

# BRITISH CONSTITUTION AND THE ROLE OF CABINET IN THE UK LEGAL SYSTEM

## A CONSTITUIÇÃO DO REINO UNIDO E O PAPEL DO GABINETE NO SISTEMA JURÍDICO BRITÂNICO

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### ABSTRACT

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The uncodified British constitution, the idea of Parliamentary sovereignty and the nearly complete fusion of Executive and Legislative branches bring attention to the uniqueness of the UK legal system. With this in mind, this essay examines the effectiveness of the separation of powers in the British constitutional framework and the dominant role of Cabinet in the UK legal order.

**Keywords:** British constitution; Parliamentary sovereignty; UK legal system; Separation of powers; Cabinet.

### RESUMO

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A constituição do Reino Unido, a ideia de soberania parlamentar e a quase fusão completa dos Poderes Executivo e Legislativo despertam atenção para a peculiaridade do sistema jurídico britânico. Com isso em mente, este artigo investiga a efetividade do princípio da separação dos poderes no quadro constitucional britânico e o domínio governamental no ordenamento jurídico do Reino Unido.

**Palavras-chave:** Constituição britânica; Soberania parlamentar; Sistema jurídico britânico; Separação de poderes; Gabinete.

### INTRODUCTION

There has been a long-standing tradition to accept the absolute sovereignty of Parliament as the foundation of the British legal system. One of the strongest

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counter-argument to this theory was the principle of EU law supremacy. However, with the Brexit process, the relation between EU and UK will be changed in the next few years. Does that mean that Parliamentary sovereignty can be interpreted in this traditional approach?

As a result of the peculiar British constitution, legislative and executive have a close relationship and, even though Parliamentary sovereignty is traditionally accepted, many authors argue that it is the executive that is the dominant institution in British politics. In this regard, in the last decade, the absolute Parliamentary sovereignty paradigm has been widely questioned and appears to be gradually changing<sup>1</sup>.

In this context, firstly, this essay will discuss how the main characteristics of the British constitution are determining to establish governmental powers and will critically analyze different doctrines about parliamentary sovereignty. Subsequently, it will examine to which extent the constitutional principles of the UK legal system in practice limit the government's authority. It will also show the failure of the orthodox view to explain the modern UK constitutional framework. Lastly, it will argue that the powerful position of the executive is a result of the UK constitutional system and as an outcome of recent constitutional reforms there has been considerable impact in the executive dominant role within the British constitution. As a result, it will argue that the powerful position occupied by the Executive in British constitution makes Parliament not effective politically sovereign.

## THE BRITISH UNCODIFIED CONSTITUTION AND PARLIAMENTARY POLITICAL SOVEREIGNTY

The UK is one of the few countries in the world that does not have a written constitution, in the sense of a single codified document that set out basic principles, protect human rights and limit the state's powers. An unwritten constitution<sup>2</sup> has no special status and can change with the political circumstances. The British legal system is guided by statutes, conventions and judicial decisions but, mostly, by the principle of sovereignty of Parliament: there is no legal limits to Parliament's lawmaking authority. As Bogdanor<sup>3</sup> points it out, as long as parliamentary sovereignty is the foundation of the British legal system, it does not make any sense to have a codified constitution: it would be incompatible to fix constitutional limits upon Parliament's unlimited power to legislate.

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<sup>1</sup> BOGDANOR, Vernor. *The New British Constitution*. Oxford: Oxford University Press, 2009. p. 281.

<sup>2</sup> The expression "unwritten constitution" is used here in the sense previously explained; in other words, as an uncodified constitution.

<sup>3</sup> *Ibid.*, p. 14.

As an unwritten constitution, much of the British government's power is not codified. Although the Parliament enact statutes to confer to the executive decision-making and lawmaking powers (statutory powers), a considerable amount of its powers come from 'royal' prerogatives, which are residual powers exercised in practice by the administration, even those legally conferred to the monarch. As Lord Bodger declared: "The executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her majesty's govern"<sup>4</sup>. This quote shows how the monarch hold some executive powers but conventionally do not exercise them: it is the Cabinet role to do it.

