for all its policies.

Functions of Co-ordination among different Departments:

The essential function of the cabinet is to co-ordinate and guide the functions of the several Departments of the Government. Harvey and Bather says that if the administration is to work smoothly and policy is to be implemented successfully, there must be careful coordination between the departments affected (P. 243). All Governmental departments are correlated and inter-depended to each other; the action of one department may affect the work of another department and, indeed, every important problem cuts across departmental boundaries. For instance, a foreign policy decision will affect defence and trade departments and as such both these latter departments are to be kept informed of those policies. Otherwise, there will be misunderstanding among these departments.

Significance of the Functions of the Cabinet

The above discussion makes it clear that the cabinet works as the central body of the British administration. As to the importance of the functions of the cabinet Harvey and Bather say, while the cabinet has important policy-forming and coordinating functions, it is not merely

an executive organ of the government. It is the device which gives coherence to the whole of the British constitution and represents an alternative to the separation of powers as a basis of organising democratic government. Through the cabinet, the executive power is directly related to the legislature and so to the electorate (P. 241). The above discussion also makes it clear that the cabinet advises the Crown with regard to all governmental activities; it is the cabinet which raises all major proposals in the parliament; it is the cabinet which can easily control the parliament because the cabinet is a body appointed from among those persons whose views there are in the majority in the parliament; again it is the cabinet which is collectively responsible to the parliament for its policy and functions. Bagehot explains it as follows: 'A cabinet is a combining committee- a hyphen which joins, a buckle which fastens the legislative part of the state to the executive part of the state'. According to Gladstone, cabinet is a threefold hinge which conjoins the Crown, the House of Commons and the House of Lords. The whole governmental system in Britain is circled around this cabinet. "It is", according to Marriott, "the pivot around which the whole political machinery revolves." Lowell called it "the keystone of the political arch." Ramsay Muir spoke of it as "the steering wheel of the ship of the state."

The Power and Functions of the British Prime Minister

Though in theory the Crown is the head of the British government, the real head is the Prime Minister. This is because there is parliamentary supremacy in Britain; the Crown has long been detached from the real executive or legislative; and for last two hundred years the Prime Minister has stood head and shoulders above his cabinet colleagues and the parliament. The term 'Prime Minister' has not been created by any statue; all the powers and functions associated with this term are based on conventions. The functions of the prime minister may be categorised as follows:

(A) Functions relating to the Cabinet;
(B) Functions to Advise the Crown;
(C) Functions on International Affairs.

A. Functions relating to the Cabinet

The Crown appoints the leader of the majority party in the parliament as the Prime Minister. Once appointed, the Prime Minister's first and most important function would be to form the cabinet, i.e. the government. With regard to the Prime Minister's function as to the cabinet professor Laski says that the Prime Minister is central to its formation, central to its life and central to its death. On the basis of this statement by Laski the Prime Minister's functions relating to cabinet may be discussed under the following three heads:

(i) **The Formation of the Cabinet or Government:** The most important function of the Prime Minister is to form the cabinet. The Prime Minister makes a list of minister and submits it to the Crown for assent. Technically, the last word rests with the Crown, because it is he who appoints them. However, in practice, the decision belongs to the Prime Minister and Royal assent is more or less a formality. The Prime Minister in constituting his government has to consider the claims and views of leading members of his party in both the Houses.

(ii) **Running the Government Administration:** The Prime Minister is central to the day to day running of the government as he is central to the formation of the cabinet. He presides over cabinet meetings as its chairperson; he controls the cabinet agenda and it is for him to accept or reject proposals for discussion submitted by Ministers; he has to keep and maintain unity among all cabinet members; he is to make sure that the collective responsibility of the cabinet is always on line; he is the chief coordinator of the policies of the several ministers and ministries. It is the Prime Minister who has the power to appoint, reshuffle, or dismiss ministers as circumstances require; he has to review the allocation of offices among his various colleagues; he determines the structure of cabinet committees; he is the communicating link among different government departments; he is the spokesman in the parliament with regard to all proposals raised on behalf of the cabinet. Thus it would not be an

exaggeration to say that all activities of the government, i.e. the cabinet is administered around the Prime Minister. And this is why the Prime Minister is called the keystone of the cabinet arch.

(iii) **Falling of the Cabinet:** As long as the Prime Minister is in power the cabinet will continue in office; if the Prime Minister resigns, the cabinet as a whole will have to go. Thus the Prime Minister is the central to the fall of the cabinet also.

B. Functions to Advise the Crown

The Crown has a constitutional right to be informed and consulted on matters of government and this is done through the Prime Minister. The Prime Minister is the principal channel of communication between the cabinet and the Crown on matters of public concern. The Prime Minister informs the Crown all major cabinet decisions and have discussion over the same. The Prime Minister is also the chief adviser to the Crown and in emergencies the Crown will first consult the Prime Minister. The Prime Minister also advidses the Crown on royal activities of an official character such as a visit to a foreign country, or tour of a part of the kingdom or empire or Commonwealth countries.

C. Function on International Affairs:

The role of the Prime Minister in fixing international policies and dealing with international relations is of great importance. The statement of the Prime Minister with regard to international affairs is the statement of the government. The Prime Minister represents the UK in different international and regional summits, conferences and treaty signing occasions.

The Importance and Significance of the Prime Minister

The above discussion makes it clear that the Prime Minister is the most important and powerful person in the administration of the state. Though there is parliamentary supremacy in the UK, the Prime

Minister is the driving force of the government. John Morley says that 'the Prime Minister is the keystone of the Cabinet arch.'[1] However, professor Jennings says that 'it would be more accurate to describe the Prime Minister as the keystone of the constitution.' Lord Morley also describes that although all cabinet members stand on equal footing, the Prime Minister is *primas inter pares* (first among equals). Ramsay Muir says that the prime minister occupies the position of '*inter stellas luna minores*' (a moon among lesser stars)[2]. However, Jennings says that the Prime Minister is not merely *primus inter pares*. He is not even *inter stellas luna minores*. He is, rather, a sun around which planets revolve. As the head of the government the Prime Minister has influence all over the administration. He is the leader of the majority party in the House of Commons; he is the master man in the formation, continuation and fall of the government; it is his opinion which is approved by the cabinet and later accepted by the parliament and lastly accepted by the people in general. Thus the decision of the cabinet is the decision of the Prime Minister. This is why many tend to say that the British government is not a cabinet government; it is rather Prime Ministerial Government. However, the Prime Minister is never a dictator because he always cannot go beyond the decision of the cabinet; nor can he go against the public opinion.

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[1] Referred to in Jennings, *Cabinet Government*, 3rd ed. p. 173.

[2] Ramsay Muir, *How Britain is Governed*, 3rd ed. p. 83

Sample Questions:

(1) Explain the role of the Prime Minister and the Cabinet in British constitutional law. (Wolverhampton, 2002).

(2) The Prime Minister in the British constitution has been described as 'primus inter pares' or 'first among equals'. However, it has recently been argued that Britain has moved from a system of Cabinet government to one of Prime Ministerial Government. To what extent do you agree with the view that the Prime Minister of the UK now dominates government decision making? (Wolverhampton, 2000).

(3) The Powers of the executive, led by the Prime Ministe, is such that any real balance between the three organs of the government in the UK is a fiction. (Wolverhampton, 1999).

CHAPTER IX

RESPONSIBLE GOVERNMENT AND MINISTERIAL RESPONSIBILITY

Responsibility

Generally responsibility means the accountability of a person or body to another person or body. This responsibility may be political or legal. But the term 'responsibility' in relation to modern democratic governmental system means political responsibility i.e. responsibility to the people or a body representing the people. This political responsibility may be used in two senses (i) Direct Responsibility ; and (ii) Indirect Responsibility. Both the presidential and parliamentary form of government are responsible government but the presidential system has no, in a sense, direct responsibility; its responsibility is indirect whereas the parliamentary system has direct responsibility.

Indirect Responsibility

When the accountability or responsibility of a government cannot be enforced directly by an elected body or parliament, the responsibility is indirect. Presidential system of government has this indirect responsibility. This is because in a presidential system all ministers are like servants or advisers of the President. Unlike in the parliamentary system ministers in presidential system have neither individual responsibility nor collective responsibility to be enforced by parliament. They are absolutely responsible to the President who can dismiss them whenever he wishes. All political responsibility is vested in the President alone and he has to take responsibility for all governmental actions. But there is no mechanism in this system to enforce this responsibility of the President directly. Because the President is not accountable to parliament; he has no responsibility to justify his action in parliament and parliament can never proceed for no-confidence motion against him. He is indirectly responsible to the people and the test of such responsibility comes after a definite period, e.g. five years, during which it is quite impossible to remove him from office.

It is pertinent to mention here that in presidential system the President may be removed from his office through impeachment. But this impeachment is not any device to make him responsible to parliament directly because of the following reasons:

First, the impeachment procedure is a very difficult procedure; it cannot be enforced by any simple majority. To impeach the President under the US Constitution a resolution thereto is to be moved in the House of Representative by one or more members. If the resolution is supported by the majority in the House, it then goes to the Senate for trial. If the charge is supported by votes of two-thirds of the total members present, the president shall vacate his office (Article 1 Sec. 3 & Article 2 Sec. 4). During more than 200 years of the US presidential system only two times the Congress took attempt to impeach the President. The first was in 1867 when the Congress moved an impeachment motion against President Andrew Johnson. But the motion could not be passed for want of one vote in favour of the motion. The second was in 1972 when the Congress proceeded to move impeachment against President Nixon on the ground of his Watergate scandal. But Nixon resigned before the motion could be moved.

Second, the President cannot be impeached on any ground of political responsibility. He can be impeached only on some limited grounds specifically mentioned in the constitution.

Direct Responsibility

When the responsibility of a government can be enforced directly by a representative body of the people i.e., parliament, the responsibility may be termed as a direct responsibility. This type of responsibility exists in Westminster type of parliamentary form of government. "The term responsibility which is more common in Britain than in most other countries is to signify the accountability of ministers or of the government as a whole to an elected assembly".[1] Thus in true sense responsible government means a government which is directly accountable to a parliament and is bound to resign whenever it loses support of the majority in it. For two specific

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1 Birch, A.H, *Representative & Responsible Government,* (London: George Allen And Unwin Ltd, 1966), P. 20

reasons or intrinsic features attributed to this system the parliamentary form of government is called responsible government: first, individual responsibility of ministers ; and second, collective responsibility of the cabinet or government as a whole.

Ministerial Responsibility

The doctrine of ministerial responsibility is a cardinal principle of the cabinet system of government. It is the doctrine which makes this form of government a directly responsible government. This doctrine is embodied purely in conventions which cannot be legally enforced. Both the conventions relating to ministerial responsibility (individual and collective) were developed during the eighteenth and nineteenth centuries corresponding with the rise of parliament and the decline in the power of the crown. And in both the cases the practice was established long before the doctrine was announced. The underlying philosophy behind it was to bring the executive under the direct control of parliament.

The principle of ministerial responsibility means the political accountability of the executive to parliament. From broader point of view a British minister has responsibility in three ways — he is directly responsible to parliament, indirectly to the people and constitutionally to the King or Queen. Individual ministers are responsible to parliament for the work of their departments and the cabinet is collectively responsible for government policy. This responsibility is direct in the sense that ministers have to answer and explain departmental policies and decisions directly to parliament and have to resign as soon as a vote of censure or of no-confidence is passed. Secondly, ministers are indirectly responsible to the people in the sense that they are not bound to justify their actions directly to common people. But the parliament to which they are directly responsible is the House of elected representatives of the people. To be directly responsible to parliament is, therefore, to be indirectly responsible to people. Thirdly, ministers are constitutionally responsible to the King. This responsibility is a legal one as opposed to political one. Because in Britain there has been monarchy from time immemorial and from legal point of view the King is the fountain

of all power and ministers are his subordinate employees whom he can dismiss any time. But this legal responsibility of ministers now is a theory only – a legal fiction; the reality is quite opposite, for the absolute monarch is now a constitutional monarch who cannot, unlike in the past, dismiss a minister according to his wishes ; his power is now strictly controlled by conventions.

Ministerial responsibility is of two kinds— individual responsibility and collective responsibility.

Individual Responsibility

Every minister is the political head of a government department. Individual responsibility of a minister means that as the political head of his department he is individually answerable to parliament for all its acts and omissions. He must answer all questions relating to his department and must give the House a full and frank explanation of policy and decisions. He is personally responsible to parliament for every failure of departmental policy and administration whether it is the minister himself who was at fault or a civil servant or if the failure resulted from a defect of departmental organisation. He cannot get rid of his liability by pleading that he acted in obedience to royal order or by imputing the blame to civil servants. The minister must submit to the judgment of parliament and if the failure is a serious one, he should resign (or be ready to resign) from office without wanting for a vote of censure.

According A.H. Birch the doctrine of individual responsibility has two strands—

> Firstly, the political head of a government and only the political head, is answerable to parliament for all the actions of that department. Secondly, the minister must receive the whole praise of what is well done and the whole blame of what is ill' in the works of his department, and that in consequence he must resign if serious blunders are expressed.[1]

Collective Responsibility

The wheel-power of the government in a Westminster type parliamentary system is the collective responsibility of the cabinet in parliament. In England this principle has so long been considered

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[1] Birch, A.H. *Representative and Responsible Government*, (London: George Allen and Unwin Ltd, 1966), P. 140

indisputable and essential part of the constitution. Collective responsibility means the accountability of the cabinet or of the government as a whole to parliament. Lord Salisbury gives a good explanation of this principle —

> "For all that passes in cabinet each member of it who does not resign is absolutely and irretrievably responsible and has not right afterwards to say that he agreed in one case to a compromise while in another he was persuaded by his colleagues."[1]

Another better explanation can be found in Joseph Chamberlain's statement—

> "The decision (of the cabinet) freely arrived at should be loyally supported and considered as the decision of the whole of government. Of course, there may be occasions in which the differences is of so vital a character that it is impossible for the minority ..... to continue their support, and in that case the minority breaks up or the minority member or members resign."[2]

Sir Ivor Jennings says that the parliamentary aspect of collective responsibility is that the defeat of a minister on any issue is a defeat of the government. The proposals made by a minister whether or not they have been approved by the cabinet, are the proposals of the government. An attack on a minister is an attack on the government.[3]

Harvey and Bather says —

> "In its decision, 'the cabinet is a unity to the House'. While a minister can speak against any proposal in a cabinet meeting, he must either support the policy decided upon or resign .... the cabinet stands or falls together ...,. In practice, therefore, all that collective responsibility means today is that every member of the government must be prepared to support all cabinet decisions both inside and outside the House."[4]

Lord Morrison says—

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1 Jennings, *Cabinet Government,*. 3rd ed, (London: Cambridge University Press, 1969), P. 277

2 Jennings, *Cabinet Government,* Ibid, P. 277

3 Ibid, P. 497

4 Harvey & Bather, *The British Constitution and Politics,* 5th ed, (London : MacMillan, 1990), P. 239–40

"All ministers whether members of the cabinet or not share a collective responsibility including that for cabinet or cabinet committee decision in the reaching of which they have taken in part whatever ..... . The Government must stand together as a whole and ministers must not contradict each other, otherwise cracks will appear in the governmental fabric .... All this is part of contract of service. It has to be endured as a condition of acceptance of office."[1]

Lord Morley's views are also noteworthy. He says—
"The cabinet is a unit —a unit as regards the sovereign, and a unit as regards the legislature. Its views are laid before the sovereign and before parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet, and in the hereditary or the representative chamber ..... The first mark of the cabinet, as that institution is now understood, is united and indivisible responsibility."[2]

The above discussion makes it clear that 'collective responsibility' means essentially that the cabinet must have the same and single voice as a 'unity to the House'. Every minister must support all cabinet decisions both inside and outside parliament. A minister who is not prepared to defend a cabinet decision must, therefore, resign. And secondly, the tenure of the cabinet or, in other words, the government as a whole depends on the confidence of the majority in parliament. As soon as the confidence is withdrawn from the cabinet, the government as a whole must resign. All ministers, therefore, share a collective responsibility for the major issues of policy and general conduct of affairs. To put more simply, the principle of collective responsibility has three aspects : (i) it requires all ministers to be loyal to the policies of the government whether or not they are personally concerned with them ; (ii) it requires the government as a whole to resign it defeated on a vote of confidence in parliament; and (iii) it requires that cabinet and the government business must be confidential.[3]

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1 Morrison, Lord, *Government and Parliament,* 3rd ed, (London : Oxford University Press, 1967), P. 74

2 Quoted by Appadorai, A, *The Substance of Politics,* 11th ed, (Madras : Oxford University Press, 1987), P. 257

3 Alder, John, *Constitutional and Administrative Law,* (London : MacMillan Education Ltd. 1989), P. 202

Purposes Served by the Principle of Collective Responsibility

Both the principles of individual and collective responsibility serve political purposes in constitutional working. But the importance of collective responsibility is always more than that of individual responsibility, for it relates to the wheel-strength of the government as a whole. The principle serves the following purposes.

Firstly, the original purpose or philosophy "underlying the doctrine of collective responsibility is that the government should be held continuously accountable for its actions, so that it always faces the possibility that a major mistake may result in a withdrawal of parliamentary support."[1] In other words, the principle of collective responsibility is the means of assuring that the government is in tune with public opinion.

Secondly, the principle provides the key-strength to the unity and stability within the government. The real executive is the cabinet and collective responsibility ensures that the cabinet presents a united front before parliament. "Cabinet is by nature a unity and collective responsibility is the method by which the unity is served".[2] It is collective responsibility which ensures that the cabinet works as a team and hence a minister who is not prepared to defend a cabinet decision must, therefore, resign. If a minister does not resign he is responsible. The policies and programmes of the cabinet have to be supported by each minister. Even if there may be differences of opinion within the cabinet, once a decision has been taken by it, it is the duty of every minister whether member of the cabinet or not to stand by it and support it both within and outside parliament. If the cabinet faces any criticism in parliament concerning any of its policy every minister must come forward and speak in defence of the cabinet policy. The principle, therefore, ensures that the cabinet members 'must be all in the same story' ; they must swim and sink together. This unity of the cabinet enables the government to retain easily the support of the majority in the House.

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1 Laski, quoted by M.P. Jain, *Indian ConstitutionalLlaw*. Ibid., P. 103
2 Ibid. P. 103

Thirdly, the collective responsibility of the cabinet also helps greatly in maintaining party unity and its cohesion. Because if the ministers were allowed to contradict the cabinet decision it would certainly open a cabinet split. "Cabinet split', as Jennings says," may become a party split and a party-split may lose the next election".[1] Cabinet Government is a party government and its members come into office under the leadership of a person whom the party acclaims. All ministers stand for the political programme of the party and represent the uniformity of political opinion. They must, therefore, have the same voice ; otherwise the fall of the cabinet will result in the fall of the party and consequently its political programme.

Fourthly, collective responsibility of the cabinet helps greatly in maintaining the stability in public opinion. Because the public opinion never wants to see disagreement among ministers. If ministers are allowed to contradict each other, cracks will appear in the government fabric which may lead to an immediate swing of public opinion. This principle, therefore, 'compels ministers to be discreet and prevents the sort of confusion that sometimes arises in other countries, for instance when government spokesmen make pronouncements which reveal differences of view within the administration.[2]

Fifthly, it serves the purpose of advising the King. Because the cabinet is legally bound to offer unanimous advice to the sovereign even when its members do not hold identical views on a given subject. It is for this collective responsibility that the cabinet can render unanimous advice to the sovereign.

Harvey and Bather says that the doctrine of collective responsibility has following practical advantages :

First, it counteracts departmental separation, for each minister has to be concerned with policies of other departments.

Secondly, it prevents the policy of one department being determined unilaterally. Since it is the cabinet as a whole which decides, ministers are less likely to be over-influenced by their civil servants.

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1 Jennings, ibid.

2 Birch, A.H. *Representative and Responsible Government,* Ibid, P. 138

Thirdly, it ensures that cabinet decisions are based on principles and not on personalities.[1]

Difficulties with Collective Responsibility

The most significant point to be mentioned about collective responsibility is that this traditional doctrine has been subject to much debate. The gist of the criticism is that the doctrine is out of line with practices of modern government and far from making government accountable; in fact it shields government from public accountability. Originally the doctrine was developed with a view to subjecting the executive to the control of parliament. But now conversely it operates to strengthen the power of the Prime Minister, and to reduce the parliament's control. The main reason behind this reversal lies in the disciplined party system and in the size and complexity of modern government.

Purposes Served by the Doctrine of Individual Responsibility.

The doctrine of individual responsibility is based upon the fundamental doctrine that 'the King himself can do no wrong'. As the personal responsibility of monarch was withdrawn ; he was turned into a titular head and parliaments supremacy was established, it was now ministers who, on behalf of the King, came to be responsible before parliament for their individual departmental acts. Like collective responsibility the original purpose behind the principle of individual responsibility was the same i.e., to bring the political head of every government department under the direct control of parliament. It, therefore, serves a vital purpose of liberal democracy. There being no separation of powers in parliamentary form of government, the actions of the administrations are controlled by peoples' representatives in parliament through this doctrine of individual responsibility.

Secondly, the Cabinet is responsible to parliament for the general policy of the government. This does not, of course, mean that each and every decision must be taken by the cabinet. Every individual

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1 Harvey & Bather, *The British Constitution and Politics,* Ibid, P. 40

minister as the head of a ministry has, therefore, personal responsibility for every action taken or omitted to be taken in his ministry.

Thirdly, the doctrine serves another purpose. The official who cannot defend himself publicly is protected from attack. There is no direct link between civil servants and parliament. Civil servants, therefore, cannot be brought under the direct control of parliament. It is, therefore, the minister, the political head of every ministry who is a member of parliament must be accountable for every mismanagement of public affairs in his department.

