Part A

Many countries such as the United States have a written constitution but Britain does not, however 'it must have something which is at the heart of its constitutional arrangements [1] and this need is fulfilled by the doctrine of parliamentary sovereignty."

The traditional and most often applied definition of parliamentary sovereignty is that of Dicey, who stated, "the principle of parliamentary sovereignty means... 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 [2]. From this definition, three fundamental principles can be derived; the first is that Parliament can make or unmake any law.

An example of this principle in practice; The Septennial Act 1715 was passed to extend the life of Parliament from three to seven years out of fear of the effects of an election. His Majesty's Declaration of Abdication Act 1936 demonstrates Parliaments ability to alter the line of succession to the throne and the Parliament Acts 1911 and 1949 demonstrate Parliament legislating over its own procedures.

The War Damage Act 1965 overruled a House of Lords decision in Burmah Oil Company v Lord Advocate [1965][3] and is a demonstration of Parliaments ability to make or unmake any law as it was able to legislate with retrospective effect.

The second principle of Dicey's theory is that Parliament cannot be bound by its predecessors or bind its successors. This affirms Thomas Paine's theory that, 'every age and generation must be free to act for itself, in all cases as the ages and generations which preceded it [4]. Vauxhall Estates Ltd v Liverpool Corporation [1932][5] concerned conflict between The Housing Act 1925 and the Acquisition of Land Act 1919 where it was held that the provisions of the later act would apply: this is known as 'implied repeal' and demonstrates Parliaments inability to bind its successors. Ellen Streets Estates Ltd. V Minister for Health [1934][6] also held that the later Act must apply and it was stated that the intention of Parliament to repeal the legislation must be given effect "just because it is the will of the legislature [7].

The third basic principle of Dicey's theory is that no-one can question Parliaments laws, as Blackstone stated, "true it is, that what the Parliament doth, no authority on earth can undo'[8]. In Edinburgh & Dalkeith Railway Co v Wauchope [1842][9]. Wauchope sought to challenge an Act of Parliament on the grounds that he was not given notice of its introduction as a bill into Parliament. His challenge was rejected on the basis that the courts are precluded from investigating whether the proper internal procedures have in fact been complied with[10], this is known as the enrolled act rule, affirmed in Pickin v British Railways Board [1974][11]. The courts cannot question the validity of an Act of Parliament or declare it void; illustrating the role of the judiciary in upholding the principle of parliamentary sovereignty.

Exceptionally in R (Jackson) v Attorney General [2005][12] the validity of the Hunting Act 2004 and use of the Parliament Act 1949 were challenged. It was affirmed that regardless of the way an Act has been passed, even if using the Parliament Acts, the courts cannot challenge the validity of primary legislation. However Jackson did raise issues of sovereignty in practice, Lord Hope stated. 'the English principle of the absolute legislative sovereignty of Parliament...is being qualified'[13].

Parliamentary sovereignty is apparently sustained, particularly by the judiciary and is justified in that the main legislative House, the Commons, is democratically elected. Yet the acknowledgement by Lord Hope in Jackson recognises that the concept is increasingly subject to limitations

Lord Steyn in Jackson also recognised the dominance of the Commons by the executive- the government, the power of a government with a large majority in the House of Commons is redoubtable'[14], and warned that use of the Parliament Acts creates a danger of "exorbitant assertion of government power'[15].

This assertion of power that Lord Steyn warns of should theoretically be prevented by the constitutional principle of the separation of powers. The doctrine of the separation of powers is largely associated with Baron Montesquieu who 'based his famous exposition of the doctrine on his understanding of the British constitution'[16]. He identified three institutions of the state; the legislature that makes the laws, the executive that formulates and influences policy and the judiciary that adjudicates upon and imposes sanctions for breaking the law. Montesquieu argued that the result of these three powers concentrated in "the same man or the same body'[17] would pose a threat to individual liberty and that to prevent excessive concentration of public power the functions of each should be allocated clearly. However Jennings identified that Montesquieu did not mean that the legislature and executive should have no influence over the other, but...that neither should exercise the power of the other [18]. There should be a system of checks and balances in place to avoid concentration of power.

The United States is an example of strong separation as the written constitution embeds the doctrine; the structure and power of the three institutions is laid out within Articles 1-3. Checks and balances are in place to ensure separation of power, for example the President's proposed legislative programme is checked by congress and the Supreme Court.

There is however, in practice, 'fusion between the legislature and executive in the British constitution; for example the constitutional convention that members of the executive come from one of the Houses of Parliament, "the executive, far from being separated from the legislature, is drawn from within its ranks [19]. The Prime Minister, is also by convention a member of the House of Commons; the legislature. In contrast, in the United States the president is separately elected and may be of a different political party than the one with a majority in either or both Houses of Congress.