These powers are regulated by constitutional conventions, non-binding customary practices, rather than legislation and are related to the fields of foreign policy, diplomacy, national security, among others. It is important to notice that decisions made under these powers are usually based on politics grounds and not traditionally submitted to judicial review<sup>5</sup> or parliamentary scrutiny, which means that they are entirely given to the administration discretion. The issue is that these powers are not codified, not precisely determined anywhere, which in practice gives the executive a considerable power, not submitted to pre-existing legal limits or even checked by the two other branches.

The conclusion is that, as a result of the unwritten nature of the British constitution, the executive holds an amount of prerogative powers, non regulated by legislation or limit by the judiciary or legislative. This constitutional feature of Britain has a substantial role on the government's authority.

### The political limits to British Executive powers

The limits of Executive powers, if not legal, can only be political ones. In this sense, the British constitution is classified as a political rather than legal on: the main constrains to their powers come from the political process and are not established by the formal law itself. However, Elliot<sup>6</sup> shows that the British constitution is not entirely a political one, there is also legal forms of constitutionalism in the UK system and judicial review of the executive actions is the most important manifestation of it.

Further, the UK constitutional arrangements are characterized by a fusion between the executive and legislative branches. It is from the members of the Parliament that the Cabinet is made; in other words, the composition of the executive is determined by the majority party in Parliament. In this sense, some

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<sup>4</sup> ELLIOT, Mark; THOMAS, Robert. *Public Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2014. p. 104.

<sup>5</sup> As a consequence of the Human Rights Act (HRA), these powers can be (and recently have been) judicially reviewed if they go against human rights protections.

<sup>6</sup> ELLIOT, Mark; THOMAS, Robert, op. cit.

authors discuss to which extend the UK has an actual separation of powers. In practice, this give an enormous amount of power to the government, that has the power to approve whatever bills they want, since they hold the majority inside the House of Commons.

Thomas Paine stated:

A constitution is not the act of government, but of a people constituting a government, and a government without a constitution is power without right [...] A constitution is a thing antecedent to a government, and a government is only the creature of a constitution<sup>7</sup>.

Even though the UK does not have a codified constitution or an entirely legal form of constitutionalism, this statement still applies: the British government's powers and limitations are a result of the UK constitutional architecture. In the UK, the constitution is not antecedent to government; it develops over time and it changes and adapt accordingly to the political circumstances. However, this does not mean that is an act of government, since the public opinion has a substantial role as a political restraining force and judicial review as a legal instrument to assure the lawfulness of government's actions.

Overall, it is clear that the UK government is, in a way, a creature of its constitution: as it is uncodified, their powers are usually regulated by customary arrangements, such as non-binding conventions, which makes governmental practices much more a political matter; it is a political constitution, since the limits to state's authority are imposed more from public opinion, media, the political process as a whole; it also have legal forms of constitutionalism, as decision-making of the administration is submitted to judicial review; lastly, the constitutional arrangements result in a fusion between Parliament and government, which puts the later in a very powerful position. It does not antecedent the government, it is a flexible constitution that can change over time and this changes impact deeply the government's authority; therefore, the government can be seen as a creature of the constitution of its time, which will determine to which extend his powers can go.

### Parliamentary sovereignty: the main theories

The classical doctrine of Parliamentary sovereignty has been developed by Dicey<sup>8</sup> and known as continuing sovereignty view. It can be summarized in two main thesis: Parliament has an unlimited power to legislate (no substantive or

<sup>7</sup> PAINE, Thomas. *The Rights of Man*. New York: Dover Publications, 1999. p. 93.

<sup>8</sup> DICEY, Albert Venn. *Introduction to the Study of the Law of the Constitution*. 8<sup>th</sup> edition. London: Macmillan, 1915. p. 37-38.

formal limits) and that it cannot bind itself by entrenching legislation<sup>9</sup>. This view was also defended by Wade<sup>10</sup> and he believed that the source of Parliament's authority is the acceptance by the courts of the rule that Acts of Parliament (House of Commons, Lords and monarch) are the highest form of law<sup>11</sup>, called the rule of recognition<sup>12</sup> and classified as a political fact, which cannot be change by legislation only revolution<sup>13</sup>.

