The Limits of Judicial Authority

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Judicial law-making

Judiciary

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Legislature

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Judicial review of executive action

Judiciary

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

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

Executive
Judicial constitution-making

Judiciary

Legislature Executive
Three contexts

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

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

Impervious constitutional values
- *R (Jackson) v Attorney General* [2005] UKHL 56
- *Moohan v Lord Advocate* [2014] UKSC 67
Constitutional statutes: *Thoburn*

**Professor A V Dicey**

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

**Laws LJ**

‘We should recognise a hierarchy of Acts of Parliament: as it were “ordinary” statutes and “constitutional” statutes.’
Constitutional statutes: HS2

Background

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

Implications

• ECA not to be taken to give EU law degree of priority sufficient to override Article 9
• Bill of Rights’ fundamentality outstripped that of ECA
• Basis for hierarchy of constitutional statutes, not just of statutes
Embedded constitutional values

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

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

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

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

Constitutional statutes
- No implied repeal
- Some more fundamental than others

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

Impervious constitutional values
- Wholly resistant to legislation
- Constitutional bedrock
Fundamental principles: View I

Parliamentary sovereignty

Rule of law

Separation of powers
Lord Wilson

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

Lord Hughes

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

Parliamentary sovereignty

Rule of law

Separation of powers
Rule of law

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

Separation of powers

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

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