Fourthly, by making a minister ccountable to parliament for his departmental acts a democratic chain is fulfilled. Because civil servants are not elected by the people and hence the elected head of a department, i.e. the minister should be made responsible. It, therefore, serves another purpose of ensuring political neutrality of civil servants.

Fifthly, the doctrine prevents the minister from trying to evade criticism of his own actions by shuffling the responsibility on to the subordinates. No minister can absolve himself by passing on the blame to someone else or saying that what was done had not been authorised by him. This doctrine, therefore, compels the minister to keep always vigilant eyes over the entire administration of his ministry.

Difficulties with Individual Responsibility

The traditional spirit of individual responsibility lies in the sense that a minister must resign whether or not he is personally to blame if serious fault is attributed to his department. If he does not resign it is the Prime Minister who can force him to resign ; or if a vote of censure is passed in parliament against him, he must resign. This is the punitive effect of individual responsibility. But most of the modern constitutional experts are of the view that in reality the principle of individual responsibility does not have any punitive

effect.[1] This is because the modern political practice do not entirely correspond with this effect of the doctrine. In practice very few ministers have resigned in response to parliamentary criticism of the work of their departments. Innumerable errors have been exposed but in most cases the minister concerned has simply refused to offer his resignation. Lowell says that no vote of censure was passed in the House of Commons since 1866.[2] And the resignation in response to criticism occurred from time to time during the hundred years (1855–1955) were not more than 20 but the number of ministers against whom parliamentary criticism were made during this time were far more.[3] This is because it is not strictly obligatory on the part of a minister to resign when he is criticised in parliament. Whether a minister has to resign or not depends upon a variety of political factors including the temperament of the minister, the attitude of the Prime Minister, the mood of the party and the toes of the opposition. In most cases it is seen that if severe criticism does not come from the party and the concerned minister is loyal to the Prime Minister, he need not resign. Professor Hood Phillips says that an examination of ministerial resignation in the past century shows that the doctrine of individual responsibility in practice has no punitive effect, because either—

i) the erring minister who resigns is appointed to another post ; or
ii) a timely reshuffle of a ministerial posts render resignation unnecessary ; or
iii) a minister who is unpopular with the opposition is protected by the solidarity of his colleagues. [4]

Ministerial Responsibility and the Rule of Law

The difficulties in confining the doctrines of ministerial responsibility within the concept of the rule of law lies, initially at least, in the fact that the doctrines are not rooted in law at all, but in

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1 O' Hood Phillips, John Alder, Herman Finer etc.
2 Lowell, A, Lawrence, *The Government of England*, Vol. 1 (New York : The Mackmillan Company, 1910), P. 73
3 Turpin, Collin, *Ibid,* P. 430
4 Phillips, O'Hood, *Ibid,* P. 310

convention. Given that ministerial responsibility is largely a matter of convention, as opposed to law, much depends on how certain these conventions are.

With regard to collective responsibility the position is almost clear. Originally the collective responsibility was developed with a view to subjecting the executive to the control of Parliament. But now conversely it operates to strengthen the power of the Prime Minister, and to reduce the Parliament's control. The reason behind this lies in the disciplined party system and in the size and complexity of modern government.

When a particular minister cannot agree with his colleagues the constitutional practice indicates that he will resign. Michael Heseltine's resignation over the Westland affair is an example.

Where, however, the disagreements threatens to split the cabinet, there is a possibility that there might be an 'agreement to differ'. In 1975 Labour Cabinet agreed to differ on the question of the UK's continued membership of the EEC.

It could be argued that a new convention is emerging to the effect that collective responsibility applies except where the Prime Minister of the day allows it to be relaxed. This has been such a flexible notion that most would say that this goes against the argument that collective responsibility is actually governed by any rules, and therefore confined by the rule of law.

The weaknesses in the doctrine of individual responsibility were furthered by the "Arms to Iraq" affair. The Scott Report indicated that guidelines on arm exports had been relaxed, so as to permit the export of military useful equipment to countries such as Iraq. This information had been withheld from parliament. One commentator concluded that the doctrine of ministerial responsibility had not operated effectively to ensure that the House of Commons was kept informed of the changes in government policy regarding arms sales, and that usual mechanisms for enforcing ministerial responsibility

such as parliamentary questions and hearing of select committees had not adduced accurate answers.

In a subsequent report, the Public Service Committee of the House of Commons concluded that ministerial responsibility in the modern constitution was not based on a convention of resignation in the wake of departmental failings, but on one of keeping Parliament fully and accurately informed. In short, a minister should really resign if found to have knowingly lied to Parliament. This emphasises that the doctrine of ministerial responsibility has evolved, to some extent, from being concerned with responsibility for departments, to being concerned with effective accountability in the House of Commons.

All these suggest that the doctrine of individual responsibility is more different to reconcile with the notion of rule of law. This is because there is so little clarity regarding when a minister should resign or how he should conduct himself.

Reform: As a response to this and in the wake of the Nolan Committee Report on Standards in Public Life, the Codes of Practice known as "Questions of Procedure for Ministers" has been revised. Essentially it is an attempt to codify the rules relating to ministerial behaviour. Amongst other things, it provides that ministers must give accurate and truthful information to parliament and makes clear that minister who knowingly misled parliament will be expected to offer their resignation to the Prime Minister.

The revised code provides greater clarity but does not answer criticisms regarding the extent to which such matters are confined by the rule of law. This is because the code does not have the status of law. It is enforced by the Prime Minister and the sanctions are a matter for him. Overall, given the extent to which political expediency plays part in determining the behaviour of ministers, it is difficult to see what tighter legal controls could achieve.

Method of Enforcing Ministerial Responsibility

Methods of enforcing ministerial responsibility may be classified into two groups :

A. Traditional Methods of Scrutiny ; and

B. Modern Methods of Scrutiny.

A. Traditional Methods of Scrutiny

They are folloing :

1. Parliamentary Questions
2. Vote of Censure
3. Cut Motion
4. Adjournment Motion ; and
5. No-Confidence Motion.

Parliamentary Questions

The responsibility of ministers to the House of Commons involves a constant control of the House over the government. One of common and effective devices of ensuring this control is asking questions to ministers. Parliamentary questions tend to keep the ministers constantly conscious of the fact that they will be called upon to give an account of what they do. A definte period is allotted at every sitting to put questions to ministers. Subject to some conditions any member of the House of Commons may address a query to the Prime Minister or to any other minister. The device of asking questions has some important merits.

Firstly, it brings the work of the various departments of government under the public scrutiny. As professor Lowell says—'question time is a search light upon every corner of the public service."[1] It is the most effective check on the day-to-day administration. According to Erskine May, the Parliamentary Question is an useful tool for 'extracting information' and 'pressing for actions.'[2] Questions in brief, bring to light the activities of government and subject government to public scrutiny and this is, according to Herman Finer, 'the fundamentally characteristic British way of keeping the cabinet painfully sensitive to public opinion'.

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1 Quoted by Harvey & Bather, *Ibid,* P.146

2 May, Erskine T, (ed. Sir Charles Gordon), *Parliamentary Practices.* 20th ed. (Butterworths, 1989)

Secondly, it enables a member publicise a grievance. He can raise special local problems affecting his constituency. As professor de Smith says—'a question to a minister is rather a method of ventilating a grievance than of securing remedy'[1] .

Thirdly, parliamentary questions are also a means of exerting pressure on ministers to achieve a particular outcome. Oral questions in full view of the press and other media can have a compelling influence on a minister and he may be able to see new merit in a case that he had not seen before. It, therefore, serves to bring particular issue to the attention of ministers.

Fourthly, parliamentary questions enable the public to get, through their representatives, the information about day–to–day administration of the government. Information over various ministries help to build up strong public opinion.

Fifthly, parliamentary questions mitigate the danger of bureaucratic habits, because 'men who have to answer day by day for their decisions will tend so to act that they can give account of themselves'. As answers to parliamentary questions are prepared in the ministries the bureaucrats become careful in advising the minister.

Sixthly, Parliamentary quetions helps back-bencher MPs to put an effective control over ministers. It develops a vigilant type of responsibility both among the ministers and back-benchers. It is the device whereby the 'back-benchers take a delight in heckling a Minister.'

As to the importance of parliamentary questions professor de Smith has given a beautiful explanation—"for a few minutes the House of Commons comes to life audibly and visibly wit; feigned or genuine outrage, cheers and jeers intrude upon the solemnity of the proceedings ; government and opposition are briefly locked in fascinating verbal combat; the prime minister and the leader of the opposition may gain or lose a point or two in the public opinion poll;

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1 Smith, de and Brazier, *Constitutional and Administrative Law*, 6th ed. (London : Penguin Books, 1989), P.291

a backbencher shows his ministerial potential and the House wonders how much longer the Minister of Cosmology can last.[1]

Prime Minister's Question Time

In the House of Commons the British Prime Minister has to answer questions once a week. The PMQT serves many purposes. First, it focuses public attention on parliament. As media coverage is extensive, the people get to see and notice their representatives and their government actually functioning. Second, the PMQT is powerful tactic to strengthen the PM's control on his cabinet colleagues. As the PM could be questioned on any aspect of government policy, the departmental ministers are likely to be careful in discharging their duties. Third, the PM can use the opportunity of question time to highlight points of the government. Fourth, it develops a vigilant type of responsibility both among the PM and the back-bencher MPs. Fifth, it makes the PM aware of all eventualities of government policies. Since the PM does not know what supplementaries would be asked, his staff prepare for all eventualities. They look at the constituency of the MP asking the question, try to anticipate the problems he may be facing, the issues of his interest and any other worries he may have. In this process the PM is acquinted with the Member and his or her constituency. As to the PMQT a former Leader of the House of Commons Richard Crossman described it saying:

"The whole British politics is centered there. The man that's running the Executive has to be there at the dispatch-box, has to present himself, has to fight the contender for power, and the whole press and television will report that evening on what happened to him. He is being tested and the House of Commons feels itself to be participating in the test"[2].

Vote of Censure

Another device for holding ministers accountable is the motion of censure, ordinarily directed at individual ministers and specifying particular acts or policies for which they are regarded as responsible. Such a motion may be offered by any member who can gain the floor

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[1] Smith, de, & Brazier, *Ibid,* P. 291–292

[2] Alderman, R. K. (1996) 'Prime Minister's Question in the British House of Commons', *The Parliamentarian*, Vol. 77, No. 3 pp. 290-2

for the purpose, and they may lead not only to embarrassing debates but also hostile votes. If any such motion is passed in the House the minister concerned has to resign.

Cut Motion

During the budget discussion a token cut may be made by the opposition and if such a motion is moved and passed in the House the cabinet i.e. the government as a whole must be prepared to resign.

Adjournment Motion

After questions and before the commencement of public business, any member may move the adjournment of the House for the purpose of discussing 'a specific and important matter that should have urgent consideration'. If the motion is supported by at least 40 members and the speaker has agreed that the matter is definite and urgent, a debate will take place. The government will oppose the motion and if it fails in voting it must be prepared to resign.

Vote of No-Confidence

The Ministers are at all times subject to challenge upon general policy. Because the leader of the opposition may move a resolution of no confidence against the cabinet, in other words, against the whole government. It the motion is supported by a required number of members a debate will take place and then the motion will face voting. If the votes recorded shows that the government is in minority it must resign.

B. Modern Methods of Scrutiny

The above mentioned methods are traditional methods of enforcing ministerial responsibility. But now-a-days governmental activities have become more complex and have been expanded far wider. Through traditional methods the legislature now is not capable enough to make full inquiries into matters of interest to it or to consider matters in detail. This created need for far greater parliamentary scrutiny than that which could be achieved by traditional methods. To that end some modern devices have developed to carry out the task of continuous scrutiny and investigation of the

executive. They are : Control by Committee System; and Control by Ombudsman.

Control by Committee System[1]

Control of executive through the working of the committee system is now considered the most effective device of ensuring ministerial responsibilities. "Investigation by committees" says Laski, "has been one of the most vital techniques contributed by the parliamentary system to the methodology of representative government ; and it has been possible only by the fact that the parliamentary system exists." It is the committee system which, as Garrett says, has "shifted the style of the House of Commons from theater to serious and penetrating scrutiny of the government". There are 18 Departmental Select Committees working in the House of Commons. They examine the expenditure, administration and policy of the relevant government departments (ministry) and its associated public bodies. They can take evidence in public; send for persons including the departmental minister, its officials, or any one it feels can enlighten them in the investigation it is conducting. The reports of these committees are published and given in press and also tabled in the House. If any report gives a serious blunder about maladministration in a ministry the government has to correctify it quickly ; otherwise it may face an uproar and even a hostile vote in the House.

Control by Ombudsman

A post of Parliamentary Commissioner i.e. Ombudsman was created in the House of Commons under the Parliamentary Commissioner's Act, 1966. It is an office of the House of Commons independent of the executive. Its function is to investigate complaints of maladministration made to it by members of parliament against any person acting in the service of the state.

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[1] Details of committee system, See, Chapter XI

Sample Questions with Suggested Skeleton Solutions

(1) Consider the theory and practice of Cabinet government in the UK making reference to the constitutional conventions governing the accountability of the Prime Minister and government ministers collectively to Parliament (University of London, 2003).

Suggested Skeleton for Solution: This question calles for discussion over more than one subject: functions of the cabinet and ministerial responsibility.

- Start with the four types of functions and practices of the cabinet (see pages 153-156);
- Discuss on cabinet collective responsibility with particular reference to the Prime Minister's power and influence over this device (see pages 157-159);
- Discuss also collective responsibility with its difficulties and reforms (see pages 173-174).

(2) To what extent is it possible or desirable to define clearly the conventions of individual and collective responsibility? (University of London, 2002).

(3) Critically assess the theory and practice of individual and collective responsibility (University of London, 2001).

Suggested Skeleton for Solution: Both the above questions calls for almost same answers.

- Discuss on both individual and collective responsibility (see pages 165-167);
- Discuss the problems and difficulties with both the conventions with illustrations (see pages 170-171);
- Discuss reforms of the responsibility (page 174).

CHAPTER X

THE HOUSE OF LORDS



Historical Note

The House of Lords is the older of the two Houses. Originally the Anglo-Saxon Kings were advised and assisted by the Witan; and the Norman Kings by the Great Council (the *Magnum Concilium*)[1]. This later body was an assembly of feudal barons, nobles, and vassals, together with the bishops whose appointments were in the gift of the Monarch. All were powerful magnates summoned by the King and consulted by him on matters of importance. The Great Council subsequently gave rise to two separate Houses of parliament: the House of Lords and the House of Commons (see more about the history at pages 27-30).

Composition of the House of Lords

The House of Lords consists of two classes of Lords: the Lords Spiritual and the Lords Temporal. Contrary to the situation in the House of Commons, all these Lords in the House of Lords are almost appointive. The recent composition of the House of Lords is 672 peers: 549 life peers appointed by the Prime Minister, 91 hereditary peers, 25 Bishops and 7 others[2].

Lords Spiritual: They are 26 in number and include two Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and 21 most senior Bishops of the Church of England. When a sitting Bishop dies or resigns, the next senior on the

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[1] Another Norman institution- the *Curia Regis* (the Court of the King) comprised a smaller group of advisers who carried on day-to-day government administration. The *Curia Regis* had two main functions which tended to separate: one was judicial which, in the time of Henry II (1154-89), gave rise to the Courts of law; the other was administrative and advisory to give continuous governmental advice to the King which later gave rise to the Privy Council.

[2] *Recent Developments in Law*, University of London, 2004.

list becomes entitled to a writ. Thus a bishop does not transmit it to his heirs.

Lords Temporal: They all are non-ecclesiastical peers[1] and consist of the following three categories of Lords:

"Elected" Hereditary Peers: Prior to the House of Lords Act 1999, the bulk of the Lords Temporal consisted of the holders of hereditary peerages of UK or Scotland. Hereditary peers were created under the prerogatives of the Crown on the advice of the Prime Minister. The object was to honor men of distinction, to win the favour and support of persons of influence or wealth, to keep in parliament a useful man who for one reason or another cannot find a seat in the House of Commons etc. In January 1998, there were 759 hereditary peers, out of total membership of 1,272. However, under the House of Lords Act 1999 the rights of most hereditary peers were removed. While it had been intended to remove the rights of all hereditary peers to sit and vote, threats of opposition to the House of Lords Bill from the majority of Conservative hereditary peers persuaded the government to allow 92 peers to remain. Out of these 92 Lords 15 have been elected by the whole House from those ready to serve as Deputy Speaker; 2 as Labour Peers; 42 Conservative peers; 3 Liberal Democrat; 28 Cross-benchers[2]; 1 as the holder of the office of Earl Marshall and 1 as the holder of the office of Lord Great Chamberlain. It is envisaged that elected hereditary peers would be

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[1] The term 'peers' means 'equal' and originally it referred to the feudal tenants-in-chief of the King all of whom were equal to one another. The King used to issue a writ of summons to an individual to the House of Lords followed by his taking a seat. It was a custom that a King, whenever he summoned a parliament, would send for the same peers who had sat in an earlier one. In course of time, custom became a right and a seat in the House of Lords descended from father to eldest son, just as did the family estate under the rule of primogeniture. Since the fifteenth century the creation of hereditary peers had been by Letters Patent which enabled descent to be directed into a certain line of heir different from those ascertained by reference to feudal customary law.

[2] Cross-benchers are those Lords who are independent and do not take a party whip.

statutorily excluded from whatever is the final form of the composition of the House of Lords[1].

Life Peers: These are men and women appointed to the rank of baron or baroness under the Life Peerage Act 1958. As the name goes, those appointed life peers hold the peerages only during their own lives and do not pass them to descendents. In 1998 there were 461 peers appointed under the 1958 Act of which 81 are female life peers and 380 male life peers. The award of peerage is one of the highest honours conferred in the UK. Approximately on third of former government ministers will receive life peerages. Peerages are conferred by the Crown on the advice of the Prime Minister. Twice a year- at New Year and on the Queen's birthday- honours are awarded. There is no limit set to the number of life peers. There is much evidence to suggest that the system of appointment is used politically by governments, a factor which further undermines the legitimacy of the House of Lords, and there currently exists no mechanism by which a balance between the parties can be established and maintained against the wishes of the Prime Minister. In her years of office Margaret Thatcher appointed 203 life peers whereas Tony Blair appointed 209 peers in three years.

Judicial Peers: They are also called Law Lords or Lords Appeal in Ordinary. They hold the rank of baron and are appointed for life under the Appellate Jurisdiction Act 1876.Their maximum number is 12. These Law Lords sit in the House of Lords with dual capacity. In their judicial capacity, they form the Judicial Committee of the House of Lords representing the highest domestic court for civil appeals in the UK and for criminal appeals from England, Wales and Northern Ireland (not from Scotland). They also sit as Members of the Privy Council which has jurisdiction to hear appeals from a limited number of Commonwealth countries. Apart from judicial functions, Law Lords play a role in the legislative and other functions but, by convention, do not take part in purely political debate. There has also

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[1] Phillips, O' Hood, *Constitutional and Administrative Law*, 8th ed. p. 177.

been a convention since 1920 that when the Law Lords speak on controversial non-legal matters they do so in a personal capacity[1].

Functions of the House of Lords

According to the Bryce Conference in 1917 and the White Paper of 1968 on Reform of the House of Lords the modern functions of the House of Lords may be divided into various categories. However, all these various types of functions may be divided into two main groups: Judicial functions and legislative functions.

Legislative Functions

(1) **Pre-Legislative Scrutiny:** Both the Houses may appoint a committee or a joint committee to examine the drafts Bills.

(2) **Legislative: Scrutiny of Legislation and Revision of Public Bills sent from the Commons:** The main legislative work performed by the House of Lords is in the revision of Bills. House of Lords spends over half of its time revising Bills from the Commons. This serves two purposes. First, it saves the time of the Commons available for debate in legislative proposals. Second, this aims at achieving concessions in Government policy, and the Lords still has the ultimate power to reject. More usually, the object is to make the bill more workable. Since there is no closure in the Lords, clauses can be debated adequately and details examined. An average of two thousand amendments to Bills are moved each year, the majority of which are tabled by the government and so it is not surprising that the majority of the Lord's amendments are accepted by the Commons. Bills, other than Money Bills, can be introduced in either the Commons or Lords. The majority of government Bills are introduced in the Commons and, having passed the

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[1] Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body*, 1800-1976 (1979), p. 308.

Commons' stages of scrutiny, will be passed to the House of Lords. The process is almost the same as in the Commons though there are some differences. First reading which will be followed by a second reading and then 'stand committed' for the committee stage, after which the Bill is reported back to the House and then receives its third reading and royal assent.

(3) **Delaying of Legislation:** The elected chamber of the parliament, i.e, the House of Commons has the ultimate power to enact legislation inspite of any opposition from the House of Lords as a second chamber. However, the House of Lords has the power to delay legislation, except Money Bills, for a year but very rarely uses this power. This power of delaying is regulated by constitutional convention[1] and the Parliament Acts 1911 and 1949. It must be remembered that this power is a power to delay by way of proposing amendments and not to veto a Bill.

(4) **Scrutiny of Delegated Legislation:** The House of Lords has unfettered power to vote on any subordinate legislation submitted to it for its consideration. The House through its Delegated Powers Scrutiny Committee scrutinises Bills with a view to establishing the extent of legislative powers which parliament intends to delegate to government ministers. The Committee performs this scrutiny at two stages: first, when it examines the parent Bill whether conditions of delegations have been followed or not; and second, after the delegated law has been submitted to the House for approval. During the

[1] This convention is called the Salisbury Convention which requires that the peers in the Lords will not block a government Bill giving effect to its manifesto commitment. The threat of delaying power of the House of Lords is potentially more important when a minority government is in office, since it is more difficult for such a government to claim an electoral mandate for its policies. Against this background, this convention has reduced conflict between the two Houses during periods of Labour Government, and allowed a government without a majority in the Lords to secure its business.

examination of the parent Bill the House considers four principal matters. First, it considers whether the power to make subordinate law is appropriate. Second, whether there is any existence of Henry VIII powers[1] in the Bill. Third, the Committee considers which form of parliamentary scrutiny of delegated legislation is appropriate, and in particular whether the power specifies the use of the affirmative or negative resolution procedure[2]. Fourth, the committee considers whether the legislation should provide for consultation in draft form before the regulation is laid before parliament.