This theory receive many criticism over time; first, its two essential propositions are in an insuperable contradiction: Parliament have no limits on its authority and, at the same time, does not have the ability to entrench legislation, which is a limit<sup>14</sup>. Secondly, Wade's explanation about the parliamentary powers is exclusively historical and does not take into account the principles of democracy, which currently constitutes Parliament's authority<sup>15</sup>; besides that, his assertive 'the rule of recognition is a political fact' does not follow his conclusion that it cannot be amended by legislation. Unlike Wade argued, a revolution is not the only way to change the sovereignty of Parliament<sup>16</sup>, as it has an inherent evolutionary character<sup>17</sup>: it dynamically and slowly changes over time.

After some unqualified answers of the orthodox view, a new Parliamentary sovereignty theory was outlined and Lantham was one of the main expositors, based on Jennings' work about 'manner and form'<sup>18</sup>. The self-embracing view agrees with the first statement of the traditional theory: Parliament can make whatever laws it wants; however, it can also create procedural binding conditions for its successors, making harder to repeal an Act<sup>19</sup>. These are only formal not substantive limits, like a certain majority, and they are exclusively fixed by Parliament itself<sup>20</sup>.

The same paradox of the continuing sovereignty view is present here: if Parliament can bind itself it will no longer be sovereign in the future<sup>21</sup>.

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<sup>9</sup> GORDON, Michael. The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade. *Public Law*, jul. 2009. p. 519.

<sup>10</sup> WADE, Henry William Rawson. The Basis of legal sovereignty. *The Cambridge Law Journal*, v. 13, n. 2, 1955. p. 174.

<sup>11</sup> GORDON, Michael, op. cit., p. 527.

<sup>12</sup> HART, Herbert. *The Concept of Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 1994. p. 149.

<sup>13</sup> WADE, Henry William Rawson, op. ci., p. 188-189.

<sup>14</sup> GORDON, Michael, op. cit., p. 528.

<sup>15</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 216.

<sup>16</sup> GORDON, Michael, op. cit., p. 533.

<sup>17</sup> GOLDSWORTHY, Jeffrey. Abdicating and Limiting Parliament's Sovereignty. *The King's College Law Journal*, v. 17, n. 2, 2006. p. 269.

<sup>18</sup> JENNINGS, Ivor. *The Law and the Constitution*. 5<sup>th</sup> edition. London: University of London Press, 1959. p. 153.

<sup>19</sup> GOLDSWORTHY, Jeffrey, op. cit., 2006, p. 261-62.

<sup>20</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 218.

<sup>21</sup> GORDON, Michael, op. cit., p. 528.

Furthermore, it is questionable if this new view is currently embraced by the British legal system, since there are some cases indicating that they may not be<sup>22</sup>. Despite that, in *Jackson*<sup>23</sup>, Baroness Hale declared that if it was acceptable for Parliament to make it easier to enact law<sup>24</sup>, by removing the Lords' consent<sup>25</sup>, 'it may very well be that it can redefine itself upwards, to require a particular parliamentary majority'<sup>26</sup>.

Recently, it has been advocated the existence of fundamental principles established by British unwritten constitution as constraints to the authority of Parliament. This would mean that Parliament does not have an absolute power to legislate and could not abolish this set of basic rights, which are substantive limits to its sovereignty.

Allan<sup>27</sup> is one of the proponents, that has also been expressed by many contemporary judges, such as Lord Hope, affirming in *Jackson case* that "parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled [...] It is no longer right to say that its freedom to legislate admits of no qualification whatever"<sup>28</sup>. In this sense, Baroness Hale also stated that "the courts will treat with particular suspicion (and might even reject) any attempt by Parliament to subvert the rule of law"<sup>29</sup>. Lastly, Lord Steyn asseverated, about judicial review, that the courts "may have to consider whether this is a constitutional fundamental which even a sovereignty Parliament [...] cannot abolish"<sup>30</sup>.

The doctrine of parliament sovereignty has been seen for some of these scholars as a construct of common law and, consequently, it could be repealed by the courts. Goldsworthy<sup>31</sup> disagrees with this statement; although he recognize that parliamentary sovereignty depends on judicial acceptance, he believes

<sup>22</sup> UNITED KINGDOM. Court of Appeal. *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. Available in: <<https://www.lawteacher.net/cases/ellen-street-estates-v-minister-of-health.php>>. Accessed at: May 25 2018.

UNITED KINGDOM. Divisional Court. *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733. Available in: <<http://www.uniset.ca/other/cs3/1932KB733.html>>. Accessed at: June 27 2018.