Under the House of Commons Disqualification Act 1975 there is imposed a statutory limit of 95 government ministers that may come from the House of Commons and prohibition of certain groups from becoming members such as civil servants and judicial office holders. This to some extent preserves separation however through its majority in the House of Commons the executive it is still likely to have the ability to dominate proceedings.

By convention, the political party that wins the most seats at a general election forms a government -the executive and a first past the post electoral system ensures that it will have a large majority of seats in the House of Commons. Dicey recognised this as a worrying shift in power stating that the majority party in the House can arrogate to itself that legislative omnipotence which of right belongs to the nation' [20]. Essentially there is a concern that the executive can control the legislative supremacy of Parliament and ensure that its legislative proposals are enacted.

There is also a fusion of function as the executive is involved in law making through delegated legislation. A large amount is made by Ministers and departments of the executive concerning important matters with justification in its efficiency compared with the passing of an Act of Parliament. It can also be made by those with specialist knowledge whilst MP's may not have the relevant expertise. However it conflicts with the theory of Parliamentary sovereignty as the executive is the supreme law making body in terms of the amount of legislation produced.

Subsequently power lies with the executive at the expense of the legislature, 'some have depicted this state of affairs as an abdication by Parliament from its principle constitutional role in favour of the executive (21)

Prerogative powers are an example of fusion as they leave considerable power in the hands of the executive and allow Ministers to legislate without the consent of Parliament. However to some extent this is limited by judicial review as in RV Secretary of State for the Home Department, ex Darte Fire Brigades Union [1995][22], where it was held that it was unlawful for the Home Secretary to introduce changes to a scheme which were incompatible with an Act of Parliament.

The unwritten British constitution is based largely on conventions and this is an important contributor to fusion between the legislature and executive. Although in theory Parliament is sovereign, in practice this legislative supremacy of Parliament is effectively inherited by the executive-giving it true power.

The constitutional theorist Walter Bagehot argues that far from being a problem, this fused relationship had clear merits, 'the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers'.[23] Lord Hailsham used the term 'elective dictatorship'[24], to criticise the way in which the executive may control the legislature.

Part B:

In light of this, it is to be critically evaluated to what extent this fusion is problematic: whether the checks and balances as prescribed by the doctrine of the separation of powers are effective enough to prevent abuse of power by the executive; in particular Parliamentary scrutiny.

There is a concern that the Government in general is too dominant over parliamentary proceedings [25] such as the Parliamentary timetable and legislative process. The majority of Bills considered by Parliament will be introduced by the executive and derive from its policy commitments. With its strong majority in Parliament the executive is subsequently able to secure its policies into law and this is predominately through control of its members rather than 'active engagement with the issues [26]. Party members are told by government whips to vote in accordance with the party line and are unlikely to deviate from this requirement as supporting the party is beneficial; they are more likely to be promoted to a position within the executive. Almost all bills are approved by each House even if they are amended and by convention the Queen cannot refuse the royal assent.

Delegated legislation such as statutory instruments and orders in council are also a significant example of the legislative power of the executive; in particular 'Henry VIII clauses' of the parent act allowing statutory instruments to change the primary legislation itself. It is argued that these clauses go right to the heart of the key constitutional question of the limits of executive power'[27]. The Legislative Regulatory Reform Bill (LRRB) when introduced into Parliament contained many of these clauses which would have enabled Ministers to make delegated legislation amending, repealing or replacing primary or secondary legislation. It was termed the 'abolition of Parliament bill' because of the power it would give to Ministers; it also proposed limitations on Parliamentary scrutiny of these actions by Ministers.

Parliamentary scrutiny of the executive is of 'fundamental importance in ensuring that the government acts under the law and in accordance with the principles of constitutionalism and democracy' [28]. John Locke's theory of the consent of the governed [29] is such that a

government's legitimacy to use state power is only justified and legal when derived from the people. Therefore the executive should be accountable to Parliament, as a representative of the electorate.

The theoretical underpinning of this accountability is the convention of ministerial responsibility Collective responsibility is such that Ministers must publicly approve the Cabinets decisions or resign; this serves to strengthen the executive further by always showing a united front but does not enhance transparency. Individually Ministers must bear responsibility for the actions of their departments. There are various scrutiny mechanisms used to hold the executive and its Ministers to account for their actions; however their effectiveness is often doubtful.