At its second stage, the House scrutinises the instrument when the draft of the instrument is laid before the House.

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[1] Henry VIII clause or power refers to the dictatorial power exercised by the King Henry VIII who used to make legislation disregarding the parliament's authority. This is a power to amend or change law without the authority of any parliamentary action. In other words, if there is any express or implied provision in the Bill that primary legislation may be amended or repealed by subordinate legislation with or without further parliamentary scrutiny, then this type of provision will be treated as Henry VIII provisions.

[2] The Statutory Instruments Act 1946 lays down the procedure by which an instrument comes into effect, but the method adopted will depend on what is stipulated in the parent Act. First, the Parent Act may provide that the instrument be laid before the parliament but no further parliamentary action would be necessary. Second, the Parent Act may provide that the instrument is subject to 'negative resolution procedure'. Under this procedure, the instrument can be laid before parliament in its final form and come into immediate effect, subject only to there being a successful move to annul the instrument. This move takes the form of a motion, known as 'prayer' for annulment of the instrument, which can be made within 40 days of the instrument being laid. Third, the Parent Act may provide that the instrument is subject to an 'affirmative resolution procedure'. If this procedure is adopted, the instrument may either come into immediate effect, subject to subsequent approval by parliament, or be laid in draft form to come into effect if approved by parliament. The affirmative resolution procedure is rarely adopted by government. Instruments subject to affirmative resolution are automatically referred to a standing committee, unless the House orders otherwise. On the other hand, instruments subject to negative resolution procedure are normally not referred to a committee; they will only be referred to a committee on a motion by a minister of the Crown.

Once laid a committee considers the draft. It examines, *inter alia,* whether the measure is *intra vires* (within the power prescribed in the Act); second, whether the consultation required under the Act has been adequate.

Supervisory Functions

(1) **Scrutiny of the Executive:** Though the debates and questioning in the Lords are less effective than in the Commons, its importance should not be underestimated. Every Wednesday is generally devoted to debates on matters of general public importance. Four types of oral questions may be asked in the Lords each day for half an hour at the start of business (starred, unstarred, written and private notice questions). To enable Ministers to give important news first to parliament, both Houses make provisions for Ministers to make statements. Most statements originate in the Commons and by current practice it is for the Leader of the House to decide whether to have such a statement repeated in the Lords. After a statement 20 minutes are available for questioning the minister. Occasionally, it is true, debates tend to be somewhat repetitive in the Lords, since the main arguments on mush-publicised controversial issues have already been thrashed out thoroughly in the Commons. However, the Lords help policy formulation. Because they are conducted quite differently from the tightly-organised debates in the Commons, a wider range of opinions can be expressed. The Lords thus makes a valuable contribution to consultative government.

(2) **Select Committees:** There is no structured system of select committees in the House of Lords as exists in the House of Commons. However, the Lords has the power to appoint select committees. Available select committees in the Lords are following:

a. Ad-hoc committees to consider a matter of public importance like unemployment, Overseas Trade etc;
b. Select Committees on Bills to consider Bills in depth and report on the same;
c. Twenty Sessional Committees like European Community Select Committee, Science and Technology Committee, Appeal Committees, Committee of Privileges etc;
d. In 2001 three new sessional committees were set up: the Joint Committee in Human Rights to consider matters relating to the implementation of the Human Rights Act 1998; the Constitution Committee to consider the constitutional implications of all public Bills before the House; and an Economic Affairs Committee to consider economic affairs.

Judicial Functions of the House of Lords

The House of Lords has important legal functions in addition to its parliamentary work, being the final court of appeal for civil cases in the whole of the UK and for criminal cases in England, Wales and Northern Ireland. Theoretically, all peers are entitled to attend the House when it is sitting as a Court of Appeal, but in practice and by established tradition, judicial business is conducted by a court drawn from the Lord Chancellor, the Lords Appeal in Ordinary, and any other peers who have held high judicial office as defined in the Appellate Jurisdiction Act 1876. To put differently, in their judicial capacity, the Law Lords form the Judicial Committee of the House of Lords representing the highest domestic court for civil appeals in the UK and for criminal appeals from England, Wales and Northern Ireland. They also sit as Members of the Privy Council which has jurisdiction to hear appeals from a limited number of Commonwealth countries.

Problem with Judicial Peers

It is argued that the position of the Law Lords is in breach of the doctrine of separation of powers in the sense that they sit in the highest court to adjudicate disputes and at the same time they sit in the House of Lords to take part in legislative deliberation.

A case in 1998-99 concerning the extradition of General Pinochet caused the Royal Commission on Lords' reform to recommend that the Law Lords should publish a statement of principles to be observed by them when participating in debates and votes, and when considering their eligibility to sit on related cases (June 22, 2000). These events have had an effect on the Law Lords' participation in the non-judicial functions of the House.

Along with this there is a critical debate with regard to the position of the Lord Chancellor as one of the Law Lords. The Lord Chancellor's position is most objectionable in respect of separation of powers. He plays key role in each of the three branches of the state. He is the head of the judiciary; he is the most senior judge in the House of Lords. The Lord Chancellor is a party political appointment; he is also one of the important members of the cabinet and as such responsible for the operation of his own government department. He is also the speaker of the House of Lords in its general role as a legislative forum.

However, it is interesting to note that the Royal Commission chaired by Lord Wakenham concluded that Law Lords should continue to enjoy membership of the second chamber by virtue of office. Similarly, the 2001 White Paper envisaged that at least 12 Law Lords would continue to sit as members of the second chamber.

Problems with the Position of the Lord Chancellor

As mentioned above, the Lord Chancellor's position is in direct contradiction to the doctrine of separation of powers. Keeping this aspect apart, from the viewpoint of the operation of the European Convention of Human Rights and the Human Rights Act 1998 the

position of the Lord Chancellor has also been under attack in recent times.

First, the Lord Chancellor's position is most objectionable in respect of separation of powers. He plays key role in each of the three branches of the state. First, he is the speaker of the House of Lords when it is sitting in its legislative capacity, and takes part in debates there. Second, the Lord Chancellor is a party political appointment; he is also one of the important members of the cabinet; he holds office while the Government of the day is in power. Third, he is the head of the judiciary and has the power with regard to appointment of the judiciary; he is one of the judges of the House of Lords; head of the Chancery division in the High Court and entitled to act as a judge in both the courts; he is also one of the judges of the Judicial Committee of the Privy Council.

In a recent case decided by the European Court of Human Rights (*McGonnel v UK* ((2000) 30 EHRR 289, App No. 28488/95) it was held that the Bailiff had acted as the judge in a case in which he had also played an administrative role and this was in breach of Article 6 of the European Convention on Human Rights. Though this decision concerned the Bailiff, it is argued that it could equally apply to the Lord Chancellor. Given the heightened sensitivity in relation to impartiality generated by Lord Holffman's participation in the Pinochet case, the Lord Chancellor himself withdrew from sitting in a case in March 1999 in which he recognised the possibility of conflict of interest.

However, the Lord Chancellor Irvine has expressed his views that he would not sit in a case where there is a possibility of conflict of interest. Experts have apprehended that under the Human Rights Act 1998 the Lord Chancellor's position will be invalidated by other judges (Slapper and Kelly, 200).

Second, it is argued sometimes that Lord Chancellor's position is against the concept of rule of law. "Lord Chancellor is always a spokesman for the government in furtherance of its party political agenda". The Lord Chancellor presides over the House of Lords. Unlike the speaker in the Commons he retains his political affiliations and is a member of the cabinet. However, he is not a member of the

House of Commons and is not, therefore, available for questioning in the House of Commons. This calls into question the principle of ministerial accountability under which ministers can be questioned by MPs and also the rule of law. Though this problem has been recently solved partially by creating a new post of parliamentary secretary in the Lord Chancellors Department who can be questioned, still there is argument that Lord Chancellor himself should be questioned.

Third, in February 2001 the issue of fundraising by the Lord Chancellor Lord Irvine from different law chambers was termed as 'cash for wigs' affair and this has undermined the position of the Lord Chancellor more.

Fourth, being the head of a department the Lord Chancellor should have been independent in exercising his duties. However, this is a post where the appointment could be seen as a reward for their political support. In addition to difficulties arising directly from his responsibility for implementing political policies in relation to the legal system, the Lord Chancellor's judicial role has also come under attack. What are the criteria of becoming a Lord Chancellor? Being it a political post there is no requirement that he should have held any prior judicial office.

Should the Law Lords be removed from the House of Lords? Establishment of a Separate Ministry of Justice?

Against the background of the above objections regarding the Law Lords it is sometimes argued that they should be abolished and be separated from the House. It is also argued that if the Law Lords were removed, who would discharge the judicial function of the House of Lords? The removal would, therefore, effectively lead to the establishment of a Supreme Court. It has also been argued that even if they are not removed, the House of Lords itself would evolve as a constitutional court.

Under the present system the administration of justice is split between different Government departments: the Lord Chancellor's Department, the Home Office and the Law officers. However, the

Lord Chancellor's Department has the major share of responsibility covering the appointment of judges, administration of the courts, civil and criminal procedure and legal aid. The Home Office, under the Home Secretary, is responsible for reform of the criminal law and procedure, sentencing policy, prisons and the probation service. The Home Office is also responsible for the police and the maintenance of law and order. It is also responsible for matters connected with immigration and civil rights.

In the face of this muddled and overlapping system it has been argued whether one comprehensive Ministry of Justice instead of two departments could be established. Proposal for Ministry of Justice was also recommended by the Haldane Committee back in 1918. It has been felt that this would lead to greater political accountability, increased efficiency and more momentum for reform. However, against the suggestion of a Ministry of Justice, it has been argued that such a ministry could erode the independence of the judiciary by leading to a continental system in which judges are civil servants. It has also been suggested that this problem could be solved by appointing an independent judicial appointment commission.

The House of Lords emerging as a Constitutional Court

There is also suggestion that the House of Lords will have to come forward to act as a constitutional court. The operation of the Human Rights Act 1998, the issue of declaration of incompatibility, the issue of devolution of power will give rise to disputes as to the relationship between Westminster Parliament, Scottish Parliament and Welsh Assembly. Eventually these issues will have to be resolved in the courts.

In view of parliamentary supremacy and liberties in the negative sense, the British courts have traditionally lacked any power to question the laws passed by Parliament on their substance, as constitutional courts in other systems could; they could only question the formal or procedural properties of such legislation. There was, however, an alternative forum capable of challenging the substance of English law since 1966 when the UK recognised the power of the European Commission on Human Rights to hear complaints from

individual UK citizens and at the same time, recognised the authority of the European Court of Human Rights to adjudicate in such matters. After the enactment of the Human Rights Act 1998 now it is believed that eventually the UK domestic courts will increasingly be involved into deciding constitutional matters. Once the courts are required to act in constitutional matters, it is surely a mere matter of time before they become Constitutional Courts, as distinct from ordinary court. Once a Constitutional Court develops, the position of the Lord Chancellor will become untenable as a judge, as his political roles would automatically place him in a position of conflict of interest. He would have to give up his position as head of the judiciary, probably, as some have already proposed to the Lord Chief Justice.

The Reform of the House of Lords

The reform of the House of Lords has been a bone of political debate for decades though there has been steady erosion of its powers for over 600 years. There is wider argument about the legitimacy of the House of Lords as a second chamber. Those who advocate the retention of a second chamber tend to focus their proposals for reform either on the method of appointment or the rights of members or the functions of the House.

Arguments For and Against:

(i) Much of the antagonism to the House of Lords stem from basic principles of democracy. A majority of parliamentary democracies have elected second chambers or a second chamber which is part elected and part nominated. However, by contrast, until 1999, the House of Lords was comprised of a majority of unelected hereditary members and a minority of nominated members;

(ii) Legitimacy of a second chamber which is unaccountable and unelected. Britain is supposed to be a democracy. So many have found it unacceptable that at the beginning of 21st century, Lords should have political power simply because of the family they were born into. It is argued that

no other civilized country has a hereditary second chamber.

(iii) In a unitary constitutional structure a second chamber is redundant. There must be abolition and not reform for the House of Lords since it is useless;

(iv) Space and resources currently utilised by the House of Lords could be more effectively deployed by an extended House of Commons;

(v) The control exercised by the House of Lords under the current system is at best sporadic. Rather than being occasionally obstructed or thwarted by the House of Lords, the House of Commons could be required to operate within the confines of a written constitution, if necessary with entrenched provision, perhaps requiring a referendum for amendment;

(vi) Though there are second chambers in some other countries, a second chamber like the House of Lords which is composed of a large number of members would be a very rare institution.

Reforms undertaken at different times

(1) **The Bryce Report 1917:** Following the Parliamentary Act 1911 a conference chaired by Viscount Brice was appointed to consider both the composition and powers of a reformed Second Chamber. It recommended that the House of Lords should consist of 246 members indirectly elected by MPs representing regional units, plus 81 Members chosen by a joint standing committee.

(2) **Parliamentary Act 1949:** Following a conference of party leaders in 1947 agreement was reached on the following:

(i) Need for the second chamber to be complementary to and not rival to the lower house;

(ii) No one political party should have a permanent majority;

(iii) Hereditary peers should not by itself constitute a qualification for admission; and

(iv) Women should be admitted.

(3) Leave of Absence 1958: To prevent 'backwoodsmenship' Standing Orders were amended to enable peers unable or unwilling to attend the House to apply for leave of absence.

(4) The Peerage Act 1963: This Act enables hereditary peers to remove their titles for life by disclaimer.

(5) With proposal of some fundamental changes a Bill named the Parliament (No 2) Bill 1968 followed by a White Paper was introduced and debated in both the Houses but was lastly withdrawn.

(6) The Labour Reform Plan after the General Election in 1997: In the 1997 election manifesto the labour party had an extensive agenda for reform of the House of Lords. The manifesto suggested that the Party intended to legislate on a step-by-step basis, without prior intra-Party talks but unilaterally with the support of its own party members. Phase 1 was intended to remove the sitting and voting rights of the hereditary peers, thereby removing the main grievance of the Labour Party, leaving the detailed planning of Phase 2 until later. After the election the Labour Party formed the government and in January 1999 the government published a White Paper, *Mordernising Parliament: Reforming the House of Lords* which set out the Government's step by step approach to reform of the Lords. The first step was the enactment of the House of Lords Act 1999, which removed the rights of hereditary peers to sit and vote in parliament and established a 'transitional House'. In last minute concession it was agreed that 92 hereditary peers would remain for the foreseeable future. To facilitate step two, the Government established a Royal Commission to make recommendations

on the role and functions of a second chamber, and on the methods of composition required to enable to fulfill its role and functions. The Commission's report will be dealt with later on in this chapter.

Suggestions for Reform

Suggestions that have been made for reform take the following three categories:

(i) Abolition of the House of Lords altogether and have single chamber government;
(ii) Have a wholly elected second chamber;
(iii) Have it partly elected and partly nominated.

Abolition of the House of Lords?

Abolition of the House of Lords would not be the answer because of the following reasons:

(i) It would leave the whole problem of elective dictatorship via executive controlled Commons untouched;
(ii) There will be a loss of valuable works the House of Lords undertakes in relation to government and European legislation;
(iii) The House of Commons would become hopelessly overworked;
(iv) The House of Lords is a part of British tradition and it is unlikely that British people will welcome its abolition.

Elected Second Chamber?

(i) An elected second chamber could become rival to the House of Commons resulting in political impasse;
(ii) It might become redundant if both chambers were dominated by the same party;
(iii) It might well jeopardise the current value of its work;
(iv) There might appear unnecessary clash between the two elected Houses.

Partly elected and partly Nominated?

Most of the arguments for reform are based along this line that the House of Lords should be partly elected and partly nominated.

Proponents of this theory base their arguments along the following points:

(i) The reformed House should not be more democratic but it should be more meritorcratic;

(ii) Much of its expertise and relative independence would remain intact;

(iii) The powers of the reformed House should be balanced with its composition – more democratic more power. It must as well be remembered that too much democratisation will increase the conflict between the two Houses. It must be more democratic than the present one but not fully democratic;

(iv) It must be ensured that the chamber must not be 'the Prime Ministers' poodle.' It is undesirable in principle to have a chamber purely appointed by the Head of the Executive;

(v) Power of appointing life peers needs to be removed from the Prime Minister;

(vi) The current value of its work must be retained;

(vii) Function of the House must be extended covering more matters of public accountability.

The Wakenham Commission Report

As mentioned above, in its second step of reform the Government established a Royal Commission to make recommendations on the role and functions of a second chamber, and on the methods of composition required to enable to fulfill its role and functions. The Royal Commission Report was published in January 2000. The report contains some proposals for a new second chamber in the following manner:

(i) The new second chamber would be composed of 550 members most of them nominated by an independent Appointments Commission who would generally serve for 15 years. A minority (either 65 or 87 or 195 of 550) of them will be elected from regions by proportional representation;

(ii) There will be 20% independent cross-benchers (non-partisan members);

(iii) There will be an independent Appointment Commission;

(iv) The regional members should serve for the equivalent of three electoral cycles and that the appointed members should serve for fixed terms of 15 years;

(v) A minimum of 30% of new members should be women with an aim of making steady progress towards gender balance over time;

(vi) There should be at least 5 members specifically selected to represent non-Christian faith communities (ethnic minorities);

(vii) There will be increased power over secondary legislation;

(viii) 20% members would have no political affiliation and so no party could gain a majority.

Critical Evaluation of the Commission Report

(i) In its report the Commission seems to be split because it has put forward three different alternatives for electing a minority of members for the reformed second chambers;

(ii) If its recommendations were to be given effect, the House of Lords would continue to be illegitimate and the public would properly disregard it;

(iii) The report rejects the idea of giving the second chamber any new formal powers on constitutional or human rights issues, such as a special delaying power or the right to trigger referendums on major constitutional bills. There is provision for constitutional human rights committee and treaty scrutiny committees but in the absence of new

powers, they are likely to duplicate the work of Commons Committees;

(iv) The report suggests for the inclusion of some appointed members to provide experience and diversity. But the balance in the report is wrong. It proposes three options for choosing between 65 and 195 regional members out of a total House of 550. In itself the number would double the size of most other second chambers in the world;

(v) There is a suggestion that the proposed Independent Appointment Commission should recommend party as well as cross- bench members. This may ensure that the old party maverick is chosen. If there are going to be appointed, as well as elected, party members, they should be chosen directly by the leaders, as now;

(vi) It is criticised that the report failed to give some extended power to the House. Some expansion in the second chamber's authority would assist in the following:

- Greater consideration of constitutional legislation;
- More effective mechanism is needed to monitor secondary legislation;
- More effective mechanism is needed to monitor the detailed rules delegated to minister that Whitehall departments produce;
- There is also a strong argument for an element of direct parliamentary questioning of those nominated for some major public appointments.

(vii) An exclusive elected House would swiftly develop destructive partisanship and lack of expertise. Again, an entirely appointed chamber would lack all democratic credentials. Recognising this conundrum the Commission has recommended three versions of a mixed chamber. But in each of them the proportion of elected members is too small to provide sufficient legitimacy. They all employ some variant of the party list mechanism. An election

should allow all citizens to vote directly for individual candidates. A party list is hardly likely to produce independent minded legislators;

(viii) Report says, "to achieve political balance a new Appointment Commission should, of course, have regard to nominations made by the political parties." This of course is lethal. It is hard to see how the Appointments Commission could do otherwise if each general election is to lead to automatic adjustment. As now, lists will exist, and they will be people known to the party leaders.

Government Reaction:

The Government has held back from a formal response to the report. The next step for the government was to send the report to a joint committee of both Houses for consideration but no such committee was set up.

Further Announcement of Reforms:

Further reforms of the House of Lords was announced in the Queen's Speech in 2003 the main points of which are as follows[1]:

(i) Abolition of the right of the remaining hereditary peers to sit and vote;

(ii) A statutory Commission answerable to parliament will control all appointments to the Lords, with the exception of five ministerial appointments to be made by the Prime Minister;

(iii) The Commission will be modelled on the current non-statutory Appointments Commission. Three members will be nominated by each of the three main parties, one by the

[1] University of London: *Recent Developments in Laws*, 2004

cross-benchers and three independent members will be recruited through open selection, along with a chairman;

(iv) The commission will determine the number and timing of nominations to be made by each party, and the number of independents;

(v) The government of the day should have no overall majority but the representation of the political parties should 'have regard to the outcome of the previous general election'. Non-party peers should comprise roughly twenty percent of the House;

(vi) The government wants the total size of the House to be capped at 600 (it will stand at 581 once the hereditaries are removed);

(vii) Peers would be allowed to resign voluntarily from their post, renouncing their peerages and becoming eligible to vote and stand for election as MPs;

(viii) The House should be broadly representative of the gender, age, ethnicity, faith and disability mix of Britain;

(ix) The powers of the House as a revising chamber remains the same.

Sample Questions with Suggested Skeleton Solutions

1. "Any proposal for reform of the composition of the House of Lords ought logically to begin by asking what it is we expect the House of Lords to do and to tailor composition to function".
   Discuss, giving an account of the existing forms of public business conducted by the House of Lords (University of London, 2003).

   Suggested Skeleton for Solution: The above question has two parts to answer. First, the functions of the Hose of Lords and second, reform of the House with reference to its functions.

   - Start with the functions of the House of Lords (see pages 184-188);
   - Evaluate and compare this function with those of the Commons (see pages 184-188);
   - Discuss reforms, if any, needed for functions of the House of Lords (see paragraphs (iii) and (iv) at pages 198-199).