<sup>23</sup> UNITED KINGDOM. House of Lords. *R (Jackson) v Attorney-General* [2005] 1 AC 262. Available in: <<https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd051013/jack-1.htm>>. Accessed at: June 12 2018.

<sup>24</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 220.

<sup>25</sup> Allusion to the enactment of Parliament's Acts 1911 and 1949.

<sup>26</sup> UNITED KINGDOM, Jackson, op. cit., p. 163.

<sup>27</sup> ALLAN, Trevor. Parliamentary Sovereignty: Law, Politics and Revolution. *Law Quarterly Review*, v. 13, 1997. p. 449.

<sup>28</sup> UNITED KINGDOM, Jackson, op. cit., p. 104.

<sup>29</sup> Ibid., p. 159.

<sup>30</sup> Ibid., p. 102.

<sup>31</sup> GOLDSWORTHY, Jeffrey. Is Parliament Sovereign? Recent challenges to the Doctrine of Parliamentary Sovereignty. *New Zealand Journal of Public and International Law*, v. 3, n. 7, 2005, p. 15.

that any changes in the rule of recognition could only be done by an official consensus between the three branches of government. Bogdanor also acknowledges that, but with more focus on popular consensus: “A new rule of recognition could not simply be imposed by the courts. It would have to be accepted by public opinion as well”<sup>32</sup>.

Overall, it has been shown that the notion of parliamentary sovereignty is not so clear and obvious; there are at least three main different approaches that lead into opposite conclusions. For a long time, the orthodox view was dominant. Nonetheless, various constitutional reforms has been taking place in the UK legal system and, as it will be argue above, they cannot be fully comprehend by a classical approach.

### **UK CONSTITUTIONAL PRINCIPLES AND REFORMS: THE CONSTRAIN OF GOVERNMENTAL AND PARLIAMENT’S POWERS**

The UK constitutional system is guided by some principles that can, in some extend, constrain the administration political powers. Firstly, the rule of law, one of the foundations of any democratic system and the strengthening of judiciary’s role by the enactment of Human Rights Act 1998 (HRA). Secondly, the analysis of UK parliamentary sovereignty in practice, after the enactment of the Parliament Acts 1911 and 1949. Finally, the separation of powers and the devolution process, also briefly commenting on Brexit.

#### **The rule of law and the approval of the Human Rights Act 1998**

As Elliot and Thomas<sup>33</sup> show, the rule of law is a set of principles upon which the courts rely on, in order to interpret legislation accordingly to common law principles and evaluate the legality of governmental action. The rule of law can mean different things: firstly, a system in which everyone is governed by laws, government and citizens; these laws must have an accessible meaning and be made public; they must follow formal requirements that ensure a due process; lastly, they must be enforceable, as declared by Lord Neuberger.

As a result, the judiciary can strike down government’s actions that affront these principles of the rule of law. Judicial review enforces the executive to act accordingly to the rule of law and it means a substantial limitation to its political power. Although it was already possible to judicially review administration’s actions under common law principles, the Human Rights Act 1998 (HRA) strengthened this judiciary role.

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<sup>32</sup> BOGDANOR, Vernor, op. cit., p. 282.

<sup>33</sup> ELLIOT, Mark; THOMAS, Robert, op. cit.

The approval of the Human Rights Act 1998 (HRA) was an attempt to give effect to the European Convention of Human Rights (ECHR) inside the British legal system, in order to provide a stronger protection of human rights to be ensured by the courts.

Formally<sup>34</sup>, the Act should not confront the Parliament's sovereignty, since the courts still could not invalidate legislation (only issue a declaration of incompatibility)<sup>35</sup>. In practice, it meant a major judicial power to interpret all legislation in accordance to the ECHR<sup>36</sup>, which, as a result, impose limitations to Parliament's authority and, consequently, to government<sup>37</sup>.

