FRENCH CONSTITUTIONAL COUNCIL AND EUROPEAN LAW

In 1996, the current President of the French Constitutional Council (the Conseil Constitutionnel), Pierre Mazeaud, wrote:

> It is necessary to amend the Treaty of Rome itself to insert into it an exception to the supremacy of Community law when the latter infringes the constitution of one of the Member States. When the Court of Justice finds that a Community act is contrary to a constitutional rule or principle in a Member State, it should exempt that state from applying it within its territory . . .[1]

No such amendment has been made, yet the question of the relationship between the supremacy of European Union law and the French Constitution has come to a head at the beginning of his presidency. In a series of decisions in the summer and autumn of 2004, the Conseil Constitutionnel has adopted an historic compromise between the supremacy of European Union law and the supremacy of the national Constitution.[2] The result is a minimal standard of constitutional review for national laws that merely seek to implement binding European legislation. In brief, such laws can only be challenged when they manifestly infringe a constitutional provision. But, in relation to the new European Constitution, the Conseil has affirmed more explicitly than previously the supremacy of the national Constitution, whilst accepting the new article I-6 CT affirming the priority of European Union law. So the Conseil has thereby re-affirmed the need to affirm and give effect to apparently contradictory views of legal supremacy. Whilst this reinforces Sacco's view that French lawyers are ultimately pragmatic,[3] a better view would be that of Ost and Van de Kerchove,[4] namely that talk of a pyramidal hierarchy of norms is no longer appropriate and that we need to conceive of law existing in networks of relationships with each other. The concept of a pre-ordained hierarchy is replaced by that of a network of legal rules and principles which are related to each other operationally when key decisions have to be made in individual situations.

The French Constitution of 1958 contained a tension between two traditions. The internationalist tradition, set out in Article 55, provides that 'duly ratified or approved treaties or agreements have a higher authority than *lois*, subject, for each treaty or agreement, to its implementation by the other party'. This monist idea was carried over from the French Constitution of 1946[5] and has enabled France to adhere to a series of

[1] P Mazeaud *Le Monde* 20 Jan 1996 p 13, reproduced in (1996) 28 Revue française de droit constitutionnel 702–4. The proposed constitutional amendment forbidding the Government from approving European legislation which infringed the French Constitution is set out in 28 Revue française de droit constitutionnel 705–6.

[2] The importance of the decision can be seen by the press coverage, eg H Gattengo and C Jakubyszyn 'Le droit européen prime desormais sur la Constitution française' *Le Monde* 16 June 2004.

[3] R Sacco *La comparaison juridique au service de la connaissance du droit* (Economica Paris 1991), 139.

[4] F Ost and M Van de Kerchove *De la pyramide au réseau* (Facultés Universitaires Saint Louis Brussels 2002) 184.

[5] See G Vedel *Droit constitutionnel* (Sirey Paris 1949) 529: There cannot be sovereignty of the law and of the national legislator in matters in which the State has voluntarily accepted the limitation of that sovereignty. (But he then explained that ratification involves an act of the legislator in the first place, so the sovereignty of the legislator is in fact preserved.)

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jsb48@cam.ac.uk

international treaties creating organizations such as the UN and the ECSC and EEC (as they were then called), as well as those dealing with fundamental rights and refugees. The Gaullist tradition (to which M. Mazeaud belongs) objected to the way the Treaty of Rome was enacted, because it considered that it infringed French sovereignty.[6] Accordingly, Article 54 of the Constitution permits the President; the Prime Minister; and the president or 60 members of either chamber of Parliament; to refer treaties to the Conseil Constitutionnel before they are ratified, in order to assess whether they are compatible with the Constitution. Where 'the Conseil Constitutionnel declares that an international agreement includes a clause contrary to the Constitution, authorization to ratify or to approve it may only be given after a revision of the Constitution.' In such a situation, the Government is faced with the choice of abandoning the treaty or securing a constitutional amendment. A key example of this second process was the ratification of the Treaty of Maastricht in 1992. On a reference from President Mitterand, the Conseil found that a number of provisions were incompatible with the Constitution, notably on economic and monetary union and the right to vote in local elections of citizens from other EU States. As a result, a new chapter of the Constitution was enacted to permit these activities. This chapter is headed by Article 88–1, which proclaims:

> The Republic shall participate in the European Communities and in the European Union, composed of states which have chosen freely to exercise certain of their competences in common in accordance with the treaties which created them.

One of the key features of the 2004 decisions of the Conseil Constitutionnel has been to take this provision to be the core text governing the relationship between EU law and the French national legal order.

The Gaullist tradition has set the Conseil Constitutionnel as the guardian of national sovereignty when treaties are ratified. But, of course, treaties are a rare occurrence in the life of EU law, and much of that law comes in the form of directives and regulations. In requiring minor modifications to the French Constitution in the Maastricht decision,[7] was the Conseil merely straining the gnat, but then letting the French legal order swallow the camel? Is it possible for a French court to refuse to implement an EU law on the ground that it violates the Constitution? Or has ratification precluded any such discussion?

The French courts can give no simple reply. The Conseil Constitutionnel only has jurisdiction over *lois* voted on by Parliament. It has no jurisdiction over other domestic legislation or administrative decisions. There is no equivalent of the reference by ordinary courts to the constitutional court that exists in Germany, Spain and many other jurisdictions (including under Scottish devolution). As a result, it is for the ordinary courts to determine the status of legislation in relation to European law on their own. Given that the administrative and civil courts are not co-ordinated in this regard, it is possible for there to be divergent voices. Indeed, this was the case throughout the late 1970s and 1980s. The Conseil Constitutionnel declared in its *Abortion* decision of 1975[8] that it had no competence to examine the compatibility of *lois* in relation to

[6] J Bell *French Constitutional Law* (OUP Oxford 1992) 28.