2. "Removing the majority of hereditary peers from the House of Lords has resulted in a more acceptable, if still undemocratic, second chamber. No further reform is necessary". Do you agree with this view? (University of London, 2002).

   Suggested Skeleton for Solution: The above question has two parts to answer. First, the question of retention of hereditary peers; and second, any other reform of the House.

   - Start with the composition of the House of Lords (see page 181);

- Evaluate critically the functions and role of the hereditary peers (see pages 182, (i) and (ii) at page 193);
- Apart from removing hereditary peers there are other important issues for reform, e.g. its functions, selection or election process etc (see page 196);
- Discuss that the main problem with reforms, i.e. problems regarding the balance of power between the two Houses.
- Outline the government's present reform plan (see pages 198-201).

3. Outline the principal arguments for reform of the House of Lords. Should reform be limited to revising the membership, or is there a need also to revise the powers of the House of Lords? (University of London, 1999).

Suggested Skeleton for Solution: The above question has two parts to answer. First, the arguments for reforms and second, areas of reform.

- Start with the introduction of the House of Lords (see pages 181);
- Discuss the arguments for reforms (see pages 193-194);
- Reform would not only be limited to revising membership but also in other areas, e.g. its functions, selection or election process of its member etc (see pages 196);
- Outline the government's present reform plan (see pages 198-201).

4. "Reform of the House of Lords has always been fraught with difficulty. The current reform proposals appear equally so with little consensus on the second stage reform" Discuss (University of London, 2002).

- **Suggested Skeleton for Solution:** The above question is mainly concentrated to the recent government plan of reforms. It has two parts to answer. First, the difficulties for reforms and second, government's current agenda for reform of the House of Lords.
- Start with the introduction of the House of Lords (see page 181);
- Discuss the various steps taken for reform of the House (see pages 194-195);
- Discuss the main difficulties with reforming the House (see page 196);
- Discuss critically the Royal Commission's report (see page 198)
- Outline the government's present reform plan (see pages 198-201).

5. Discuss whether the House of Lords should be elected. What arguments are there for and against the Law Lords continuing to be members of parliament's second chamber? (University of London, 2000).

Suggested Skeleton for Solution: The above question has two parts to answer. First, the arguments for and against an elected House of Lords and second, problems with the Law Lords and their reform.

- Start with the introduction of the House of Lords (see page 181);
- Discuss the arguments for and against an elected House of Lords (see pages 193-194);
- Discuss the problems with the Law Lords and suggest solutions, if any (see pages 189, 191-192).

CHAPTER XI

THE COMMITTEES IN THE HOUSE OF COMMONS

In a parliamentary system of democracy one of two important functions of parliament is ensuring the accountability of the government. This is done through two categories of techniques: individual and collective. The collective device is worked out through an effective committee system. Modern legislatures are unthinkable without a committee system. Committees exist to meet a practical need. The House as a whole is too widely a body to make full inquiries into matters of interest to it. To consider matters in detail, pressure of circumstances and in particular the increasing range of subjects with which parliament is concerned, has led to the steady development of committees. Committees are considered mini parliaments within the parliament.

Evolution of Committee System

The growth of governmental functions in recent time has created a need for greater parliamentary scrutiny than that which could be achieved by traditional methods like question-making etc. This need has resulted in committee system. Control of executive through committee system actually developed in the USA almost from the first session in 1789 which later came to be blended in parliamentary system in the latter part of the 20th century. By 1919 the House of Representative in the USA had 63 Committees and the Senate 74. After the Second World War the number of committees declined to the present level of 23 in the House of Representative and 18 in the Senate. The Congressional Committees have numerous Sub-Committees and the whole nature of the system is both elaborate and complex. It performs a range of legislative functions, budgetary functions as well as that of serious scrutiny of both the Executive and matters of public concern. In fact, the major work of Congress is said to be in committees. It was in 1979 when the House of Commons set up 16 departmental Select Committees for the first time.

Advantages of Committee System

An effective committee system helps developing and functioning parliamentary democracy in many ways:

First, since committees can take evidence in public, send any person including ministers to justify their actions; since reports of committees are published, given in press and also tabled in the House, departmental ministers and bureaucrats cannot adopt unfair means or do corruption. If any report gives a serious blunder about maladministration in a ministry, the government has to correctify it quickly; otherwise it may face even a hostile vote in the House.

Second, committee functions give message to the general public about efficiency and transparency in the governmental functionaries and people can decide whether they will elect the same government or not in the next election.

Third, it is the nature of parliamentary system that once a government is formed, a distinct difference develops between the government i.e. the ministers and their own party MPs. The backbenchers feel left out as they have no role in the policy, legislation or anything else. This creates an unnecessary hostility towards their own government and results in party intrigue and backbiting which, in turn, leads to the government developing a siege mentality and being over-sensitive to criticism.[1] Both these differences and unnecessary hostility can be mitigated if all MPs are given role to play and this is possible by proper committee functioning. In committees backbench MPs can effectively play their role to scrutinise the government. Though policy-making is the sole prerogative of ministers, it is committee system through which other MPs can examine and criticise those policies and can play role in ensuring their implementation in the spirit it was formulated.

Fourth, it is through the functioning of the committee system that bureaucracy comes under the direct scrutiny of the parliament since the committee concerning a particular ministry along with its associated bodies can send for any official or bureaucrat to appear before it to justify his action or send for any paper or document.

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1 Choudhury, Nazim Kamran, *The Mirage of Parliamentary Democracy*, Daily Star, June 2, 1996.

Different Types of Committees:

Committees in the House of Commons may be of three types:

(a) Committee of the whole House;
(b) Standing Committees; and
(c) Select Committees.

Committee of the whole House

The Committee of the whole House consists, as its name suggests, of all members of the House. It is, in fact, the House itself with its members in a less formal guise, presided over by a chairman instead of the Speaker and conducting its business under a more flexible procedure. The device was originally used for a variety of purposes when the House wished certain matters to be considered in detail before being formally approved by the House itself. Lord Morrison of Lambeth states two reasons for such a committee: first, the wish of parliament not to weaken its own powers and authority and the desire of Governments not to become the victims or creatures of committees (*Government and Parliament*, 166). When the Committee of the Whole House sits, the Speaker (the King's man) does not stay there; the Chairman of Ways and Means presides over the proceeding. Today committees of the whole House are used mainly for the committee stage of some very important government bills.

Standing Committees

As far as standing committees in British Parliament are concerned, the name is a misnomer. The name implies that these committees are permanent in nature but in fact they are not permanent. They are basically formed for the purposes of examining Bills and will stand down once the examination is complete. A better term might be 'debating committees' which emphasises the method of working which distinguishes them from most other committees[1]. The only relevance the word 'standing' now has to such committee is that, as in the chamber, Members speak on their feet (rather than seated as in select committees) (Grifith & Ryle, 385).

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[1] The Procedure Committee recommended that the umbrella title of 'standing committee' be replaced by 'general committee' and that such committee on bills should be called 'public bill committees'. The recommendation, however, has not been agreed by the House.

Functions of the Standing Committees:

Standing committees may be grouped into four categories on the basis of their four types of functions:

(i) Standing Committees on Public Bills dealing with bills referred to it by the House;

(ii) Standing Committees on delegated legislation dealing with secondary legislation or statutory instruments;

(iii) European Standing Committees dealing with European Legislations; and

(iv) Grand Committees and Standing Committee on regional affairs dealing with Northern Ireland, Scottish and Welsh business and regional affairs.

These committees are also sometimes used for the second reading of public bills, and amendments at report stage can be taken in committees if the bill is re-committed to a standing committee. The composition and procedure of standing committees differ significantly between committees used for the different purposes. Bills are referred to a standing committee by the House after its second reading. Sometimes, on completion of second reading bills 'stand committed to' to a standing committee. Standing committees may comprise between 16 to 50 members of parliament. Membership is proportionate to overall party strength in the House. Appointments are made by a Committee of Selection on the basis of advice from party whips as to appropriate members. Chairmen of committees are appointed from both the sides of the House by the Speaker from the Chairmen's panel. Once appointed the Chairman is impartial and enjoys the same power as the Speaker of the House.

The functions of the standing committees is to examine bill clause by clause. The minister in charge of the bill will steer the bill through; a member may move amendment; minister will respond; the opposition speaks and other members comment and this debate continues until a decision on the clause is reached. According to one commentator, the committee stage of a bill is tedious with the minister 'being pinned to the wall' throughout the process in the committee room. For the most part deliberation will follow party lines. However, if the government has a majority on the committee, the chances of successfully moving amendment is very little (Barnett, 478).

Difference between Standing and Select Committees:

It is to be mentioned that in British Parliament departmental select committees are permanent in nature; they are elected for the duration of the whole parliament. On the other hand, Standing Committees in the House are ad-hoc in nature; bills are commonly referred to them and their terms expire when they report on bills to the House. In Japan, Malayasia, Bangladesh and India Standing Committees are permanent in nature.

Select Committees

The main select committees are those responsible for monitoring the expenditure, administration and policy of specific government departments. Most select committees are set up in every parliament and are provided for in the standing orders of the House. All select committees may be categorised as follows:

(i) Departmental Select Committees (18);
(ii) Internal Domestic Committees;
(iii) Other Committees concerned with scrutiny of Government legislation (e,g. Public Accounts Committee, Public Administration Committee, Human Rights Committee, Regulatory Reform Committee, European Scrutiny Committee etc);
(iv) Temporary Select Committees.

Powers and Functions of the Select Committees

The departmental select committees have wider power to exercise control over the government departments. Ministers cannot be members of these standing committees as it is their policies that are to be scrutinised by these committees. These committees serve, *inter alia*, the following purposes:

(i) scrutiny of government;
(ii) internal administration of the House;
(iii) examination of secondary legislation;
(iv) general audit;
(v) examination of bills; and
(vi) addressing specific issues.

The usual powers for a committee with continuing inquiry functions, such as the departmental select committees, include:

(i) to call for oral and written evidence (the power 'to send for persons, papers and records, (PPR));
(ii) to meet whenever they choose, irrespective of sittings of the House;
(iii) to travel away from Westminster;
(iv) to set their own agenda and report at their discretion;
(v) to exchange evidence with other committees;
(vi) to meet jointly with other committees;
(vii) to appoint specialist advisers; and
(viii) to appoint a sub-committee.

These committees also have powers to meet concurrently with other committees to take evidence. Almost all committees take their evidence in public; the transcript published and the meeting televised. The reports of these committees are usually by consensus and are sent to the government as advice. The reports are also published.

A select committee having been once appointed is now free to use the powers given to it by the House as it thinks fit. For example, it interprets its own order of reference; it chooses its own subjects for inquiry within the scope of that order; it determines the days and times of its own sitting; it summons evidence of its own choosing; and it prepares and agrees its own reports and special reports. Subject to the rules and practices of the House it also, in effect, regulates its own proceedings, and there is no appeal to the Speaker on a decision of a committee or of its chairman.

Basic Process of an inquiry by a Committee:

(i) Committee chooses a subject;
(ii) Press notice announces inquiry and invites written evidence;
(iii) Written evidence received;
(iv) Committee chooses witnesses for oral evidence;
(v) Oral evidence heard;
(vi) Visits to relevant places;
(vii) Committee considers the main points of report;

(viii) Report drafted and considered informally by committee;
(ix) Report formally agreed and published;
(x) Government replies within 60 days;
(xi) Report may be debated.

Effect and Impact of Select Committees Activities

A study of committee report in 1997 showed that one third of reports covered expenditure, 60 percent looked at administration and over three-quarters touched on policy issues. During the parliament of 1999-2000 departmental select committees made 138 reports compared 120 the previous year.

Ministers are most embarrassed when a report is strongly critical of government and agreed to unanimously, because this means that members of their own party have made common cause with opposition members.

(i) The fact that a committee has chosen a subject for an inquiry brings that subject to the attention of ministers and positive changes may be brought before committee starts questioning;
(ii) Committee scrutiny makes it more likely that the options rejected when a decision is made become known and this may compel decision-makers to be more rigorous in their assessment;
(iii) The compilation of evidence by committees encourages a more open discussion of policy options;
(iv) The continuing interest of a committee in an issue over a period of years makes it harder for that point of view to be ignored;
(v) Select Committees have made the greatest short-term impact when conducting inquiries into recent scandals;

General assessment of the relative success or failure of select committees, as of other parliamentary activities, depends on differing expectations. On one matter, however, opinion is almost unanimous: select committees since 1979 have increased the flow of information coming out of Whitehall and this has resulted to some extent in debates being better informed both inside and outside parliament.

The Liaison Committee noted in 2001 that the cost of the select committee system at £7.7 million represents less than 0.002 percent of the government spending it scrutinises.

Reforms in Select Committees

'The beauty of the select committee is that it is the only area of activity in this House where the writ of the Whips office does not run. Once one is in a select committee, one is in it for the Parliament'. This is how an MP commented in the House (Diane Abbott, Commons Hansard, July 7). This is why the appointment procedure of these committees should be neutral. Although it is generally recognised that the Whips on both the sides of the House take a closer interest in nominations, it is not always clear whether this achieves the expected results.

The Liaison Committee, in a series of three reports under the general title *Shifting the Balance: Select Committees and the Executive* recommended that MPs should be nominated to membership of select committees by a body independent of the party whips: vacancies would be advertised; individuals would be able to apply; names would be chosen by a new Select Committee panel and the final decision would remain with the House. It also recommended for an opportunity for reports to be presented briefly on the floor of the House, additional resources to support committees[1]. These proposals initially rejected by the government, were re-examined by the Modernisation Committee after the 2001 general election. In 2002 the House approved their recommendations for core tasks for select committees, extra staff resources and additional payments for chairman but rejected the scheme for a more independent Committee of Nomination to choose members of select committees.

However, still there remain some areas where reforms are needed. First, select committees lack mechanism to compel the attendance of

[1] First Report, HC 300 of 1999-2000; Second Report, HC 748 of 1999-2000; First Report, HC 321 of 2000-01.

members of either House. Second, there are rules governing the appearance senior civil servants before committees which also limit the scope and effectiveness of questioning by committees. A minister may instruct civil servant to remain silent while questioning. Third, committees still lack any power to impose penalty if a minister refuses to appear or refuses to allow civil servants to appear or give evidence or face questioning.

Core Tasks of the Select Committees approved by the House:

(i) to consider major policy initiatives;
(ii) to consider the government's response to major emerging issues;
(iii) to propose changes where evidence persuades the committee that present policy requires amendment;
(iv) to conduct pre-legislative scrutiny of draft bills;
(v) to monitor performance against targets in the public service agreements;
(vi) to take evidence from minister at least annually;
(vii) to take evidence from independent regulators and inspectorates;
(viii) to consider reports of executive agencies;
(ix) to consider, and if appropriate report on, major appointments by a Secretary of State or other senior ministers;
(x) to examine treaties within their subject areas.

Enforceability of Committee Reports

A parliamentary Committee may give recommendation, opinions and finally its most important function is to prepare reports for parliament. In all systems committees do not have any power to enforce their recommendations or reports on their own. Committees are advisory bodies in nature. The usual practice is that various Government departments respond to the reports of the DPCs within two months of their submission to the House, specifying the recommendations they accept and explaining the reasons for non-acceptance if any. According to estimates by Rush, nearly 30% of the recommendations of various DPCs in Britain are accepted outright;

while about a quarter of them is rejected[1]. In India, for example, practice shows that the committee reports are mostly accepted by the Government. The ministers in India submit, 'action taken report's to parliament, providing details of the progress of implementation of the recommendation of various DPCs and explaining reasons for delay or rejection, if any[2].

Sample Questions with Suggested Skeleton Solutions

(1) Critically consider the role of departmentally-related Select Committees of the House of Commons in scrutinising government. What reforms, if any, would you advocate? (University of London, 2000).

Suggested Skeleton for Solution: The above question has three parts to answer. First, the functions of the Select Committees; second, how far are they effective in scrutinising government; and third, reforms, if any, needed to make them work effectively.

- Start with the definition and categories of select committees in the Commons (see page 207);
- Discuss their functions in scrutinising government (see page 209);
- Importance and significance of the functions (see pages 209-210);
- Reform of select committees (see page 212).

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[1] Rush, M. (1995), Parliamentary Scrutiny: in R. Pyper and L. Robbins (eds.), *Governing the UK in the 1990s*, Macmillan, London, PP. 108-29

[2] Bhardwaj, R. C (1995) '*Parliamentary Partners: Departmentally-related standing Committees in India*, the Parliamentarian, Vol. 76 No. 4, PP. 313-9.

(2) Critically assess the adequacy of parliamentary procedures which enable Members of Parliament to scrutinise government administration (University of London, 2002).

(3) Consider the principal procedures by which the House of Commons holds ministers of the Crown to account. In what ways, if any, might the scrutiny procedures of the House be in need of some 'modernisation'? (University of London, 2002)

Suggested Skeleton for Solution: The above two questions have to be answered with careful consideration of more than one chapters.

- Start with the categories of parliamentary procedures to scrutinise government: (i) doctrine of ministerial responsibility both individual and collective; (ii) parliamentary questioning; and (iii) scrutinising by committees in parliament (modern methods of scrutiny);
- Discuss how parliament ensures the scrutiny by collective and individual responsibility (see pages 174-179);
- Discuss parliamentary questioning procedure (see pages 175-177);
- Discuss how scrutiny is done through committee system in parliament (see pages 178-179, 211);
- Discuss reforms, if any, needed for all the methods (see pages 212).

(4) Consider the legal and parliamentary means of scrutinising government administration to ensure that the principle of government under the law is observed. (University of London, 2001).

Suggested Skeleton for Solution: Here both legal and parliamentary controls are to be discussed. With regard to parliamentary control collective and individual responsibility, questioning and committee systems are to be discussed. With regard to legal control the device of judicial review and its effectiveness as a check on government functionaries are to be discussed.

- Start with setting the categories of parliamentary and judicial procedures to scrutinise government: (i) doctrine of ministerial responsibility both individual and collective; (ii) parliamentary questioning; and (iii) scrutinising by committees in parliament (modern methods of scrutiny)- all these are parliamentary procedures. Among the judicial procedures judicial review would be most important.
- Discuss in short how parliament ensures the scrutiny by ministerial responsibility, parliamentary questioning procedure and committee system in parliament (see pages 174-179);
- Discuss how the doctrine of judicial review allows the court to control the government functionaries and keep it under rule of law (see page 249, *ultra vires* etc).
- Point out if any reform would be necessary in the systems, i.e, reforms for collective responsibility and committee systems etc.

CHAPTER XII

ELECTORAL LAW

It is the electoral system in a country whereby the electorate elects its representatives and confers powers over its government to govern the nation. Thus the electoral system is the way and source of deriving democratic power of the government. However, the law governing the electoral system varies from country to country. As Hilaire Barnett states, if the electorate is to enjoy true equality in constitutional participation, it is of fundamental constitutional importance that the electoral system ensures four principles:

(i) There is a full franchise subject to restriction (The Representation of the People Act 1948);
(ii) The value of each vote cast is equal to that of every other vote (Boundary Commission);
(iii) The conduct of election campaign is regulated to ensure legality and fairness (The Representation of the People Act 1983); and
(iv) The voting system must be such as to produce both legislative representative and government with sufficient democratic support to govern effectively[1].

Electoral system in the UK

The United Kingdom is divided into 659 parliamentary constituencies, each of which is represented by one member in the House of Commons. The constituency boundaries are determined by the Boundary Commission which works on theory that each constituency should have the same member of votes within it to ensure that all votes in the country are of equal value. This is summed up by the maxim, 'one man, one vote, and one value.'

A full franchise on the basis of equality and respecting the principle of 'one person one vote' was finally achieved under the Representation of the People Act 1948. The current law relating to

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[1] Barnett, Hilaire, *Constitutional and Administrative Law*, 4th edn, p. 423.

electoral process is the Representation of the People Act 1983. This statute also governs the law relating to election campaigns and their legality. Under the provisions of this Act, election to the House of Commons is decided by secret ballot in which British subjects and the citizens of the Irish Republic are entitled to vote provided that they are 21 years old or over and are not subject to any legal incapacity to vote. Those eligible to vote in any constituency are those who are recorded on the register of electors for the constituency.

Voting System

An electoral system has to be chosen in order to translate votes into seats and the choice has implications because different system will produce different results. Most available methods of voting system are FPTP, Alternative Voting System, Additional Member System, Single Transferable Vote and Party List system. For parliamentary election in the UK the single majority or 'first past the post' system is followed.

The First Past the Post System

The system employed for elections in the House of Commons is a plurality or simple majority system, often called 'first past the post' (FPTP). A single member is elected to represent each electoral area and wins by having the largest number of votes, irrespective of the proportion of votes cast for each candidate. It is a 'winner takes all' system. Many candidates win without having an absolute majority, e.g. one may be elected with only 30% of the votes cast merely by virtue of having more votes than any other candidate.

Merits of the system

(i) Voting procedure is simple and cheap and the results may be quickly and easily calculated;

(ii) There is a link between members and his constituency;

(iii) This system generally returns one political party with a clear parliamentary majority which ensures strong government. This eventually leads to stability in the government which is very essential for sustainable

democracy. No party has won 50% or more of votes cast in any general election since before the Second World War, and so in that sense all of the governments formed since then have been minority governments. However, in the fifteen general elections from 1945 to 1997, only one (in February 1947) produced a 'hung parliament' where no party had an overall majority of seats[1].

Demerits:

(i) Winner takes all. In other words, this system results in one party having the most seats in the House than any other and most frequently results in that party having more seats than all the other parties put together;

(ii) Large number of votes are wasted;

(iii) Minority interests are represented badly. This is because this system produces an exaggerated majorities for the two major parties and discriminates against the minority parties;

(iv) It fails to produce a parliament whose membership reflects the wishes of the electorate; there is no concept of 'proportional representation';

(v) Distortions in individual areas may produce further anomalies when the results are aggregated. At the general election of 1974 the Labour won more seats, although the Conservatives had received more votes;

Other Alternative Voting Systems

For the demerits mentioned above in the FPTP system consideration is frequently given to some alternative voting systems. There are four alternative voting systems:

1. Alternative Vote System (AVS);

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[1] Munro, Colin R, *Studies in Constitutional Law*, 2nd edn, p. 107.