The reason is that, since the courts cannot declared void legislation, they use as much as possible the interpretation tool; in some drastic cases, this even meant to interpret an Act differently from the original parliamentary intentions, in order to conciliate it with human rights. This is what happened in *Anisminic case*<sup>38</sup>; Parliament enacted Foreign Compensation Act 1950 that had a provision<sup>39</sup> clearly excluding judicial review of the decisions of Foreign Compensation Commission. The courts interpreted this provision on the grounds of presumed legislative intentions, arguing that it is more reasonable to think that Parliament intended to submit the commission to judicial review rather than not have any legal control<sup>40</sup>. It is clear that the judges actually disapplied the provision by extending the mechanism of interpretation, since it was against a fundamental common law principle<sup>41</sup>. The courts option suggest that they would not accept an abolishment or disrespect of fundamental principles or human rights by parliamentary legislation, thus, Parliament's authority is substantively limited by them.

Under section 6<sup>42</sup> of the statute, acts of public authorities can be declared unlawful by the courts when incompatible with the Convention rights. It should

<sup>34</sup> GOLDSWORTHY, Jeffrey, *op. cit.*, 2005, p. 31.

<sup>35</sup> Human Rights Act 1988, s 4 (6) "A declaration under this section ('a declaration of incompatibility') (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made".

<sup>36</sup> Human Rights Act 1988, s 3 (1) "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

<sup>37</sup> BOGDANOR, Vernor, *op. cit.*, p. 65.

<sup>38</sup> UNITED KINGDOM. House of Lords. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL). Available in: <<http://www.bailii.org/uk/cases/UKHL/1968/6.html>>. Accessed at: May 17 2018.

<sup>39</sup> Section 4 (4) of the Act stated: "The determination by the commission of any application made to them under this Act shall not be called into question in any court of law".

<sup>40</sup> GOLDSWORTHY, Jeffrey, *op. cit.*, 2005, p. 32-33.

<sup>41</sup> ALLAN, Trevor. *Constitutional Justice: a Liberal Theory of the Rule of Law*. Oxford: Oxford University Press, 2001. p. 211-212.

<sup>42</sup> "6. Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.



be noticed that the concept of public authorities only includes members of judiciary and executive; the Parliament was expressly excluded in order to protect parliamentary sovereignty. The provision makes exceptions to the rule when the authority acted in such way to give effect to primary legislation or delegated legislation made accordingly to the powers given by primary legislation. These exceptions are also an enforcement of the principle of sovereignty of Parliament and its capacity to legislate even to violate human rights.

It should be mentioned that under section 3 and s 4, the courts should interpret primary and secondary legislation compatibly with the Convention rights; against the former, they can issue a declaration of incompatibility, which does not affect its validity but puts a substantial political pressure on Parliament to change it; as to the latter, the courts can invalidate delegated legislation incompatible with Convention rights, unless the primary legislation that conferred the delegated powers prevents removal of the incompatibility, in which case the courts can issue a declaration of incompatibility.

Besides that, a declaration of incompatibility issued by the courts should not be underestimated. Although it does not provide judicial remedy, it puts a major political pressure into Parliament to amend the legislation declared by the courts incompatible with the Convention rights. In practice<sup>43</sup>, in all occasions that such declaration was made resulted into legislative amendment. As Bogdanor comments, “if ministers and Parliament regularly give effect to declarations of incompatibility by the courts, this practice would, at some time in future, harden into a convention, though it has not yet done so”<sup>44</sup>.

Furthermore, the HRA also imposed a formal restriction to Parliament’s powers, as it has a provision prohibiting to be repealed impliedly. “To this extend, the Human Rights Act modifies the strict doctrine of parliamentary sovereignty.

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(2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes— (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) (...)

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) ‘An act’ includes a failure to act but does not include a failure to – (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order”.

<sup>43</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 718.

<sup>44</sup> BOGDANOR, Vernor, op. cit., p. 61.

There is now at least one thing that Parliament cannot do. It cannot impliedly repeal the Human Rights Act<sup>45</sup>.

It is not hard to conclude that the HRA has strengthened Judiciary's power, which could only mean limitations to the Parliament's authority. Some of its power was alienated to the courts and the HRA implemented that by strengthening the judicial interpretation, the relevance given to a declaration of incompatibility and the need of express language to repeal the Act.

In conclusion, the principles of rule of law enables the courts to use the mechanism of judicial review in order to strike down governmental actions or invalidate delegated legislation enacted by the executive, when these affront the common law principles or, more specifically, the human rights, under the provisions of the HRA. This has an important role to limit the administration's power and make an effective check and balance between judiciary and executive, but, as shown, there are some limitations to it, related to the principle of sovereignty of Parliament and these limitations not only puts the legislative in an untouchable position, but also empowers the executive, since the later controls the former in a certain way.