Ministerial Question Time enables Members of Parliament to question government Ministers in the House of Commons. This method of obtaining information and scrutinising the actions of the executive is not a spontaneous affair'[30] as there is notice given of the questions to be asked. However there is strength in that the answers given are recorded and subsequently become a part of public records. The Ministerial Code outlines that 'ministers give accurate and truthful information to Parliament'[31] and that "ministers should be as open as possible with Parliament and the public [32] providing firm regulation on the answers to be given. Question Time is televised and it is arguable that this is successful at providing public insight of the executive being held to account. However it is problematic as the televised element leads to a theatrical and superficial occasion. Parliament may face difficulty in questioning the executive as there are various restrictions on the types of questions that can be asked; Ministers are only questioned on matters directly within their responsibility, with some subjects excluded completely such as the "personal powers of the monarch' and defence and national security [33]. Ministers can also refuse to answer questions on hods including cost of obtaining the inforntion or whether the question is in the public interest. They can also refuse to answer certain questions under the restrictions in the Freedom of Information Act 2000. Furthermore, if a Minister refuses to answer a question they cannot be pressed to answer it. These limitations on questioning are therefore problematic and prevent proper scrutiny: "the obtaining of information, by MPs on behalf of their constituents, lies at the heart of the scrutiny process... ill-informed debate will not be effective [34]. As questions are not limited to the opposition party it is arguable that as 'sycophantic questions are frequently asked [35] Question Time is used by the executive to promote its own views and party achievements. This does however have the benefit of raising party morale and confidence in seeing the party leaders perform well in Parliament. Although this then becomes more about the political relationship rather than scrutiny, with the parties trying to expose weaknesses in each other. Written questions are arguably a more effective mechanism for obtaining information rather than oral questions. The "Cash for Questions' scandal was also problematic as Members were being paid to table certain questions for Ministers and therefore not effectively scrutinising their actions. Its reputation for holding Ministers to account was also somewhat ruined.

For Prime Minister's Question Time questions are notified in writing and this first formal, open question is usually to ask the Prime Ministers engagements for the day providing a neutral peg on which to hang a supplementary, and real, question' [36]. The wide range of supplementary questions asked, without notice, means the Prime Minister needs to be able to demonstrate his competence across a full range of government policy [37] and this spontaneity provides stronger scrutiny. However Prime Ministers Question Time is allocated only 30 minutes per week: providing a very short amount of time for questioning.

Various debates on the floor of the House of Commons are also an opportunity for scrutiny. They are often used to express the view of an individual Member and the support for this view attracting public interest and media coverage; subsequently pressure is placed on the government to respond

depending on its support. However debates are limited by the adversary framework in which they are held[38] and Ministers are often not to be questioned on their responses which is problematic us it prevents deeper questioning on the issues. A vote on a motion of no confidence is arguably the most effective at holding the executive to account; if the government is defeated the convention is that it must resign or seek dissolution of Parliament and call a general election. Parliament therefore does have ultimate power in withdrawing its confidence however this is not really a threat due to party discipline; it is more likely to be of influence on the government. A vote of no confidence is rare and even more rarely successful; the last time a government lost such a vote was in 1979 where the Callaghan Government resigned and called a a general election.

Select committees ‘examine the expenditure, administration and policy of the principal government investigate without government approval. Select departments[39] and also investigate other matters of public interest or concern. They are composed, by convention, of backbenchers and this theoretically increases their independence, they committees also have the power to ‘send for persons, papers and records’ [40] to assist in their work are also free to decide which matters to and often provide highly influential reports, however they are perhaps more successful in drawing media and subsequently public attention to issues of importance. The party whips also “have great influence, if not total control, over membership 141] chairmanship is open to any party and it is therefore possible it will be chaired by an executive party member- creating the problem of further dominance within the committee. Committees can also only investigate a small proportion of the activities of the department as they are constrained by time and with each department having its own committee; it is more difficult to investigate issues that cut across several departments. They are also only capable of advising on matters and with no powers to impose sanctions, this is problematic as it does not allow active control. Select committees are also subject to several limitations, such as that there is no obligation that the government should cooperate with them; when the select committee on defence started its inquiry into the Westland Helicopter affair”, the government refused to allow witnesses from the Department of Trade and Industry to give evidence. They justified this in saying that giving evidence would have major implications for the conduct and relations of the government. Civil servants have often been forbidden from appearing on the grounds of national security or excessive cost’ [42]. This is problematic as the executive is protected from real scrutiny by ‘shielding the inner workings of government’ [43].

Britain’s unwritten constitution is problematic as its basis on conventions enables the executive to inherit the legal sovereignty of Parliament and subsequently it is ‘the dominant institution to which the other two institutions react’ [44]. Parliamentary scrutiny does not control the executive, it merely reacts when necessary. This is problematic as it is one of the checks and balances in place to prevent the concentration of power that Montesquieu warned would be a threat to liberty’. The executive often appears to abuse its power through its dominance of the legislative process to pass legislation for its benefit and even dominate the mechanisms for its own scrutiny. Lord Hailsham’s description of an ‘elective dictatorship’ appears to be the problematic reality.