2. Party List system;
3. Single Transferable Vote (STV); and
4. Additional Member System (AMS).

Most of these alternatives are based on 'proportional representation' as opposed to 'first past the post' system. Proportional representation means that members should be elected to parliament on a party basis which reflects the proportion of votes cast for a party in the election. Thus if 40% of the population votes Conservative then 40% of the Parliamentary seats should be held by that party; not as under the FPTP system where the 1987 election revealed that 25% of the population voted Liberal-Democrats but in terms of seats in Parliament, the party only won 3% of seats.

Alternative Vote System

This system of voting is used to elect the federal House of Representatives in Australia. This system works on the notion of multiple votes in order of preference retaining individual constituencies. In other words, the voting is preferential, with the electors required to rank the candidates numerically according to inclination. After the voting, operations commence with the counting of the first preference votes, and any candidate who receives more than half of these is thereby elected. If no candidate has an absolute majority of first preferences, the one with the smallest number is eliminated from the contest and his votes are redistributed according to the second preference shown on the voting papers. The procedure continues until one candidate reaches the 50% level to secure election. The merits of this system is that it produces consensus candidates. However, the defects of this system are as follows:

(i) unlikely to produce proportional representation and may be even worse than FPTP;

(ii) the voter has the potential to be confused with the procedure and the winner might not have a clear mandate from the voter; and

(iii) would be very difficult for uneducated voters.

The Party List system

This system is perhaps the method which best reflects the real proportion of the votes. This system is used in many European countries. The country is classified as one constituency and parties present their lists of candidates and the electors vote for the whole party list. Seats in parliament are allocated to the parties in proportion to the votes received by each list. For example, if a party wins 40% of the total votes cast, it will have 40% of the total seats in the parliament. This system has the merit of producing real proportional representation; it is also easy and simple for all types of electorates. However, the system has some demerits as well.

Demerits:

(i) Strengthens party bureaucracy. Too much patronage is placed on the party leader;

(ii) The link between MP and constituency is destroyed; and

(iii) Minority parties are given greater potential power as they offer their conditional support to any putative government; an outright winner is almost unusual and there is less likelihood of stable government. Hung parliament would be usual feature of this system.

Single Transferable Vote System

This method is used for European Parliament election in Northern Ireland and also for local authority election there. This is the most favoured of the alternative systems and this system offers both proportionality between votes and seats. It is a preferential system which requires multi-member constituencies for its operation. Voters mark their preferences numerically against the name of the candidates they favour. Any candidate obtaining the quota of first preference necessary to secure election is immediately elected. The surplus votes of successfully candidates are then transferred to other candidates proportionately according to the second preference expressed. Any candidates who reach the quota following the transfer are also elected, and their second preferences are in turn able to be transferred, and so

on until all the seats are filled. This system reduces the number of wasted votes; it offers better prospects for the representation of minority parties and independent candidates. However, this system has some defects as well. The system is complicated; counting may take couple of days to complete.

Additional Member System

This system is used to elect members of the German Bundestag. In this system each voter has two votes, one used to elect a candidate for a single-member constituency on the FPTP system, whereas the second is a vote for a party list. Half the number of members of the Bundestag consist of constituency representatives. The other half are selected on the basis of party votes nationally. This list element is used to correct adjust for the disproportionality of the FPTP system.

Reforms of Electoral Law in the UK

The reform of the present electoral system, i.e. the FPTP system for election of the House of Commons has long been asserted by many. It is argued that the present system is not suitable for producing true proportionate representation in the House. It is also argued that there are a variety of proportional representation systems in the European countries. Even in the UK for elections other than to the House of Commons, there are now a variety of voting systems, most of which have been introduced since 1997 election. Election to European Parliament is by Regional List System based on multi-member electoral regions. Elections to Scottish Parliament and Welsh Assembly are by the AMS, a combination of FPTP and RLS.

Against the background of this varieties it has been argued that the system of election to the House of Commons should be reformed. With that end in view, following its electoral success in May 1997 the Labour Government set up an Independent Commission to consider alternatives to the FPTP system for general election. Under the chairmanship of Lord Jenkins, the Commission was invited to observe four requirements:

Broad proportionality (AMS)

Need for stable government (FPTP)
Extension of voter choice (STV)
Maintaining the link between an MP and constituency (FPTP)

The Commission in its report in 1998 recommended a two vote mixed system. The Alternative Vote System should be used to elect 80% of the members representing constituencies and the remaining 15% to 20% of MPs would be elected on a regional list basis in order to mitigate any disproportionality in these constituency results. This 15%-20% top-up element has been in order to achieve a substantial degree of proportionality.

The report's initial reception even amongst committed reformers was distinctly lukewarm. The report tried to square several circles. The AV system enjoyed considerable support within the Labour Party[1]. The progress towards proportionality would please proponents of proportional representation. By limiting the top-up element, opponents of coalition government might be appeased. Though Jenkins claimed that the proposed system would have produced single party majority government in three out of four election, political scientists soon worked out that it would have produced coalition government in nine out of last fourteen[1]. The system has been commented as unfamiliar and complex.

The strong arguments for proportional voting system are that the system provides two important merits—proportional representation and best voter choice which are two important basic elements of democracy as well. On the other hand, this system has great demerits of producing unstable government and destroying constituency links between MPs and electorate which are in no way less important for sustainable democracy than proportional representation and voter choice.

Proportional representation leads to coalition government which nobody votes for and it gives disproportionate influence to minority

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[1] Munro, Colin R, *Studies on Constitutional Law*, 1999 at p. 115

[1] Michael Pinto-Duschinsky, *The Times*, 29 October 1998.

parties holding the balance of power. The compromises and trade-offs between coalition partners produces hindrances in implementing electoral programmes; produce difficulty in portraying a more 'representative government.' The present effective mechanism of collective ministerial responsibility will lose its all strength in proportional system in either coalition or minority government. Individual responsibility of ministers will be difficult to adhere; MPs will have no constituency link; they would become less cohesive; the present local development and complaints via MPs to parliament and Ombudsman will be destroyed and this will eventually result in less confidence of the people to the government.

The proportional system may work better where political parties are much more in number and less polarised than has traditionally been the case in the UK. While New Zealand has introduced a system of representation, Italy has moved away from it. So one might conclude that the election system in the UK is unjust and unsatisfactory. However, it is to be remembered that all systems have defects; no system is fully correct.

While elections for the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly and European Parliament have already taken place under the system of proportional representation, plans introducing a new system as recommended by Jenkins Commission for election to the House of Commons have been delayed. The Government is yet to make a decision on the matter.

Sample Questions with Suggested Skeleton Solutions

(1) Discuss the effects of the 'first past the post' method of electing Members of Parliament upon the role and working of the House of Commons (UL, 2001).

(2) What reforms of law relating to election, would you advocate in order to ensure optimum equality in the value of each individual vote? Evaluate the view that the British election system requires fundamental reform. (UL, 1998)

(3) 'With differing forms of electoral systems being used for different elections within the UK. It is high time that the simple majority system used for general elections be reformed.' Do you agree? (University of London 2002).

(4) What are the advantages and disadvantages of the 'simple majority voting system'? On what grounds is it argued that the system should now be changed, and what system would you advocate? (UL, 2000).

Suggested Skeleton for Solution: All the above question will have almost the same answers.

- Start with the introduction of the electoral method in the UK for the election in the House of Commons (see page 217);
- Discuss the merits and demerits of the FPTP system (see pages 218-219);
- Discuss the alternative system for election and their advantages and disadvantages (see pages 219-220);
- Compare how the FPTP system will provide more stable government in the House of Commons than any other system of election (see last 4 paragraphs at pages 223-224).

CHAPTER XIII

THE PARLIAMENTARY PRIVILEGE

What is Parliamentary Privilege?

Parliamentary privilege is part of the law and custom of parliament. It consists of those laws and customs which Parliament has evolved for itself, to expedite its work. It takes the form of a number of rights, powers and immunities which are enjoyed by members of both the Houses of Parliament, and by each House collectively. Privilege thus allows parliament to conduct its affairs without improper interference by the Sovereign, the Courts or other bodies or persons outside parliament. Privilege, unless created by Statute, forms part of the common law. It is defined by Erskine May as:

> ".....the sum of the peculiar rights enjoyed by each House collectively as a constitutional part of the High Court of Parliament and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals." (1997, p 69).

Blackstone said in his *Commentaries on the Laws of England*, (17th edn, vol. 1, p. 163) "the whole of the law and custom of parliament has its origin from this one maxim, that whatever matter arises concerning either House of parliament, ought to be examined, discussed and adjudged in that House and not elsewhere." The privileges of parliament are those rules of both the Houses of Parliament which offer protection from outside interference- from whatever source- to the House collectively, and to individual members. (Hilaire Barnett, 549). Professor Munro says that parliamentary privilege is that part of constitutional law which consists of special rules developed by the Houses of Parliament so as to augment their dignity and independence, and in order to protect themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstruction. (Munro, 217).

Nature of Parliamentary Privilege:

(i) Parliamentary privileges are rules of law and custom of parliament. They are a special form of law which is interpreted, administered and enforced in each House by the House itself, in other words, by the High Court of Parliament and not in ordinary courts of law. However, they are part of common law and are recognised constitutionally by the courts of law, though not enforced by courts directly.

(ii) Privileges provide rights and immunities to the Houses and their members; at the same time they provide the basis for punishment by the same Houses for their alleged breach. Every court of justice has rules and customs for its own; so has the High Court of Parliament. When any of the privileges is disregarded or attacked by anybody, the offence is called a breach of privilege, and is punishable under the law of parliament. Such offences are contempts of Parliament; the concept is analogous to contempt of court.

(iii) The main object of privileges is to protect the rights of the Houses of parliament and their members inside parliament to enable them to do their duty. By asserting special powers and immunities for parliament as a whole, and for its members individually, parliament provides itself a protection with rights and immunities not accorded to individual citizens.

(iv) Parliamentary privileges are regarded as part of the law and custom of parliament. Their origin lies in the customs of parliament; they are recognised as having the status of law; however, they will be found, for the most part, not in statutes or cases, but in parliamentary proceedings. It has to be collected, said Coke[1], 'out of the rolls of Parliament

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[1] Coke, Edward (Sir), *Institutes of the Laws of England; Concerning the Jurisdiction of the Courts*, 1644, p.15.

and other records, and by precedents and continued experience'. Because they are enforced primarily by the Houses themselves, it is defined principally in resolutions of the Houses and rulings by the Speakers. (Munro, 217).

(v) Like any other part of the law, parliamentary privileges are subject to the supremacy of Acts of parliament. Acts have curtailed the scope of privileges from time to time. For instance, by the Parliamentary Privileges Act 1770 the privileges of freedom from arrest was withdrawn from the servants of members, to whom it had previously extended. Likewise, Acts of Parliament may regulate the exercise of privileges. For instance, the determination of disputed elections for parliamentary constituencies, which lay within the Common's privilege of regulating its own composition, has effectively been transferred by statute to judges of the ordinary courts. Again, statute may recognise and maintain the scope of a privilege. For instance, Article 9 of the Bill of Rights maintains the following privilege of freedom of speech:

> "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament."

(vi) As like as Royal prerogatives, parliamentary privileges are residual in nature. As the Crown cannot enlarge its prerogatives, the two Houses recognise that they cannot by their own act of resolution of the House create new privileges. However, there is evidence that the statutes may create new privilege[1]. Again, if there is a dispute as to the existence of privilege, it is decided by the courts. Thus in *Stockdale v Hansard* it was decided that the Commons could not extend privilege to cover reports of its debates, which therefore had to be safeguarded from

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[1] *Stockdale v Hansard* (1839), referred to in Barnett, Hilaire, *Constitutional and Administrative Law*, 4th edn, p. 550 and also in Harvey and Bather, *The British Constitution and Politics*, 5th edn, p. 153.

proceedings for defamation by creating a new privilege by the authority of statute, i.e. the Parliamentary Papers Act, 1840.

Distinction between Prerogatives and Privileges

(i) Between prerogatives and privileges there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament (Dicey, 428).

(ii) The prerogative courts have been abolished, and the Crown cannot punish infringements of its prerogatives, whereas the two Houses have retained their penal jurisdiction, and so are able to punish breaches of privilege.

(iii) For the same reason as mentioned above, the Crown has long since had to concede that the ambit of prerogative is determinable by the courts, and not by the Crown's claim. The Houses of Parliament, however, still claim the right to determine the extent of their privileges. However, this claim is contested by courts which will be discussed later in this chapter.

Historical Notes

As to their historical evolution professor Munro has depicted the following notes:

"Parliamentary privileges had their origin in the insistence of monarchs that they would not be deprived of the services of their advisers and officials. Many of those advisers and officials sat in parliament. If they could be harassed on their journey to the parliament chamber or arrested by creditors, Crown and Parliament would have lost their services. To prevent this, a privilege of freedom from molestation and arrest was granted and enforced. enforcement was initially by the Crown, but during the reign of Henry VIII, the House of Parliament began to assume jurisdiction themselves, and took the opportunity that offered to lay claim to further rights, powers and immunities as customary. Some of these

repeatedly and successfully asserted, came to be legally recognised as privileges of Parliament".

According to another account, the rights or privileges have been won largely as the result of the former struggles of Parliament with the Crown over the question of the 'supremacy' of Parliament and with the Courts over the question of jurisdiction.

The Main Privileges and their Scope

The privileges may be of two categories: individual privileges which a member of either House may claim and collective privileges which both the Houses may claim as a body. Freedom of speech in parliament and freedom of members from arrest in civil matters are the two main individual privileges. On the other hand, collective privileges include (i) the right to regulate composition and procedure of the House; (ii) right to the 'favourable construction' to its proceedings; and (iii) power to punish for breach of privilege or for contempt.

Freedom of Speech

This is the central privilege of an MP who must be at liberty to speak and write in the parliament without fear of interference from outside bodies. Originally this privilege was claimed to protect members against the Sovereign. Elizabeth I recognised it, but stipulated that certain matters, such as foreign policy and the question of her marriage, should not be discussed, as they were no concern of the House. In 1621 James I complained to the Speaker because the House criticised him and, when the House formally protested, he tore the offending page from its Journal. Charles I went further, arresting Sir John Eliot, Hollis and Valentine in 1629. They were prosecuted and fined by the Court of King's Bench for 'seditious words' spoken in the House in the case of *R. v Eliot, Hollis and Valentine* ((1629) 3 St. Tr. 294). The Houses in 1641 and 1667 passed resolutions against this judgment, and it was reversed by the Lords on a writ of error in 1668. After this case no legal action were taken by the Crown for words spoken in the House. The privilege was finally confirmed in the Bill of Rights, 1689:

"The freedom of speech or debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament" (article 9).

This privilege is statutory as protected by article 9 of the Bill of Rights. But it may also be considered to be constitutionally established and as such it would be difficult by an ordinary Act of Parliament, to abolish or amend such an historic instance; indeed this freedom was claimed and accepted by the sovereign long before 1689.

Extent of the Privilege

Extent of Legal Protection:

The extent of this privilege is very wide today. All MPs are absolutely immune from both civil and criminal liability in respect of things said or done by them in the course of proceedings in parliament ((*Wason v Walter* (1668) L.R. 4, *Dillon v Balfour* (1887) 20 L.R Ir. 600). This means that a member speaking in either House may accuse any person of the basest crimes, may do so knowing that his words are false, and yet that person will be unable to take any action against him. A citizen who regards himself as having been defamed by any speech of an MP in the parliament will have no legal remedy in courts.

Extent of Subject Matter: The Meaning of 'Parliamentary Proceedings':

How far the protection of freedom of speech extends is not entirely clear. Article 9 refers to 'speech' and 'debates' or 'parliamentary proceedings'. Speech, debates or proceedings includes proceedings in the parliament or questions asked by an MP in the House whether written or oral, committee proceedings, and written documents published by Order of the House (Parliamentary Papers Act 1840, section 2)[1]. However, difficulty has arisen from time to time as to the meaning of the term 'proceedings in parliament'. The

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[1] Following *Stockdale v Hansard* (1839) 9 Ad & EI 1) the Parliamentary Papers Act 1840 was passed which bars proceedings, criminal or civil, against persons for the publication of papers or reports printed by order of either House of Parliament, or copies of them.

phrase seems intended to cover what is the business of parliament or its members. A committee once provided an explanation:

> "It covers both the asking of a question and the giving written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business."

According to Erskine May, proceedings in parliament includes speaking in a debate, voting, giving notice of a motion, presenting petitions or committee reports, taking part in committees nominated or appointed by either House, asking parliamentary questions (Erskine May, 95-98). It also includes actions taken by officers of the House in persuance of its orders (*Bradlaugh v Gossett* (1884) 12 Q.B.D. 271). However, something is not a 'proceeding in parliament' merely because it happens within the building of the House. For instance, the Committee of Privileges ruled that the showing of a film in a committee room to MPs privately arranged by a member about a secret security project was not protected by privilege. Even a conversation between members, if on private affairs, would probably not be privileged (Munro, 222). Likewise, it was decided in *Rost v Edwards* ([1990] 2 QB 460) that correspondence between members relating to questions to be raised in the House was privileged but letters from the public to MPs and letters from MPs to public would appear not to be 'proceedings in parliament' to be protected. However, letters to and from members, ministers and constituents will be protected by qualified privilege in respect of an action for defamation, provided there is a common interest between the parties and an absence of malice (*R v Rule*, [1937] 2 K.B. 375, *Beach v Freeson* [1972] 1 Q.B. 14). In 1998 the Joint Committee of the parliament decided that correspondence between a Member and a minister should not be covered by parliamentary privilege (Griffith and Ryle, 129).

Limits of Protection: Exceptions to the Privilege of Freedom of Speech:

(i) Although article 9 prevents attempts by outside bodies or the courts to limit freedom of speech in parliament, it

does not mean that Members can say whatever they like at all times, because the House itself, and the Speaker on behalf of the House, can restrict the content of speech in debate and other proceedings, such as motions and questions.

(ii) The privilege of freedom of speech applies only to speech in the House and other proceedings of the House itself, but not to reports of proceedings or debates by newspapers or others outside parliament. Documents published by the order of the House (Parliamentary Papers Act 1840, section 2)[1] are protected. However, extracts from such documents enjoy only qualified privilege, meaning that they must be made in good faith. Broadcasters of parliamentary proceedings also have qualified privilege (Defamation Act 1952, s. 9).

(iii) Protection of proceedings in parliament does no longer mean that the laws passed by parliament cannot be challenged in the courts. Under the Human Rights Act 1998, the compatibility of an Act with the European Convention on Human Rights can be questioned. In an earlier case, the Merchant Shipping Act 1998 was held by the European Court of Justice to be ineffective because it was in breach of European Union law (*R v Secretary of State for Transport Ex. p. Factortame* (No 2) [1991] 3 All E.R. 769). These are, however, challenges to the outcome rather than the process of legislation.

(iv) Article 9 also means that matters arising in the course of parliamentary proceedings cannot be relied on for the purpose of supporting an action or prosecution against a member in prison. For example, the Church of Scientology, bringing a libel suit against an MP for

[1] Following *Stockdale v Hansard* (1839) 9 Ad & El 1) the Parliamentary Papers Act 1840 was passed which bars proceedings, criminal or civil, against persons for the publication of papers or reports printed by order of either House of Parliament, or copies of them.

remarks made in a television interview, was unable to refer to his speeches in the House of Commons in seeking to prove his malice (*Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, [1972] 1 All ER 378).

(v) Though article 9 puts limits on the use of Hansard in court proceedings by stating that parliamentary proceedings 'ought not to be questioned in any court or place out of parliament', the House of Lords in *Pepper v Hart* ([1993] AC 593) has modified this rule. The House held that to use clear statements made concerning the purpose of legislation did not amount to a questioning of proceedings in parliament. Likewise, the courts may consult records of proceedings when it is relevant to a judicial review proceeding (*R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513). In the above two cases the courts have not regarded the use of parliamentary proceedings in judicial review proceedings as in breach of article 9. In *Brind* a ministerial statement was used as evidence that the Minister had properly used his powers to impose broadcasting restriction on terrorists. Likewise, in *World Development Movement* (*R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386) and in *Hindley* (*R v Home Secretary, ex p Hindley* [1998] Q.B. 751) ministerial statements were permitted to use by applicants to support the argument that a government decision or policy statement was unlawful. "This use of parliamentary proceedings", says Hood Phillips, "in the course of judicial review can be seen as complementary to ministerial accountability to parliament" (*Constitutional and Administrative Law*, 278). The Joint Committee accepted that both these developments should remain and that legislation should be introduced to make it clear that they were proper exceptions to article 9.

(vi) Article 9 has been interpreted widely as preventing parliamentary materials from being used as evidence in court proceedings (*Church of Scientology v Johnson-Smith*) [1972] 1 QB 522, [1972] 1 All ER 378) (MP sued for defamation: evidence of his statements in parliament could not be used). This has led to problems. For example, the Defamation Act 1996 section 13 amended the Bill of Rights in order to accommodate Neil Hamilton, a Conservative MP, who wished to sue a newspaper for defamation, relying upon parliamentary materials for the purpose. Section 13 permits an MP to use things said in parliament in evidence provided that the MP waives his or her own immunity.