#### UK parliamentary sovereignty: limit or endorsement of Cabinet's powers?

As an ultimate outcome of the principle of democracy, in the UK parliamentary sovereignty is one of the foundations of its legal system. Since Parliament is the directly elected body of the state, its supreme powers is the maximum consequence of democracy. There are several theories that explain the meaning and scope of parliamentary sovereignty; for the purposes of this essay, it should be understood as unlimited power to legislate and supremacy of Parliament, as an institution not submitted to proper check and balances from the other two branches (they cannot strike down parliamentary legislation). This principle could, at least in theory, limit the government's authority; since Parliament is supreme, to government must be hold into account to Parliament and administration statutory powers must be submitted to parliamentary scrutiny.

Firstly, it is important to understand in what measure it is still possible to talk about parliamentary sovereignty. The enactment of the Parliament Acts 1911 and 1949 represented a reduction of the Lords' power by making possible to approve legislation without its consent. As a result, it made easier for the government to approve its bills. This constitutional reform symbolize an amend of the rule of recognition, making it possible to enact legislation only with the approval of the Commons and monarch, when the conditions of the Acts are met. In other

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<sup>45</sup> Ibid., p. 60.

words, it happened exactly what Wade said to be impossible: the rule of recognition was changed by legislation<sup>46</sup>.

Yet Wade's explanation of this phenomenon was a different one. He argued that Act 1911 created an inferior legislature (monarch and Commons) and a delegated body cannot extend its powers, meaning that Act 1949 and all bills approved under its procedure were invalid, such as the Hunting Act 2004. However, the courts rejected this argument in *Jackson* case and declared that a parallel route was created by Act 1911, "whereby full Acts of Parliament could be enacted"<sup>47</sup>. It is clear that the orthodox view cannot be reconciled with the constitutional reforms made by Acts 1911 and 1949.

As a result of government's accountability to Parliament, a convention establishes ministerial responsibility, which means that ministers are responsible for the actions taken in its ministry and subordinate bodies and are accountable to Parliament about these actions<sup>48</sup>. Because of that ministers would have the duty to resign in case of failures, as the Ministerial Code establishes. Nonetheless, due to the complexities of modern government and the large scale of subordinates to a ministry, some authors argue that ministerial responsibility became a fiction<sup>49</sup>. Although in theory ministers should be hold responsible for the actions under its ministry, in reality the convention has been malleable in particular circumstances to state that they only have the duty to resign when the failure is a result of the ministry policy, when results from operational matters, there is no such duty. This approach means that ministerial responsibility has been limited and accountability to Parliament has become less effective in modern administration structure.

Parliamentary scrutiny is another mechanism to check the government's policies, as it enables the House of Commons to challenge and debate the executive's work through oral questioning in the Chamber or publication of administration written statements before Parliament. An example of this practice is the weekly sessions in the Commons where the Prime Minister answer questions of the MP's about government's decision-making. However, Elliot declares that there is a lack of parliamentary scrutiny of the executive, specially concerning royal prerogative powers, such as machinery of government reforms<sup>50</sup>.

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<sup>46</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 217.

<sup>47</sup> Id.

<sup>48</sup> They are also accountable to the Prime Minister and the public.

<sup>49</sup> DREWRY, Gavin. The Executive: Towards Accountable Government and Effective Governance. In: JOWELL, Jeffrey; OLIVER, Dawn (eds.). *The Changing Constitution*. Oxford: Oxford University Press, 2011. p. 203-204.

<sup>50</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 125.

Although in theory it seems that Parliament can hold the executive into account, the practice has shown that because of the UK constitutional arrangements Parliament cannot effectively do so. As the government holds the majority in the House of Commons, Parliament, instead of examining and scrutinizing the executive's work, performs a function of approving the government legislative agenda, not only by primary legislation but also conferring the executive legislative powers. Parliament authorizes the administration to legislate in particular cases by delegated legislation. Even though it is recognized the need of the executive to have legislative powers, it is also a consensus that they should be restrict, exceptional and submitted to control. Nonetheless, in reality, Parliament gives the executive broad powers to legislate and the volume of delegated legislation has reached enormous proportions. As already shown, these powers are also not adequately controlled by Parliament, submitted to check and balances by the legislative branch.