Freedom from Arrest

Both the Houses of parliament have right to unhindered attendance and uninterrupted services of their members, and this is the justification for the freedom from arrest which members individually enjoy. This privilege had application in the past. However, owing to reforms in civil procedure in the nineteenth century, and the abolition of imprisonment for debt by the Debtors Act 1869, this privilege has lost most of its importance. It may now operate so as to prevent arrest or imprisonment for civil contempt and in a few other circumstances. This privilege does not apply to any criminal matters. Thus when an MP commits a crime he may be arrested like anyone else; if he is convicted the court will notify the Speaker. The conviction-related documents will be laid before the House at their request and the member may be expelled. The abolition of this privilege was recommended in 1967, and again by the Joint Committee in 1999 on the ground that it is anomalous and of little value ((1967-68) HC 34, (1998-99) HL 43, HC 214).

Right to regulate Composition and Procedure of the House

This is sometimes divided into two different privileges: (i) right to regulate composition; and (ii) exclusive right to regulate its own proceedings. The first one covers: (i) the filling of casual vacancies,

(ii) the determination of disputed election returns, (iii) the determination of legal disqualifications of persons returned to Parliament, and (iv) expulsion of members who are unfit to sit. All these powers are exercised within the limits left by statute.

Exclusive Right to regulate its own Proceedings: Each House of the parliament has the collective right to control its own proceedings and to regulate its internal affairs including whatever takes place within its walls. This privilege was accepted by the court in *Stockdale v Hansard* when it held that 'whatever is done within the walls of either assembly must pass without question in any other place.' Thus an aspect of parliament's claim to regulate its own proceedings is its right to regulate the conduct of its members. The following sub-heads deal with the issues of members' conduct, members' interest and Cash for Questions.

Rules regulating Members' Conduct and Members' Interests: There should be a line between the privilege of freedom of speech and its abuse which has, however, been very difficult for the parliament to draw in right direction. This has led the House from time to time regulating the members' interests and conducts. The underlying purpose of freedom of speech is the protection of parliament's independence; to make sure that all members of parliament are under no external pressure which could pose a potential threat to their independence. However, this has not been possible in recent times when pressures or risks of influence come from outside connections which members themselves have embraced. Until 1911 MPs did not receive a salary, so it is not surprising that there have always been many members with other sources of income. Some MPs have held company directorships, some have received financial support or sponsorship from trade unions; some have engaged in legal practice or journalism. However, beyond these traditional sources of income, from the 1970s it became commonplace for members to be paid as consultants or advisers to industries or professions, companies, pressure groups, and foreign governments, and even to be associated with firms of lobbyists etc. All these have led to the problem of conflict of interest for MPs to be tackled by the Houses. To prevent MPs from prejudicing the privileges of freedom of speech and to

regulate their conflicts of interests the House of Commons formulated a resolution in 1974 imposing a duty upon the members to disclose their private interests when relevant. In the same year the House also resolved to establish a Register of Members' Interests, and since then members have been required annually to record for this purpose such as rewards, benefits and interests in various categories as they may receive on top of their salaries. A Committee on Members' Interests was set up to monitor and enforce compliance with the Register.

Until 1995 the Commons exercised its jurisdiction in respect of conduct and interests through the Committee of Privileges and the Committee on Members' Interests. However, allegations of impropriety by MPs and Ministers during the 1990s, as well as, a more general disquiet in respect of standards of conduct in public life, led to the establishment in 1994 of a standing Committee on Standards in Public Life (Nolan Committee). The reports of this committee have resulted in significant changes to parliamentary procedures relating to the conduct of MPs and registration of their pecuniary interests. In its first report the committee stated its Seven Principles of Public Life which are now used as a touchstone to judge ethical behaviour in the public sector[1]. In 1995 the House of Commons agreed to the following proposals:

(i) the appointment by the House of Parliamentary Commissioner for Standards (PCS);
(ii) the replacement of the former Committees on Privileges and Members' Interests by a new Committee on Standards and Privileges;
(iii) the drawing up of a Code of Conduct for MPs;
(iv) a requirement that members should deposit with the PCS for public record, all agreements with outside bodies for the provisions of services in their capacity as MPs and the annual remuneration received from such employment.

The Code of Conduct includes seven principles of public life as mentioned earlier. It also contains guidelines of more specific

[1] The seven principles are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

obligations, such as not to accept bribes, to register their interests, not to misuse confidential information, not to make improper use of their parliamentary allowances. There are extensive guidelines on three areas: registration of interests; the declaration of interests; and paid advocacy. This Code and guidelines were adopted by the House in 1996. The Code is publicly available and complaints of breaches may be made by the public as well as raised by members.

Cash for Questions: The cash for questions affairs began in 1993, when various MPs were implicated in having received, directly or indirectly, payments (in other words, bribes) from Egyptian businessman Mohamed Al Fayed to pursue his interests in parliament. In 1994 Al Fayed publicly claimed that Tory MPs were paid to plant questions. A number of allegations were also made against MPs in relation to accepting money from the tabling of parliamentary questions to ministers. In the same year two Parliamentary Private Secretaries resigned following allegations into the receipt of money in exchange for tabling parliamentary questions. Furthermore, two Junior Ministers faced allegations that they received payments for tabling parliamentary questions. The *Sunday Times*, working undercover, offered payment £1,000.00 to some MPs for tabling questions in the House. Two of the MPs approached, Graham Riddick and David Tredinnick, both Conservative MPs, agreed. The Committee of Privilege inquired into the matter and recommended that the two MPs should be suspended from parliament for 20 days for their conduct which fell below the standard of the House. In April, 1995, the House, following debate, adopted the committee's recommendation. The members also lost their parliamentary salaries for the period of suspension.

Penal Jurisdiction of the House

Contempt of Parliament and Breach of Privilege: Both the Houses, as the High Court of Parliament, possesses an inherent jurisdiction to deal with breaches of privilege or contempt. However, breach of privilege should be distinguished from contempt of parliament. A parliamentary privilege is a special right or immunity

available either to the House collectively (for instance, to control its own composition and procedure) or to individual members (for instance, freedom of speech). Contempt is a general term embracing any conduct, whether by an MP or outsider, which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of the House in the execution of his duty or which has a tendency directly or indirectly to produce such a result (May, 1983, p. 143). Thus while all breaches of privilege may be counted as contempts, there are many kinds of contempts which fall outside an infringement of or attack on privileges. A well established categories of contemptuous conduct include interruption or disruption of proceedings, serious misconduct in the House, disobedience to rules or orders of the House, a refusal to give evidence to committees etc.

Penalties imposed by the House: The Houses do not rely on the courts but has its own jurisdiction to impose penalties for breach of privileges or contempts. The main powers, historically, have been to imprison, fine, suspend, expel and reprimand. The severest and historically most important power is that of imprisonment (known as commitment) which has for long fallen into disuse. The last person to be committed, by order of the House, was Bradlaugh, in 1880. It is unlikely that this power would be used today. The Joint Committee recommended in 1999 that this power should be abolished. Among the other penalties 'expel' has also fallen into disuse; no Member has been expelled since 1954. As to imposition of fines the Commons used to exercise this power in the past; however, it has not used this power since 1666, and later it was denied that the House possessed this power (*R v Pitt and Mead* (1762) 3 Burr 1335).

Among the other available penalties are reprimand, admonition and suspension. For reprimand and admonition offenders may be brought to bar of the House to be rebuked by the Speaker (or in the House of Lords, the Lord Chancellor). In this case, however, a sufficiently humble apology makes the House not to take any action. Suspension from the service of the House for a specified period or until the end of session is common penalty. Suspension has been used recently for serious misbehaviour in the House, for unauthorised

disclosure of a select committee report or for a breach of the rules on declaration of financial interests. Suspension now carries with the loss of pay for the same period (also called finacial penalty) (Standing Order no. 45A made on June 4, 1998).

Report of the Joint Committee: As to the penal jurisdiction of the Houses the Joint Committee recommended in 1999 the following:

(i) Both the courts and the House should have power to impose fine to Members;

(ii) In relation to non-Members, the penal power of the House should, in general, be transferred to the High Court; parliament should retain a residual jurisdiction, including power to admonish a non-member who accepts he acted in contempt of parliament (and therefore did not require any trial of the facts);

(iii) Proceedings against non-Members in the court should be initiated on behalf of the Speaker on the advice of the Standards and Privileges Committee;

(iv) The court should have power to impose a fine of unlimited amount. Willful failure to attend committee proceedings or answer questions or produce documents should be made a criminal offence punishable in the courts by a fine of unlimited amount or up to three month's imprisonment.

However, none of these recommendations have so far been implemented.

How to deal with a Contempt or Breach of Privilege:

The questions of privilege or contempt were traditionally referred to the Committee of Privilege, a Select Committee nominated for the duration of a parliament in proportion to party-strengths. Its successor since 1995 has been the Committee on Standards and Privileges.

The procedure for dealing with a contempt or breach of privilege is as follows:

(i) Any member can give written notice of a complaint to the Speaker;

(ii) The Speaker decides whether to give priority over other business;

(iii) If the Speaker decides not to do so, the member may then use the ordinary procedure for the House, to get the matter discussed;

(iv) If the Speaker decides to take up the matter, the complaining member can propose that the matter be referred to the Committee of Standards and Privilege or that some other action be taken, for example, an immediate debate. A select committee may in certain cases refer a complaint against itself to the Committee on Standards and Privilege;

(v) The Committee of Standards and Privilege investigates the complaint. Witnesses are examined but there is normally no legal representation. The procedure is entirely up to the committee. The accused has no right to a hearing nor to cross-examine witnesses;

(vi) The Committee reports back to the House, which decides what action to take. This could range from a reprimand, through suspension or expulsion from the House, to imprisonment for the rest of the session.

Recent Example: In February 2003 a Conservative MP was suspended from the Commons for two weeks for falsely caliming more than £90,000 in expense on his constituency home. The Committee on Standards and Privileges took a lenient view in the light of the MP's offer to repay the money immediately and to stand down as an MP at the next general election.

The Courts and Parliamentary Privileges

"After three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege is still not entirely determined" (May, 160). Parliamentary privileges are enforced by parliament exclusively;

accordingly, a matter involving privilege will be outside the jurisdiction of the courts. However, the function of the courts, when dealing with privileges, as like as prerogatives, is simply to determine "whether the privilege arises, and if so its scope and effect" (*Stourton v Stourton* [1963]).

It was established in *Stockdale v Hansard* that it is for the courts alone to decide whether an alleged privilege exists or not: parliament cannot create new privileges except by legislation (since only Acts are binding on the courts: (*Bowles v Bank of England*). In *Stockdale v Hansard* the defendant had published papers on the authority of the House of Commons, which were defamatory of Stockdale. Handsard claimed that the papers were privileged by virtue of this authority. The court held that they were not privileged, even though the House had said they were. The following year, however, the parliament passed an Act which extended privilege to reports of parliamentary debates published on its authority: the Parliamentary Papers Act 1840.

Thus courts are not prepared to intervene in the internal affairs of the House. In any dispute between Parliament and the courts, Parliament in theory can have the last word, for example, by imprisoning the litigants and court officials for contempt. Parliament is subject to the Human Rights Act 1998. The Human Rights Act 1998 reinforces this by providing that parliament is not a 'public authority' (other than the House of Lords in its judicial capacity) thereby excluding parliamentary proceedings from scrutiny (s. 6(3)). However, there is a broad consensus of mutual respect between Parliament and the courts (*Hamilton v Al Fayed* [1999] 3 All ER 317 at 333-334). On the other hand, where parliamentary activities involves the rights of persons outside the House, the courts have claimed the power to intervene at least to the extent of deciding whether the privilege asserted by parliament exists. In a famous eighteenth-century controversy the courts held that parliamentary officers had no power to deprive citizens of voting rights (*Ashby v White* (1703)).

In *A v UK* (Application No. 35373/97, Times LR 28 December 2002) the Court of Human Rights considered the parliamentary

immunity from suit conferred under Article 9 of the Bill of Rights 1689- the right to freedom of speech. In the case A, the applicant alleged that comments made about her and her family in debate in parliament by an MP were defamatory and that Article 9 prevented her from access to a court of law as guaranteed by Article 6. The court, however, rejected her allegation holding that the statement was protected by absolute privilege and press reports covered by qualified privilege which would only be lost if reports were not fair and accurate and published for improper motives. The immunity did not exceed the 'margin of appreciation' allowed to states. The court also observed that the immunity pursued the legitimate aims of protecting free speech in parliament and 'maintaining the separation of powers between the legislature and the judiciary'. The rules which conferred immunity were narrower than those operating in several member states, being confined to statements made in the course of debate on the floor of the House. The victims of such statements were not totally without remedy: they could petition Parliament through any other MP with a view to securing a retraction, and in 'extreme cases' deliberately misleading statements could be punished as contempt of the House. The court also found that the principle of proportionality had not been offended.

The Reform of Parliamentary Privileges

In 1997 a joint committee of the two Houses was established under the chairmanship of the Lords of Appeal, Lord Nicholls, to review and make recommendations on the law of parliamentary privilege. The Committee recommended as follows:

(i) Introduction of a new legislation in the form of Parliamentary Privileges Act;

(ii) Further definition of the phrases 'proceedings in parliament', 'place out parliament' and of the prohibition on its being 'questioned';

(iii) Replacing the Parliamentary Papers Act 1840 with modern provisions to clarify the position on the publication of papers and the reporting;

(iv) Contempt of parliament should be statutorily defined;

(v) Ordinary courts should be given jurisdiction to deal with offence which would be punishable with fine when non-members are accused of it;

(vi) The House of Commons should be empowered to impose fine, but the House's power to imprison contemnors should be abolished;

(vii) The privilege of freedom from arrest should be abolished;

(viii) The adjudication procedure for breach of privilege or contempt is devoid of any natural justice because there is no scope of fair hearing and impartial tribunal. This is incompatible with the European Convention on Human Rights, Article 6 of which provides for the right to a fair trial (*Demicoli v Malta*[1]). The Joint Committee has, therefore, recommended that the procedure followed in the investigation and adjudication of complaints should match contemporary standards of fairness (HC 214-1 (1998-99) p 75).

(ix) The provision of waiver of Article 9 in section 13 of the Defamation Act 1996 has been criticised. It is stated that section 13 has undermined the basis of privilege in the sense that privileges are for the benefit of the whole House and not for the benefit of an individual Member. It is further stated that it has been wrong to confine section 13 into only defamation matter, as similar issues could arise in the course of other civil or criminal proceedings. The Joint Committee, therefore, has recommended that section 13 should be replaced by a new statutory

[1] (1991) 14 EHRR 47. However, domestic courts under the Human Rights Act 1998, s 6(3), are not to treat as a public authority for the purpose of the Act 'either House of Parliament or a person exercising functions in connection with proceedings in parliament.

provision empowering each House, in its discretion, to waive article 9 for the purpose of any court proceedings, whether relating to defamation or to any other matter;

(x) To prevent conflicts of interest among MPs the House's own disciplinary capacity would remain adequate and appropriate; prosecutions should be made rare. If MPs are made subject to any new legislation, there should be provision for the avoidance of doubt that Article 9 should be set aside in any criminal prosecution;

Sample Questions with Suggested Skeleton Solutions

1. To what extent do the rules of parliamentary privileges ensure that ministers and members of parliament avoid conflicts of interest in relation to their constitutional duties? Are further reforms necessary? (University of London, 2000).

Suggested Skeleton for Solution: This question asks for discussion on the point of 'conflict of interest' and then on the reform of privileges.

- Start with the definition and types of privileges (see pages 226 and 230);
- Discuss the rules relating to Members' conduct and Members' interests (see page 236);
- Discuss the issue of 'cash for questions' (see page 238);
- Discuss reforms, if any, necessary (see pages 243-245).

CHAPTER XIV

JUDICIAL REVIEW AND NATURAL JUSTICE

We will see later that there is no judicial review in the sense of constitutional law in the UK. In the UK administrative law is treated as a part of the constitutional law and the doctrine of judicial review is treated as a part of administrative law.

What is Judicial Review?

The doctrine of 'judicial review' may, for the convenience of research and study in constitutional and administrative law, be used in two senses:

A. Doctrine of judicial review in the sense of constitutional supremacy; and

B. Doctrine of judicial review in the sense of parliamentary supremacy.

A. Judicial Review in Constitutional Supremacy

The doctrine of judicial review in the sense of constitutional supremacy refers to the powers of the judiciary to examine the constitutionality of laws made by the legislatures. This is the primary and strict meaning of judicial review. However, from broader and liberal point of view the doctrine includes the following things :

i) Judicial review of laws made by legislatures;

ii) Judicial enforcement of fundamental rights enumerated in the Constitution;

iii) Judicial review of administrative actions under the provisions of the Constitution;

iv) Judicial review of administrative actions under statutory law;

v) Judicial review of delegated law.

The last two of these are principally the subject matter of administrative law.

B. Judicial Review in the sense of Parliamentary Sovereignty.

Where there is parliamentary sovereignty, the Constitution is unwritten and there is no distinction between fundamental law and ordinary law. So the court cannot question the constitutionality of law passed by the parliament. Because there is nothing as a touchstone to test the constitutionality of laws on one hand and on other hand the doctrine of parliamentary sovereignty does not allow anybody to test the legality of law passed by the parliament. In such a system, therefore, there is no judicial review in strict sense. There is judicial review in the following two inferior senses:

i) Judicial review of administrative action under statutory law; and

ii) Judicial review of delegated law.

Of course, in these two inferior senses judicial review is more a matter of administrative law than of constitutional law.

Judicial Review in the UK

UK has no written Constitution. It has a constitutional system with parliamentary sovereignty. Parliament is both a legislative body and constitutional assembly; hence what parliament enacts is a part of the Constitution. Consequently no distinction is made between fundamental law and ordinary law and the same parliament can change or abrogate any law whatsoever by the same procedure. There is no touchstone to justify the validity of Acts of parliament, for no law exists in the UK higher than that made by the British parliament. This is why there is no judicial review in strict sense or in the sense of constitutional law. Cockburn C.J. in *Exp. Cannon Selwyn* said—

> "No court or judicial body in the country can set aside an Act of parliament on the ground that it is illegal, immoral or unconstitutional as can, easily be made by the US Supreme Court."

In the UK there is judicial review only in the sense of administrative law. Administrative law is the branch of public law dealing with the actual operation of government, the administrative process. The power of judicial review means the jurisdiction of the superior courts (the High Court, the Court of Appeal and the House of

Lords) to review the legality and validity of acts, decisions and omissions of persons, bodies and public authorities whether of a legislative, executive or judicial or adjudicatory character.[1] A person wishing to challenge the validity of an exercise of public power may seek leave in the Queen's Bench Division to bring an application for judicial review. Leave will usually be granted if the applicant has a sufficient interest in the matter, has not been guilty of undue delay and presents an arguable case.[2]

In Britain most of the powers of the government are subject to judicial control because in a society under rule of law bodies performing public functions are subject to judicial review. The courts have developed a number of principles in order to establish whether there has been an excess or abuse of power by the public authorities or bodies. For instance, a public body must use its power properly on the law; it must not use its powers for improper purposes, and it must not act in breach of the rules of natural justice. And all these principles are principles of judicial review.

Professor De Smith[3] outlines four warnings about the general principles of judicial review which are as follows:

First, the field of judicial review is an extremely complex subject with intricate ramifications;

Second, a grasp of general principles is obviously important; But to apply all these principles to concrete situations demands flexibility and subtlety. To a large extent judicial review of administrative action is a specialised branch of statutory interpretation;

Third, administrative law is not very coherent;

Fourth, from time to time the courts shift their position, and they are apt not to be entirely consistent in their attitudes.

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1 Walker, David M, *The Oxford Companion to Law,* (Oxford : Clarendon Press, 1980), P. 675

2 Application for judicial review is made under order 53 of the Rules of the Supreme Court. A statutory basis for this procedure appears in section 31 of the Supreme Court Act, 1981. It allows an application to cover under one umbrella all the remedies of *Certiorari, Mandamus* and also declaration and injunction.

3 *Constitutional and Administrative Law*, 7th edn, Penguin, 1994, pp. 590-591.

Basis, Importance and Significance of Judicial Review:

(i) Primarily judicial review rests upon a broad common law notions that public bodies must act in accordance with basic values of fairness and justice, respect for rights and rationality (*Dr Bonham's case* (1610), *Cooper v Wandsworth Board of Works* (1863)).

(ii) As a safeguard to rule of law judicial review has developed to ensure that public bodies which exercise legal power or adjudicatory powers are kept within the confines of the power conferred.

(iii) As a safeguard to rule of law judicial review represents a means by which the courts control the governmental powers. They have developed broad grounds of review including unfairness, unreasonableness and error. They have also extended judicial review to the royal prerogatives and to bodies which do not derive their power from statute (*GCHQ* case, *R v Panel on Takeovers and Mergers ex parte Datafin plc* [1987] QB 815).

(iv) As a safeguard to democracy judicial review makes sure that governmental powers created by statutes are exercised as parliament intended and not otherwise. This is largely done through the doctrine of *ultra vires*. Indeed the significance of judicial review lies in the fact that it is a process by which the ordinary citizen can challenge the legality of any action in the public law sphere.

(v) The Human Rights Act 1998 has introduced a new ground of judicial review, that a public authority has acted in breach of a convention right, which may be regarded as a specific example of illegality. Public authority has been defined as including a court or tribunal and any person certain of whose functions are functions of a public nature.

(vi) Judicial review underpinned by the Human Rights Act 1998 goes beyond the protection of legal rights as such. For instance, a member of the public can sometimes seek judicial review even if he has no rights at stake; judicial review might be invoked between government agencies such as central government and the a local authority or between the UK Government and the other governments.

(vii) The Human Rights Act 1998 makes it unlawful for all public bodies to act in contravention of Convention rights (section 6) and the definition of public bodies includes courts and tribunals. Initially it was thought that the Act would operate only vertically against government bodies. However, by including courts and tribunals within the definition of public bodies, the Act seems to allow for horizontal effect, which extends the scope of the Act to include non-state bodies. Example is the *Venables* case in which the Court of Appeal granted an indefinite injunction against the press preventing the disclosure of the identity and whereabouts of the child-killers Thompson and Venables in order to protect their right to life under Article 2.