It has been shown how government's actions are not properly held into account to Parliament<sup>51</sup>; the same happens to the public in general and the main reason is the lack of transparency of governmental actions and legislation. The publication requirement of all legislation does not apply in some particular cases of delegated legislation, which is a break of the rule of law<sup>52</sup>. It is argued that the confidentiality of cabinet discussions and of the relationship between ministers and civil servants should be protected, in order to enable a freely discussion inside and a united front outside the administration. The same argument is applied to delegated legislation concerning secrets of state. However, this results in a lack of transparency, which is an enormous obstacle to an effective public accountability of administration decision-making. The Freedom of Information Act 2000 (FIA) tried to solve this problem and bring more transparency to the process; nonetheless, it does not go far enough and still protects too much governmental affairs confidentiality<sup>53</sup>.

Therefore, the second principle that could theoretically limit the government's powers is the parliamentary sovereignty, from which derives ministerial responsibility and parliamentary scrutiny of the executive; however, as it has been shown, the substantial influence of the executive inside Parliament unable the later to effectively check and control the former's powers. As long as the cabinet is made from the Commons, this closed relationship between these two branches will remain and their powers can only be properly checked by the judiciary, the only truly independent branch of the UK constitutional system.

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<sup>51</sup> The reason is the British constitutional arrangements that result in a fusion between legislative and executive.

<sup>52</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 139.

<sup>53</sup> DREWRY, Gavin, op. cit., p. 211.

## Separation of powers, Brexit and the devolution process

From what has been explain about the rule of law and parliamentary sovereignty as limits to executive's powers, it is clear that the principle of separation of powers is one of the most valuable mechanisms to limit all branches abuse of power. In the UK constitutional system, the separation of powers is fragile shaped, as some members of the legislative are also members of the executive. This principle has its strongest manifestation in Britain in the judiciary independence and role to interpret legislation in accordance to the rule of law and to strike down government's actions that affront common law principles. It seems that as long as the parliamentary sovereignty is the foundation of Britain's constitution, the separation of powers is, in a certain way, put aside. However, after a set of constitutional reforms over time<sup>54</sup>, the UK legal system is slowly shifting from an absolute sovereignty of parliament towards a more strong separation of powers<sup>55</sup> and this change is crucial to ensure the establishment of limits to government's political authority.

Before the Brexit, the principle of supremacy of EU law, recognized by the UK after the ratification of the Treaty of Rome and the enactment of European Communities Act 1972 (ECA), was a limit to the government's political authority. However, the people of Britain voted for the UK to leave the European Union in a referendum on June 23, 2016. The full outcomes of this withdraw are still been laid out, but it is safe to say now that EU law has much less power in the UK territory then before; therefore, it is not a considerable constrain to British governmental power at the present moment.

Lastly, the devolution settlement is a peculiar feature of the UK constitutional system; it could be understood as a limitation of central government political authority, as it establishes that the devolved matters shall be handle by the devolved bodies and the central administration cannot interfere on them. This means a territorial diffusion of governmental powers and gives Scotland, Wales and Northern Ireland a degree of autonomy from the United Kingdom central powers (Parliament and executive)<sup>56</sup>. The devolution phenomena, therefore, established a limit on central government's political authority, since it cannot decide on local questions, as this power was transferred to the devolved bodies. In a way, the same applies to local governments, but in a smaller degree, since they do not have as much power as devolved bodies.

Devolution was constructed to preserve the parliamentary sovereignty, considering that Parliament can, at anytime, abolish the devolved bodies by an

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<sup>54</sup> Enactment of Acts 1911 and 1949; enactment of Human Rights Act 1998; among others.

<sup>55</sup> BOGDANOR, Vernor, op. cit., p. 282.

<sup>56</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 278.

ordinary Act<sup>57</sup>. As demonstrated by Bodganor<sup>58</sup>, in practice, devolution imposed some restrictions to its sovereignty; Parliament has accepted (by agreement or convention) not to legislate on devolved matters, specially without the devolved bodies' consent. If Westminster tried to abolish them without their consent, it could mean their abandonment of the United Kingdom.