Principles of Judicial Review:

The grounds or general principles of judicial review have been categorised by the Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374, [1984] All ER 935, HL (also called the GCHQ case) under three heads: 'illegality', 'irrationality' and 'procedural impropriety'. Lord Diplock acknowledged that this principle of judicial review had grown on a case be case basis and these three heads were not exhaustive; there might occur more grounds to be added to these three.

Illegality: This principle includes the doctrine of *ultra vires*, in its both wider and narrower sense.

Irrationality: This principle includes natural justice, 'unreasonableness' in the Wednesbury sense and also proportionality.

Procedural Impropriety: This principle includes violating important statutory procedures, bias, lack of fair hearing, failure to give reasons for a decision etc.

The Human Rights Act 1998 has introduced a new ground of challenge, that a public authority has acted in breach of a convention right, which may be regarded as a specific example of illegality. Public authority has been defined as including a court or tribunal and any person certain of whose functions are functions of a public nature.

Principle of Proportionality: This principle is another extended head of the grounds of judicial review as contemplated by Lord Diplock in GCHQ case. The basis and reason of this principle lies in the development of the European Community law.

Judicial Review and Doctrine of Ultra Vires

As a ground of judicial review of administrative actions the principle of *ultra vires* is central to the idea of rule of law. It is a fundamental principle of English law that no person or body should be permitted to exceed it lawful powers. In administrative law the doctrine of *ultra vires* is founded upon the doctrine of parliamentary supremacy in the sense that all subordinate authorities exercise their power under the authority of statutes passed by the parliament and they must not exceed the limits provided for in the statutes. If any authority exceeds its statutory power, then the court will declare its actions to be *ultra vires* (beyond jurisdiction) and void. Thus the legal basis of *ultra vires* is the supremacy of parliament and rule of law. Again, it is the rule of *ultra vires* which protects and upholds the doctrine of parliamentary supremacy and rule of law. And the means by which the courts do this is *ultra vires.* The doctrine of ultra vires may of two types: substantive and procedural *ultra vires*. Where any public body or authority acts in excess of its statutory powers, this is known as substantive *ultra vires* (*A-G v Fullham Corporation* (1921)). On the other hand, where a public body or authority acts ostensibly within its statutory power but fails to comply with any procedural requirements laid down by statute, the actions would still be *ultra vires* and this is known as procedural *ultra vires* (*Howard v*

Secretary of State for the Environment (1975)). It also covers instances where a body exercising a judicial function fails to follow the requirements of natural justice by acting as judge and prosecutor in the same case or not permitting the accused person to make representations to the panel deciding the case.

Scope of the Doctrine:

(i) It covers the exercise of any powers or jurisdiction of any authority, so long as those powers are conferred by statutes or by common law; these powers do not have be judicial in nature.

(ii) In so far as the common law powers of public authorities are part of the royal prerogatives the jurisdiction of the courts over them was asserted by the court in cases like *Case of Monopolies* (1602) 11 Co. Rep. 84b, *Case of Proclamation* (1610) 12 Co. Rep. 74 etc. However, in the GCHQ case the House of Lords held that the exercise of prerogative powers is subject to judicial review.

(iii) The doctrine applies not only in cases where powers are exceeded, but also where discretion is abused, or duties not fulfilled or mandatory procedures are not followed or delay in exercising statutory powers.

(iv) Where an authority is found to have acted *ultra vires* in any of the ways mentioned above, any action or decision taken by it is void, and any person affected by such action or decision can apply to the court for appropriate relief.

Difficulties with Ultra Vires/ Judicial Review:

(i) Like any other principle of law judicial review in the form of *ultra vires* may have defects and shortcoming in its effectiveness. The court might decline to intervene on the ground that the subject matter under challenge is a policy matter (*R v Cambridge District Health Authority, ex parte B* [1995] 1 WLR 898).

(ii) Application of judicial review may also be refused if the court determines that the action or decision in question falls into the non-justiciable' category. This may include matters of foreign affairs, disposition of troops, appointment of ministers, acting for national security etc (*CCSU v Minister of the Civil Service*, [1984] 3 All ER 935).

(iii) *R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] A.C. 240 suggests that the courts will be reluctant to declare administrative action *ultra vires* if it has been expressly approved by the House of Commons.

(iv) Though the *ultra vires* rule is consistent with the doctrine of parliamentary supremacy, many hold the view that it is not fully consistent with the concept of rule of law. Courts are not empowered to review legislation passed by parliament. Also is the fact that judicial decisions are susceptible to being overruled by Acts of Parliament.

(v) However, with the enforcement of the Human Rights Act 1998 and the European Union influence there has, at least, been a shift away from the traditional stand of judicial review. The higher courts in the UK, unlike earlier, will be more proactive in reviewing primary legislation of the British Parliament to test the compatibility with the ECHR through the process of declaration of incompatibility. A recent declaration was made by the House of Lords in *R v Secretary of State for the Home Department* (2002). The House of Lords made a declaration under section 4 of the HRA that section 29 of the Crime (Sentences) Act 1997, which conferred on the Home Secretary control of the release of mandatory life sentence prisoners, was incompatible with the right under Article 6 to have a sentence imposed by an independent impartial tribunal.

Judicial Review and Prerogatives

The traditional role of courts over prerogatives was that they could determine the existence of a particular prerogative but they lacked the jurisdiction to review the manner of exercise of prerogative powers, or the adequacy of the grounds upon which they had been exercised. However, in the later part of the last century the courts undertook the role of judicial review to determine the extent and manner of the exercise of the royal prerogatives.

(i) Courts have been prepared to allow a recognised prerogative to broaden and in adapting itself to new situations (*Malone v Metropolitan Police Commissioner* [1979] Ch. 344);

(ii) Whether an order given in exercise of a prerogative is legal or not is to be determined by the courts. It was held in GCHQ (*The Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) case that reviewability depends not on the source of executive power but on its subject-matter. In this case it was also held that a number of prerogative powers which, by virtue of their nature and subject matter, were not amenable to the judicial process e.g. treaty making, disposal of armed forces, prerogative of mercy, dissolution of parliament etc;

(iii) Notwithstanding excluded categories in *GCHQ* case, in a number of cases since *GCHQ* the courts have begun to whittle away those excluded categories suggesting a readiness in principle to review all prerogatives other than those which relate to matters at the heart of the political process such as treaty making, deployment of armed forces, appointment and dismissal of ministers, matters of foreign policy etc. In *Exp Rees-Mogg* (1994) (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457) it was held that prerogative of mercy should be subject to judicial review (Munro, 284);

(iv) A more generalised attack on the scope of the excluded categories was made in *Exp Smith* (1996) (*R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257) where it was held that even government policy in relation to armed forces is susceptible to judicial review.

It may, therefore, be concluded that a general move to bring the exercise of the prerogative within the remit of judicial review and then gradually extend the remit to cover areas previously thought to be immune can be discerned. While a number of important areas remain largely immune from review, overall, there has been a significant extension of the scope of legal accountability of the executive and hence a restriction on governmental arbitrary action. Thus the courts' willingness to assume a greater role in the control of governmental action under prerogative is understandable.

Judicial Review and Doctrine of Natural Justice

As a ground of judicial review the principle of natural justice is of ancient common law origin and central to the idea of rule of law. Rules of natural justice are minimum standards of fair decision making, imposed by common law on persons or bodies who are under a duty to act judicially. This principle requires the decision-making authority to act without bias, to allow those affected by the decision to be heard and to reach its conclusion honestly and fairly (*R v Police Complaints Board, ex p. Madden* [1983] 1 WLR 447, 470). The obligation to give a hearing was declared long ago in the case of *Dr Bentley* (1723) 1 Stra. 557, who had been deprived of his degrees by the University of Cambridge without notice. Though the basic theme of natural justice may be said to be the requirements of fairness, this principle is based on two rules:

(i) Rule against bias (*Nemo judex in causa sua*); and
(ii) Right to a fair hearing (*audi alteram partem*).

There is authority for regarding the requirements of 'natural justice' as a special part of the *ultra vires* rule. This is because in relation to administrative law the basic proposition is that a breach of

natural justice may render the action of an administrative authority void in the same way that a decision taken in excess of its power (*ultra vires*) is void. This is why some scholars, notably professor Wade in *Administrative Law*, consider natural justice to be a sort of branch of the doctrine of *ultra vires*, arguing that breach of natural justice amounts to a violation of the "implied conditions which parliament intended". This view assumes that whenever parliament confers powers upon an administrative authority it intends that they should be exercised only in accordance with natural justice.

On the other hand, it must be remembered that a breach of natural justice does not necessarily imply that statutory powers have actually been exceeded. This means that when considering the question whether a breach of natural justice has occurred, the courts will not necessarily have to scrutinise the enabling Act so as to determine the extent of the powers contained therein.

Application of Natural Justice: Case by Case Development

It is of foremost importance to mention that the rules of natural justice were not designed originally as a means to reviewing administrative action. Indeed, the main purpose of the rules was as a tool whereby the superior courts (and in particular the Court of King's Bench) could exert control over inferior courts. The means whereby they did this were the prerogative writs.

Until the middle of the twentieth century the question of natural justice was legal requirement only in relation to functions of a judicial or at least quasi-judicial nature. Where the functions could be said to be purely administrative then it could not be challenged solely on the grounds of a breach of natural justice. In 1948 in *Franklin v Minister of Town and Country Planning* (1948) the House of Lords held that acting purely administrative capacity will not require any observance of natural justice.

However, it was *Ridge v Baldwin* [1964] A.C. 40 in which the House of Lords reviewed the history of natural justice and took its modern view that even in relation to administrative functions the

principle of natural justice would have to be followed. *Ridge v Baldwin* was a watershed for it established that natural justice could be established, in a suitable case, irrespective of the nature of the function involved, i.e. irrespective of whether it was judicial or not. Since this case the courts have used the more open ended concept of 'fairness' (*Re H.K.* (1967)). They have extended the right to be heard into most areas of government, including for prison discipline (*R v Hull Prison Visitors ex parte St Germain* [1979] QB 425; *Leech v Parkhust Prison Deputy Governor* [1988] 1 All ER 485).

Analysis of the Rules

***Audi Alteram Partem* (Fairness, hearing the other side):**

Basic consideration of this rule are the following two:

First, a person who stands to be affected by the decisions of an administrative authority must be allowed to present his side of the case. Second, to enable him to do so he must be told of the 'case against him', that is, the case against which he will be required to argue. These, in other words, mean one or more of the following:

(i) the right to being given notification of a hearing;
(ii) the right to be given indication of any adverse evidence;
(iii) the right to be given an opportunity to respond to the evidence;
(iv) the right to legal representation at a hearing;
(v) the right to question witness etc.

The basic requirement is that, irrespective of the decision making body, whether judicial, quasi-judicial or administrative, the individual should be treated fairly in the decision making process (Barnett, 902).

Uncertainty and Limiting factors surrounding Fairness:

Though both the principles of natural justice have been extended to judicial, quasi-judicial and administrative functions, still there remains limitations and uncertainties around them.

Limitations:

First, fairness concerns the protection of persons who are adversely affected by government action, and not the idea of democratic participation in government (*Hammersmith and Fulham LBC v Secretary of State* [1990] 3 All ER 589).

Second, purely advisory or preliminary governmental decisions do not attract a right to be heard unless the decision has direct adverse consequences, e.g. decision to start investigation and no right to be heard or suspension of teacher pending investigation (*Furnell v Whangarie High School Board* [1973] AC 660).

Third, special factors might override the right to a hearing. In particular, national security overrides a right to be heard (*CCSU v Minister for the Civil Service* (1985)). The need to act in emergency will exclude at least a prior hearing (*R v Secretary of State ex parte Pegasus Holdings Ltd* (1988)).

Uncertainties:

First, from historical point of view it is clear that the doctrine of natural justice has never got any universal or consistent interpretation. At its initial stage it was interpreted restrictively applying only in cases of judicial functions; subsequently it was extended to quasi-judicial functions and since the middle of twentieth century it has been interpreted to apply in cases of all sorts of administrative functions.

Second, it has also been argued that the principle of natural justice is not any independent principle; it just a special part of the ulra vires rule (*Ong Ah Chuan v Public Prosecutor* [1981] A.C. 648).

Third, in *McInnes v Onslow Fane* (1978) Megarry VC states that it would be more appropriate to reject an expression which includes the word 'justice' or 'natural justice' and to use instead terms such as 'fairness' or the 'duty to act fairly'.

Fourth, in *CCSU v Minister for the Civil Service* (1985) Lord Roskill argues that the phrase 'natural justice' might now be allowed

to find a permanent resting place and be better replaced by speaking of a duty to act fairly.

Fifth, in *Schmid v Secretary of State for Home Affairs* [1969] 2 Ch. 149 Lord Denning M.R. extended the scope of natural justice to decisions involving legitimate expectation in the sphere of public law with rights in the private sphere (*O'Reilly v Mackman* [1983] 2 A. C. 237), (*CCSU v Minister of Civil Service* [1985] A.C. 374).

Sixth, in the context of legitimate expectation the courts, following the lead of Lord Diplock in the GCHQ case, increasingly refer to procedural impropriety rather than breach of natural justice. Lord Diplock in the GCHQ case included within procedural impropriety breach of statutory rules of procedure which did not necessarily amount to a breach of natural justice. Later cases suggest the phrase can cover various forms of 'unfairness' such as going back on an assurance, unreasonable manner in which a decision is reached. Lord Scarman described this new terminology as 'a humdrum modernisation of breach of natural justice' ([1990] P.L. 490).

Seventh, there is no fixed requirements of the test of 'fairness' or 'fair hearing'. Everything depends on the particular circumstances.

***Nemo Judex in Causa Sua* (Bias and Interests):**

This means that no man should be a judge in his own case. In other words, no one should be a judge in a matter in which he is interested. In practice the rule has two forms:

(i) cases where the 'judge' (party taking decision) has an interest; and

(ii) cases where he is biased- indeed, this rule is sometimes referred to as the rule against bias.

Evidence of either of these will amount to a breach of natural justice. Interest may be of financial or other interest. A person who has either of these interests in a matter should not take a decision on it.

On the other hand, as far as bias is concerned, two possible situations may arise:

(i) Evidence of **actual bias** towards a person or body involved in an administrative action will render such action void.

(ii) It is not actually necessary to prove that a decision taken is biased; it is enough that there is a real **likelihood of bias** which a reasonable man could discern (*Metropolitan Properties Co. Ltd v London* (1969)).

Uncertainties in the Test for Bias:

As like as the test of fairness there are uncertainties around the concept of bias.

First, the test of 'bias' itself has been a matter of huge debate. Different formulations such as 'reasonable suspicion', 'real likelihood' of bias have been used without general acceptance and many cases have applied both tests. According to the 'reasonable suspicion' test which was favoured in *Hannam v Bradfor Corporation* [1970] 2 All ER 690 the question of appearance of bias is foremost in view of an ordinary informed person. Under the 'real likelihood' test the court itself decides whether bias is likely in the light of all the circumstances. In *R v Gough* [1993] the Court of Appeal applied a compromise which it labelled the 'real danger' test (or 'real possibility' or 'real risk'). According to this test the court itself asks whether there is a chance of bias in the light of all the circumstances.

Second, the Gough test has been rejected in some commonwealth jurisdictions as weakening the element of public confidence (*Webb v R* [1994]) and may also be less stringent than the ECHR Article 6 requires. In *Re Medicaments and Related Classes of Goods* (2001) the Court of Appeal, having reviewed the ECHR cases, suggested a 'modest adjustment' to Gough test. This required the court to decide (on the basis of all the circumstances as in Gough), not whether there was real danger of bias but whether the hypothetical informed outsider could reasonably so believe.

Third, in case of administrative decisions based on political or social policy a less stringent approach is taken. In such a case, bias does not seem to invalidate the decision unless the decision maker acts unfairly (*R v Secretary of State ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304). The House of Lords in *R v Secretary of State* [2001] 2 All ER 929 held the view that this relaxed approach satisfies Article 6 of the ECHR. In this case a variety of decisions made by the Secretary of State were challenged on the ground of incompatibility with Article 6. The House of Lords held that the jurisprudence of the European Convention supported a fundamental distinction between policy or political decisions for which the minister is answerable to parliament and judicial decisions made by courts and similar bodies. Provided that there is judicial review in relation to the legality and fairness of the decisions "a government minister can be both a policy maker and a decision taker without violating Article 6" (per Lord Hutton [2001] 2 All ER 929 at 1018). Thus the House of Lords endorsed the traditional common law approach. On almost the same line the House of Lords held very recently in *Lwal v Northern Spirit Ltd* [2003] UKHL 35, Times LR 27th June 2003 that there was no difference between the test of bias at common law and the requirements of Article 6 of the Convention. The court stated that the issue was whether a fair-minded and informed observer would think that there was a possibility of subconscious bias on the part of the lay member or members.

Exclusion of Judicial Review

Difference between the Exclusion Clause and Validation Clause: The parliament may, by an authority of a law, exclude the operation of the power of judicial review. It is possible for the decision of an administrative authority to be validated, notwithstanding a breach of natural justice, by means of an express statutory provisions. It would also be possible for a decision taken by wrong procedure to be validated if, for example, the statute provided for an alternative procedure. However, a validating clause must be distinguished from an excluding clause. An exclusion clause has the effect of excluding the jurisdiction of courts, whereas a 'validating' clause does not attempt to remove the issue from the courts'

jurisdiction, but simply validates a particular decision. Exclusion clauses are wider than validating clauses: they can be used to prevent the challenging of decisions which could not in practice be validated, either because:

(i) the appropriate formula is impossible to find; or
(ii) 'validation' would be contrary to policy, e.g., decisions taken in bad faith or fraudulently could not be validated though jurisdiction could be excluded.

Exclusion Clauses: There are many provisions to be found in Statutes whereby the jurisdiction of the courts may be purportedly excluded. Not all of these will operate completely so as to prevent the courts reviewing decision at all. Most such clauses operate simply to limit the scope whereby a party might challenge the actions of administrative authorities. Exclusion clauses may be of different types: 'finality clauses', 'as if enacted clauses', 'ouster clauses' and 'exclusion of particular remedies'.

(a) **Exclusion of particular remedies:** Occasionally a statute may provide that a particular remedy might not lie in a particular situation. Such provisions are rare. However, it is sometimes the case that a statute, by laying down a particular procedure and remedy, impliedly excludes other remedies (*Barraclough v Brown*, 1897).

(b) **Finality Clauses:** A statute may provide that a decision shall be final. Whilst this might appear to exclude the jurisdiction of the courts, the courts have not interpreted such clauses in this way. Thus, where a statute provides "the minister's decision shall be final", the courts will interpret this as meaning simply that no reconsideraion or appeal on the merits of the decision can be enforced, not that the courts cannot review the decision on grounds of natural justice or *ultra vires*.
Per Denning LJ: "Parliament only gives the impress of finality to the decisions of the tribunal on condition that

they are reached in accordance with the law" (*R v Medical Appeal Tribunal ex p Gilmore* 1957).

(c) **"As if enacted clause":** A statute will ocassionally provide that an administrative decision will take effect 'as if enacte in this Act'. Even here, the protection against judicial review given to such decisions is not total, for the courts have tended to regard such clauses as applicable only to such decisions as conform with the requirements of the enabling Act (*Minister of Health v R ex p Yaffe* (1931)).

(d) **Ouster Clause/ Henry VIII Clause:** will be discussed in the following head:

Ouster Clause

'Ouster' clause is a clause attempting to prevent a decision being reviewed by the court. Such type of clause tends not only protect a particular administrative decision or quasi-judicial action but also excludes (ousts) the jurisdiction of courts altogether. There is a variety of possible wordings for these clauses. For example, the legislation might provide that 'the minister's decision shall be final', or the decision in question shall be final and conclusive' or it might even provide that 'it shall be final, conclusive and shall not be called in question in any legal proceedings whatsoever'. Such a clause may be used either in conjunction with a time-limitation provision or alone. However, the effect of such a clause has been determined from time to time by the court.

Effect of Ouster Clause: On the face of it an ouster clause would appear to have the effect of preventing the courts from the reviewing a decision altogether. However, this will not be the case in every instance. The courts are most unwilling to relinquish their powers of judicial review; they have construed statutes narrowly; they will ordinarily do so only if a statute contains very clear words, leaving them no choice. Recently the courts have taken power to overcome ouster clause by saying that if the exercise of that power is not in accordance with law, i.e, *ultra vires*, or made by misinterpreting the

power given, or made out of an error, the minister or tribunal has lost jurisdiction and the court can intervene (*Anisminic Ltd v Foreign Compensation Commission* (1969) 1 All ER 208, *Hotel and Catering Industry Training Board v Automobile Property Ltd 1969*).

Effect of Partial Exclusion Clause: Where legislation has provided for a limited time period within which parties have to apply for judicial review, then applications outside of the period will not be successful (*Smith v East Ellow Rural DC* (1956)).

Article 6 and Ouster Clause: Article 6 of the ECHR may be invoked on the ground that an ouster clause prevents a fair trial. There are no overrides in the ECHR to the right to fair trial and there must arguably always be provision for judicial review even though the level and scope of this may vary with the particular context. For example, decisions based on political policy or national security can be subject to a lower level of review (*R v Secretary of State* [2001] 2 All ER 929).

Judicial Review and the Human Rights Act 1998

It is contended that under the Human Rights Act the scope of judicial review will be greatly widened both from the view point of administrative actions and constitutionality of legislation.

As far as administrative action is concerned, action, inaction and the use of discretion by the executive will have to be exercised within Convention limits. The Act makes it unlawful for all public bodies to act in contravention of Convention rights (section 6) and the definition of **public bodies** includes courts and tribunals. Initially it was thought that the Act would operate only vertically against government bodies. However, by including courts and tribunals within the definition of public bodies, the Act seems to allow for horizontal effect, which extends the scope of the Act to include non-state bodies. Example is the *Venables* case in which the Court of Appeal granted an indefinite injunction against the press preventing the disclosure of the identity and whereabouts of the child-killers Thompson and Venables in order to protect their right to life under Article 2.

As far as constitutionality of legislation is concerned, though the Act maintains the theory of parliamentary supremacy, nonetheless, in practice, the courts will inevitably become involved in political-constitutional issues. As result of the secondary nature of the legislation produced by the Scottish Parliament, the court will have the power to quash such Acts invalid for lack of compatibility with the ECHR. This is evident from a recent decision by the Court of Appeal in *R v Secretary of State for the Home Department* (2003). In this case the Court of Appeal held that the policy to refuse support to asylum seekers unless they claimed asylum at the port of entry under section 55 of the National, Immigration and Asylum Act 2002 was unlawful. The Court also went out of its way to provide the Home Secretary with advice on how to make the Act and the procedures under it, compatible with ECHR rights. This case shows that the introduction of the Human Rights Act has greatly increased the judicial power in relation to the other two branches of the Constitution i.e. the executive and the legislature.

There is also suggestion that the House of Lords will have to come forward to act as a constitutional court. Apart form the issue of declaration of incompatibility, the issue of devolution of power will give rise to disputes as to the relationship between Westminster Parliament and Scottish Parliament. Eventually these issues will have to be resolved in the courts.

In view of parliamentary supremacy and liberties in the negative sense, the British courts have traditionally lacked any power to question the laws produced by Parliament on their substance, as constitutional courts in other systems could; they could only question the formal or procedural properties of such legislation. There was, however, an alternative forum capable of challenging the substance of English law since 1966 when the UK recognised the power of the European Commission on Human Rights to hear complaints from individual UK citizens and at the same time, recognised the authority of the European Court of Human Rights to adjudicate in such matters. After the enactment of the Human Rights Act 1998 now it is believed that eventually the UK domestic courts will increasingly be involved into deciding constitutional matters.

However, the Act has also imposed legal obligation on 'public authorities' to comply with convention rights. This obligation has created an opportunity for litigation by making the same directly enforceable in the courts. In this respect the Act creates a new cause of action. However, if actions are brought by way of judicial review or other proceedings to claim that a public authority has acted unlawfully, then there is standing only for someone who is or would be a victim of the allegedly unlawful action (Section 7(1),(3),(4)). This adopts the Strasbourg test which is narrower than the test for standing in judicial review generally. Pressure groups, for instance, would be less likely to qualify as having standing on the basis of Strasbourg case law.

Sample Questions with Suggested Skeleton Solutions

(1) The so-called principle of natural justice are not engraved on tablets of stone.....What the requirements of fairness demand when any body.... has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates ..... The courts will not only require the procedure in the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.' (per Lord Bridge in *Lloyd v McMahon* (1987)) (London, 2001).

(2) 'The well attested flexibility of natural justice does not mean that the court applies different standards at will, but that the application of the principles (which, subject to known exceptions are constant) is necessary as various as the situations in which they are invoked.' (per Sedley J., *R v Home Secretary ex parte Moon*, 1996). (London, 2002).

(3) The rules of natural justice cannot be precisely defined without risking introducing a degree of rigidity which would undermine the essential characteristic of fairness which must be applied in widely differing circumstances.' (London, 2003).

(4) 'Bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.' (per Lord Woolf). Discuss with respect to the requirements of natural justice in administrative and judicial decision making. (London, 1999).

Suggested Skeleton for Solution: All the above questions will have almost the same answers in the light of specific issue of natural justice as a condition of judicial review.

- Start with the introduction of judicial review of administrative actions (see second and third paragraphs at page 248);
- Discuss the two principles of natural justice as a condition of judicial review along with their conditions, exceptions and case laws (see pages 255, 257 etc);
- Discuss the uncertainties surrounding the principles of natural justice (see pages 257, 258-261).

(5) By reference to decided cases, discuss the role and scope of judicial review in ensuring that administrative bodies act according to law (UL, 2000).

Suggested Skeleton for Solution: The above question asks for general discussion over judicial review as a means of checking administrative authorities.

- Start with the introduction of judicial review administrative actions (see second and third paragraphs at page 248);
- Discuss the principles of judicial review and how are they applied by the court to examine administrative actions (see pages 249, 251);
- Discuss the principle of *ultra vires* which is one of the strongest device of controlling administrative actions (see pages 254);
- Discuss judicial review of prerogatives with important cases (see pages 254);
- Discuss widen scope of judicial review under the Human Rights Act 1998 which provides for wider definition of public bodies; horizontal effect for judicial review; *Venables* case (see pages 264-265).

CHAPTER XV



RULE OF LAW

The term 'rule of law' is used as opposed to the concept of 'rule of man'. The primary meaning of rule of law is that the ruler and the ruled must be bound by the same law. No separate law or system can be provided for the ruler.

History of Rule of Law

The history of rule of law is the history of emergence of political liberalism from the bondage of political despotism. The study of history of every major legal system, e.g. USA, UK, France etc. will necessarily reveal the idea that all of them had once bitter experience of despotism. All the despotic Kings claimed themselves to be the representatives of God and as representatives of God they claimed themselves to be above the law and under the cover of this design they did all the injustices and arbitrary actions over the subjects. But gradually protests against this despotism began to grow. In thirteenth century Bracton, a judge in the reign of Henry III wrote—

> "The King himself ought to be subject to God and the law, because law makes him King."

This universal law (or natural law as it is sometimes called) was attributable to God. In the seventeenth century, L.C.J Coke identified natural law with the common law of England which he described as 'the perfection of reason'. Since human reason was given by God, the principles of natural law were deducible by man by the use of his reason. He, therefore, emphatically claimed that the common law must be above the King and the Executive (i.e. the King's ministers). Thus the idea of rule of law as of human rights, to a great extent, evolved as a result of political absolutism since rights and freedoms of man became a slogan against the injustices and indignities committed by tyrannical or despotic government. As a necessary outcome of arbitrary actions by King John there arose conflict between the King and the wealthy landowners or barons in arms. At the climax point of this conflict they ultimately compelled the King to accept their terms embodied in Magna Carta. This Magna Carta was the first foundation of rule of law. Because this was the document in the world history

where for the first time we find a strong protest against arbitrary punishment. It ensured the prohibition of imposition of taxation by the King without the assent of the Great Council and arbitrary seizure of property by Royal officials, freedom of movement for merchants within the realm, trial by jury etc. Though this charter was in no sense a peoples' charter, its subsequent tradition transformed it into a charter of English liberties, and at present it is considered as one of the most important landmarks in the history of human rights and free government. The famous article 39 of it says:

"No freeman might be arrested, imprisoned, dispossessed, outlawed or exiled or harassed in any other way save by lawful judgment of his peers or of the law of the land."

Thus the charter made a principle absolute that the authority of the King was not unlimited and arbitrary and the abuse of power might be resisted. Later on during the long struggle for power between the king and parliament in the seventeenth century, the parliamentary forces lastly won through the Glorious Revolution in 1688 and the supremacy of the parliament over the King and all other bodies was assured by the Bill of Rights, 1689. It was now made certain that the King might be under the law and parliament. Thus the rule of law[1] (law made by parliament) in place of rule by man (King) with its divine right came to be established. In words of Sir Ivor Jennings—

> "The rise of liberalism and the burden of despotic rule created popular leaders prepared to rebel. As the liberal tradition developed on the English principles and by French methods, many monarchs shared the fate of Louis XVI or were urged unceremoniously into retirement. It was considered necessary to extend the notion and ambit of Rule of Law. It ceased to be only a rule among citizens and became also a rule among rulers."[2]

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1 The doctrine of Rule of Law (as understood by Coke) had now to be reconciled with the other important doctrine of the supremacy of parliament. Either the law was supreme or parliament was supreme. The outcome of this contention was the adoption of the theory or principle that the common law was subject to such changes as the King-in-parliament must make from time to time. Henceforward the law now regarded as supreme law was the common law and statute law i.e. the whole of English law. Padfield, Colin, F, *British Constitution Made Simple.*

2 Jennings, Ivor, *The Law and the Constitution,* 5th ed, Ibid, P. 45

Professor Dicey and his Theory of Rule of Law

The general conception of the rule of law or rule of law as a principle of constitutional government has become identified and crystallized with professor Dicey's usage of that phrase in his work *'the Law of the Constitution'* first published in 1885 though the phrase has been in use since at last as early as the time of Aristotle in fourth century B.C. Professor Dicey first stated that the rule of law was one of the essential features of the constitution of UK. He gave three meanings of the concept of rule of law.



1. Absence of Arbitrary Power

"Rule of law means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government ..... a man may be punished for a breach of law, but he can be punished for nothing else."[1] ... No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by person in authority of wide, arbitrary or discretionary powers of constraint."[2]



2. Equality Before Law

Rule of law, in the second sense, means the equality of law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. In this sense rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law, and there can be no special court or administrative tribunal for the state officials.[3]



3. Constitution is the Result of the Ordinary Law of the Land

The rule of law lastly means that 'with us, the law of the constitution, the rules which in foreign countries naturally form part

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1 Dicey, A.V, *Law of the Constitution, Ibid*, P 202
2 *Ibid.* P. 188
3 Dicey, A.V, *Ibid.* PP. 202-3 and 193

of a constitutional code, are not the source, but the consequence of the rights of individuals as defined and enforced by the courts' (Dicey, P. 203).

Dicey means by this that the general principles of the constitution i.e. the rights of the citizens e.g., freedom of movement, speech etc. are secured not by guaranteed rights proclaimed in a formal constitution like that of USA, rather they are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. Hence the constitution is the result of the ordinary law of the land, for its general principles have evolved from the rights of individuals as upheld by the courts in specific cases. This is in marked contrast with many a written constitution in which the rights of the individual are declared.

Though Dicey's theory has been criticsed from different angles, the three important things—absence of arbitrary power, guarantee of citizens right and the equality before law—over which he made emphasis are universally recognised as the cor of traditional[1] theory of rule of law.

Criticism of Dicey's Exposition

Several attacks have been mounted against Dicey's exposition of rule of law. As to his first principle he says that there would be no arbitrary or discretionary power. But even in Dicey's lifetime there were both arbitrary and discretionary power in Britain and they still exist in all governmental systems and also it is important to mention that without arbitrary power in exceptional cases the governmental machinery would remain unworkable. Preventive detention, emergency situation, compulsory acquisition of goods and properties, direct enforcement of administrative decisions etc. measures are common and essential for development purposes in exceptional cases and these measures are the best examples of exercise of arbitrary power. Again, there is a distinction between arbitrary power and

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1 The Theory of rule of law as propounded by Dicey is traditional in the sense that the concept of rule of law has undergone a tremendous change in recent time which has been discussed in this chapter.

discretionary power which Dicey failed to trace. Of course, it may be contended that 'it is still an essential principle of constitutional government in UK that there should be no arbitrary power to arrest or punish.[1] But discretionary power is sometimes a must for governmental function. For example, judges are given wide discretionary power in granting bail, defining some crimes, explaining laws etc. Ministers and other executive bodies are sometimes given wide discretionary powers by the statute. Thus a minister may be empowered by law 'to act as he thinks fit' or 'if he is satisfied.' In many countries with written constitution discretionary powers are expressly given to the executive e.g. in promulgating ordinances, determination of emergencies etc.

As regards the second postulate Dicey says that there should be equality before law and all are amenable to ordinary courts of the land. But this principle has many exceptions because equality before law is not possible in every case. The king or the head of the state in other countries are immune from both criminal and civil action, judges are immune from personal responsibility for their official acts even if they might have acted beyond their jurisdiction but not knowingly. There are also diplomatic immunities and members of embassies are exempted from process in English courts though not from legal liability. Members of parliament have certain immunities from legal proceeding in respect of some of their activities. Again, special courts are common features in all countries. Rights and obligations of individuals are now largely decided in many cases not by ordinary courts but by special courts like labour tribunal, administrative tribunal, juvenile court, court martial, military court etc. Not only that various Acts like Factories Act, Education Act etc. have vested the executive with certain judicial powers. All these have certainly curtailed the jurisdiction of the ordinary courts of law and refuted the substance of Dicey that there is only one kind of law and one kind of courts that exist in England.

Again, Dicey says that there should be no separate administrative courts as in French '*Droit Administratif*'. He believed that the *Droit Administratif* in France favoured the officials. But 'rule of law has no

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1 Wade, E.C.S and Bradley, A.W, *Constitutional Law*, Ibid, P.66

effective contrast with *droit administratif* for the purpose of *droit administratif* .... is not to exclude public officers from liability for wrongful acts, but to determine the powers and duties of publice authorities and to prevent them from exceeding or abusing their powers.'[1]

As regards his third postulate Dicey says that fundamental rights and liberties emanate form judicial decisions. But this is one-sided view. Because in England people have got many rights through the law of parliament and the charters issued by the monarchs. The supremacy of parliament is the Constitution. It is recognised as fundamental law just as a written constitution is regarded as a fundamental law. Various public authorities, the Crown, the House of Parliament, the court, the administrative authorities have powers and duties and most of these are determined by statute not by the courts.

It becomes clear from the above discussion that the abolition of discretionary power is not possible fully and also the equality before law is not possible in every case. So the concept of rule of law as propounded by Dicey needs modification.

Rule of Law in Modern Sense

The concept of rule of law may be used in two senses – narrower sense and wider sense. In narrower sense it means that people will abide by law and they will be governed by law only. In wider sense it means that the government will be administered by law and under the authority of law only; it will not do anything beyond the authority of law. Thus what in essence means that rule of law is a government by law and not by man. But such a definition of rule of law still remains traditional as explained by Dicey. If rule of law means government by law or according to law, then rule of law exists in every country whether it is ruled by a King, or a military dictator or a president. Because they also rule the country according to law only whatever be the nature of that law. And in this sense the government of Hitler, Mussolini, Louis XIV, Ershad, Zia of Bangladesh (a military dictator) etc. all come under the category of rule of law. But no man with a

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1 Jennings, Ivor, *The Law and the Constitution,* 5th ed, Ibid, PP. 312–313

minimum conscience will call these governments as rule of law. This is why sir Jennings says—

> "The rule of law in the liberal sense requires that the powers of the crown and of its servants shall be derived from and limited by either legislation enacted by parliament, or judicial decisions taken by independent courts. It is not enough to say with Dicey that English men are ruled by the law and by the law alone, or, in other words that the powers of the crown and its servants are derived from the law; for that is true even of the most despotic state. The powers of Louis XIV, of Napoleon I, of Hitler and of Mussolini were derived from the law, even if that law be only 'the Leader may do and order what he pleases."[1]

It may, therefore, correctly be said that rule of law does no mean any government under any law. It means the rule by a democratic law—a law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says—

> "in proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow."[2]

He says further—

> "Since fundamentally it (rule of law) requires a limitation of powers, most states have sought to attain it by written constitutions, for such a constitution is fundamental law which limits by express rules the powers of the various governing bodies and thus substitutes constitutional government (in large part a synonym for the rule of law) for absolutism. It implies also a separation of powers, since the confusion of powers in one authority is dictatorship or absolutism which according to liberal ideas, is potential tyranny."[3]

The statement of Bhagwati J. in *Bachan Singh* V. *State of Punjab*[4] in respect of rule of law is worth noting here :

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1 Jennings, Ivor, *The Law and the Constitution*, Ibid, PP. 47–48
2 Jennings, Ivor, *Ibid,* PP. 60–61
3 Ibid, PP. 48–49
4 AIR 1982 SC 1325

"Law in the context of rule of law does not mean any law enacted by legislative authority, howsoever arbitrary or despotic it may be, otherwise even in dictatorship it would be possible to say that there is rule of law because every law made by the dictator howsoever arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial it is law that governs the relationship between men and state, but still it is not rule of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator, it is in effect and substance the rule of man and not of law which prevails in such a situation. What is necessary element of rule of law is that the law must not be arbitrary or irrational and must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people."

Since the end of Second World War the principle of rule of law has been a matter of universal discussion and endeavour bas been launched to formulate the basic elements of rule of law. In the context of modern development in the matters of human rights the scope of rule of law has much widened. After the adoption of the Universal Declaration of Human Rights, 1948, the International Bill of Human Rights, 1976, other international covenants on human rights and also after the congress of the International Commission of Jurists and some conferences the concept of rule of law has come to be identified with the concept of rights of man. Rule of law now, therefore, does not mean merely the rule by democratic law but it essentially includes the security of life particularly the establishment of the social, economic and educational conditions without which democratic law, liberty, civil and political rights remain meaningless to the people. Because 'the blood-shot eye of law can make hungry people obey the law but it cannot make them respect the law'.

With this end in view the International Commission of Jurists, an international organisation with consultative status under the United Nations, has undertaken a series of studies which have been discussed at successive congresses in various parts of the world. A congress was held in New Delhi in 1959, where representatives of no fewer than 53 country's judges, lawyers and teachers of law affirmed in a formal declaration their recognition that rule of law is a dynamic concept

which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish certain social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.[1] The Congress through four committees, reported on the practical safeguards required for the maintenance of the rule of law. Committee IV reports the following :

a) The function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. The dignity requires not only recognition of his civil and political right but also establishment of the social, economic, educational and cultural conditions which are essential to the development of his personality.

b) The rule of law depends not only on the provisions of adequate safeguard against abuse of power by the executive, but also on the existence of effective government capable of maintaining law and order and ensuring adequate social and economic condition of life for the society.

c) An independent judiciary and a free legal profession are indispensable for a free society under the rule of law.[2]

To mention more specifically the above Congress in New Delhi adopted a Declaration – Delhi Declaration, 1959. In answers to a questionnaire distributed to those attending, 'Respect for the supreme value of human personality' was stated to be the basis of all law. Clearly this is a statement in general terms about what the content of law should or must be. Taking this as a starting point, the Declaration stated that the rule of law involved :

i) the right to representative and responsible government (viz. the right to be governed by a representative body answerable to the people);

ii) that the citizen who is wronged by the government should have a remedy;

iii) certain minimum standards or principles for the law, (those contained in the Universal Declaration of Human Rights, 1948 and the European Convention of Human Rights, 1950) including freedom of religion, freedom of assembly and association, the absence of retroactive penal laws.

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1 Wade, E.C.S and Bradley, A.W, *Constitutional Law*, 8th ed., P. 75

2 Quoted by, Bari, Dr. Ershadul, *Rule of Law and Human Rights*, (a booklet in Bengali), P. 14–15

iv) the right to fair trial, which involves :
- certainity of the criminal law.
- the presumption of innocence.
- reasonable rules relating to arrest, accusation and detention pending trial.
- right to legal advice.
- public trial
- the right of appeal
- the absence of cruel and unusual punishments.

v) the independence of the judiciary including proper grounds and procedure for the removal of judges.[1]

The influence of Dicey's first and second conceptions can be seen in above. His third conception was abandoned since most other countries in the world have a 'bill of rights' on some description.

The Human Rights Act 1998 and the Rule of Law

First, the Human Rights Act preserves parliamentary sovereignty and as a result the judiciary has not been given any new power of judicial review as is understood under an entrenched constitution. Therefore, the balance of power still remains with the British parliament and the judiciary is still in subordinate position.

Second, given the limited power of the judiciary, it will not be possible for citizens to come to the court to challenge an Act of parliament with a view to protecting their rights and freedoms which might be under attack by any alleged enactment.

However, inspite of above difficulties it is contended that unlike earlier there is a domestic forum for enforcement of rights under the Human Rights Act 1998. Not only that it is also contended that under the Human Rights Act the scope of judicial review will be greatly widened both from the view point of administrative actions and constitutionality of legislation.

As far as constitutionality of legislation is concerned, though the Act maintains the theory of parliamentary supremacy, nonetheless, in

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1 Quoted by, Blessly, Jain, *Constitutional Law*, (London : HLT Publication, 1990), PP. 12--13

practice, the courts will inevitably become involved in political-constitutional issues. As result of the secondary nature of the legislation produced by the Scottish Parliament, the court will have the power to quash such Acts invalid for lack of compatibility with the European Convention on Human Rights. This is evident from a recent decision by the Court of Appeal in *R v Secretary of State for the Home Department* (2003). In this case the Court of Appeal held that the policy to refuse support to asylum seekers unless they claimed asylum at the port of entry under section 55 of the National, Immigration and Asylum Act 2002 was unlawful. The Court also went out of its way to provide the Home Secretary with advice on how to make the Act and the procedures under it, compatible with Convention rights. This case shows that the introduction of the Human Rights Act has greatly increased the judicial power in relation to the other two branches of the Constitution i.e. the executive and the legislature.

In view of parliamentary supremacy and liberties in the negative sense, the British courts have traditionally lacked any power to question the laws produced by Parliament on their substance, as constitutional courts in other systems could; they could only question the formal or procedural properties of such legislation. There was, however, an alternative forum capable of challenging the substance of English law since 1966 when the UK recognised the power of the European Commission on Human Rights to hear complaints from individual UK citizens and at the same time, recognised the authority of the European Court of Human Rights to adjudicate in such matters. After the enactment of the Human Rights Act 1998 now it is believed that eventually the UK domestic courts will increasingly be involved into deciding constitutional matters.

Sample Questions Suggested Skeleton for Solution:

1. 'In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law' (Lord Bridge of Harwich). Discuss.

   Suggested Skeleton for Solution: See page 132

2. Discuss the nature of rule of law and its importance to the law and working of the British constitution. (University of London, 2000).

   Suggested Skeleton for Solution:

   - Discuss three principles of rule of law as propounded by Dicey (see page 271),
   - Point out the defects in Dicey's theory (see pages 272-273);
   - Point out the modern idea on rule of law which now include promotion and protection of human rights (see pages 277-278)
   - Discuss the role of the Lord Chancellor and the Home Secretary which are against the concept of rule of law (see pages 121, 128);
   - Discuss the change introduced by the Human Rights Act 1998 (see pages 278-279);

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