## CONCLUSIONS

From what has been shown, the UK constitution enables the executive to exercise a dominant role within the legal system, specially because of its dominance inside Parliament and the parliamentary sovereignty as the cornerstone of British constitutional network, instead of limiting the executive, gives it more power. Thus, the principle of separation of powers still have a small impact in really restricting the government's authority, but this role has been increasing in the past years, specially because of the judiciary strengthened function after the enactment of the HRA. As a result, the rule of law is the main principle that can currently limit the political powers of administration by the instrument of judicial review, which enables the courts to strike down government's actions and invalidate delegated legislation<sup>59</sup> that violate the rule of law<sup>60</sup>.

Thus, the UK government is limited by a "network of institutions operating at local, devolved and supranational levels"<sup>61</sup>. In this approach, the devolution process is significant limitation to government's political authority, as devolved bodies are entitle to decide about domestic affairs and the central administration cannot interfere on them.

It is worth to notice that because of the modern social complexities and large scale of administration structure government is no longer understood as a single institution rather than a wider network of institutional arrangements.<sup>62</sup> This means that the executive power is not concentrated in a unified body, instead, it involves a complex number of organisations that are coordinated by the Cabinet Office's national policy<sup>63</sup>. "The cabinet is the core of the British constitutional system"<sup>64</sup> because it is responsible to the ultimate control of the network

<sup>57</sup> Ibid., p. 281-282.

<sup>58</sup> BOGDANOR, Vernor, op. cit., p. 112.

<sup>59</sup> With the exceptions pointed out at the HRA, section 6.

<sup>60</sup> Not only human rights but any common law principle, for example, a governmental attempt to abolish judicial review.

<sup>61</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 305.

<sup>62</sup> DREWRY, Gavin, op. cit., p. 192-193.

<sup>63</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 153-53.

<sup>64</sup> JENNINGS, Ivor. *Cabinet Government*. 3<sup>rd</sup> edition. Cambridge: Cambrigde University Press, 1959. p. 20.

of organisations inside the executive<sup>65</sup>. As a result, it could be declared that the executive limits itself, as a division of power is done inside this branch and in practice all administration's organisations do not directly follow cabinet orders (since it would be impossible for cabinet or even the Prime minister to closely control all governmental structure), having a certain level of autonomy in decision-making process.

It has also been shown that the orthodox view of Parliament's authority cannot explain accurately the contemporary British constitution, in which the following reforms has been taking place. Firstly, the enactment of Acts 1911 and 1949, representing an amendment of the rule of recognition; secondly, the enactment of HRA, implicating an alienation of power to the Judiciary, in human rights matters; lastly, a transfer of powers to devolved bodies about local questions.

The failure of the classical theory to explain these events can only mean that is no longer possible to interpret Parliament's sovereignty in a traditional analysis: Parliament has no longer unlimited power in the new constitutional framework, in which it shares some areas of its powers with, the Judiciary, the devolved bodies and, mostly, with the Cabinet.

Additionally, it has to be mentioned that Parliament's sovereignty can also be called a fiction in a different perspective. Because of the peculiar implementation of separation of powers into British constitution<sup>66</sup>, Legislative and Executive branches are, in an aspect, combined.

In conclusion, UK government and also British Parliament does not have anymore a monopoly of power<sup>67</sup>. The programme of constitutional reforms that have been taking place in the past few years has resulted in the strengthen of the judiciary role (enactment of HRA), gradual attempt to enhance more transparency to governmental procedures (enactment of FIA) and the reforms to royal prerogative (enactment of Constitutional Reform and Governance Act 2010).

The outcome of this process is the establishment of limitations to government's political authority; they might still not be enough to effectively restrain the dominance of the executive, however, they seem to be in the right path. British unwritten constitution is once again gradually but solidly changing towards a more balanced separation of powers and to effective accountability of government.

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<sup>65</sup> FOSTER, Christopher. Cabinet Government in the Twentieth Century. *The Modern Law Review*, v. 67, 2004, p. 753-754.

<sup>66</sup> ELLIOT, Mark; THOMAS, Robert, op. cit., p. 93-94.

<sup>67</sup> In this sense, the executive was called an elected dictatorship by Bogdanor (op. cit.), although he believes it is not the case anymore.

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