[7] id *French Legal Cultures* (Butterworths London 2001) 200: CC decision No 92-308 DC of 9 Apr 1992, Rec 55.

[8] CC decision no 74-54 DC of 15 Jan 1975, Rec. 19, see Bell *French Constitutional Law* 75 and 318: 'Considering that a *loi* contrary to a treaty is not, as such, contrary to the Constitution…' (considérant 5).

treaties signed by France—its jurisdiction is limited to ensuring that they are compatible with the national Constitution. By contrast, the Cour de Cassation was prepared to declare that national laws were subordinate to community law in 1975. In its electoral jurisdiction, the Conseil Constitutionnel accepted this in 1988, followed by the Conseil d'État in 1989. This leaves the position that the national supreme courts will give priority to European law, but the Conseil Constitutionnel will not treat a law that offends European obligations as unconstitutional. A leading current member of the Conseil Constitutionnel, Mr Dutheillet de Lamothe described the position as creating a form of constitutional review operated by the ordinary courts:

> In not ensuring itself the primacy of a treaty over a loi, but leaving it to the ordinary courts to ensure this supremacy, the Conseil Constitutionnel has opened for these courts *a new form of constitutional review*.

Of course, from the strictly legal perspective, it is not constitutional review but review of compatibility with a treaty, and it does not have the same consequences. It cannot lead to the censure of a *loi*, preventing it being promulgated. It results simply in the fact that the judge, in specific litigation, sets aside the national provision from a *loi* or *règlement* which it considers contrary to European law.[9]

Formally, if not substantively, validity according to the Constitution and validity according to EU law are seen as distinct. In Lamothe's phrase, there is a divorce, but like many modern couples the two maintain a peaceful and friendly relationship.[10] This divorce is entrenched by institutional factors. The Conseil Constitutionnel has no power under its statute to refer cases to Luxembourg. In addition, it is subject to a very tight timescale for reaching a decision. Because it only deliberates in abstract and before legislation is promulgated by the President, it has a maximum of 30 days in which to decide on ordinary cases, reduced to a week for urgent matters, such as finance laws. There is no time for the Conseil to refer a case to Luxembourg and for Luxembourg to reach a decision before the time limit has expired. This is only possible where the case is one of concrete review—a decision in relation to a specific legal dispute that does not threaten the validity of the legislation as a whole. The French compromise is that the national *loi* comes into force and can then be challenged in relation to a specific dispute before the ordinary courts. At this point, there may well be a reference to the ECJ. In practice, the Conseil Constitutionnel has no formal procedure and the reporting judge is free to take such steps as she or he wants to be informed before drafting a judgment for the Court. It is therefore possible for the reporter to make informal inquiries of members of the ECJ to gauge how that Court might view the *loi* under consideration. The judgment can then be drafted to minimise any conflict between national and European laws.

The gradual picture reached before Maastricht enabled France to maintain its own fidelity to the Constitution and to be fully European in implementing EU legislation. Indeed, in areas where the French Parliament was slow in implementing directives, the ordinary courts succeeded in interpreting French law so as to achieve compatibility with the unenacted directives. So the question of what would happen if a European directive or regulation was incompatible with the Constitution remained fairly theoretical.

[9] O Dutheillet de Lamothe 'Le Conseil constitutionnel et le droit européen' (2004) 57 Revue française de droit constitutionnel 23, 27.
[10] ibid.

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Discussion of the European Constitution and the new presidency of the Conseil Constitutionnel have brought matters to a head. Pierre Mazeaud, a leading Gaullist politician, became president in 2004 with an avowed view that France ought to give priority to its own Constitution. Spice was given to this mix by the fact that Giscard d'Estaing, architect of the Convention and its draft Constitution, ceased to hold political office in June 2004 and announced on 20 May that he would begin to sit as ex officio member of the Conseil. The decision of 10 June 2004 came at this critical juncture. Its sensitivity was shown by the decision of the Conseil not to make its decision public until 15 June, after the European elections scheduled for 13 June. The decision n° 2004-496 DC concerned a *loi* passed by the French Parliament to implement Directive 2000/31 EC on e-commerce. A key problem raised was the compatibility of its provisions with freedom of expression. In particular, Article 6-I of the *loi* provided that the website host was not to be liable criminally or civilly unless it had knowledge that a posted message was unlawful and it had failed to act promptly to render access to the message impossible. The French text was ambiguous. Members of the French Parliament and commentators had thought that this provision created a new, automatic liability in such circumstances. By contrast, the travaux préparatoires of the directive clearly indicated that the circumstances merely aggravated an existing basis of liability, but created no new offences. This second interpretation left fewer problems with freedom of expression, and this was preferred by the Conseil. The Conseil could have contented itself with an interpretative approach that excluded the creation of any new offence and thus any possible conflict between the *loi* and the Constitution over the question of whether the criminal offence was sufficiently defined and whether the procedure for removing unlawful messages by the website host complied with constitutional safeguards for the freedom of expression. More generally, it decided to set out a general principle on the relationship of EU law and French Constitutional law for the first time. Under this principle

> the transposition of a directive into internal law results from a constitutional requirement which can only be impeded because of a provision expressly contrary to the Constitution; as, in the absence of such a provision, it is only for the Community court, seised by means of a preliminary reference, to ensure that the Community directive respects both the competence set out in the treaties and the fundamental rights guaranteed by article 6 of the Treaty on European Union.[11]

As has been mentioned, the 'constitutional requirement' here is Article 88-1of the Constitution, introduced in 1992. This article is broader than Article 55 and gives a legal status to all European legislation.[12] Whereas the Conseil had said in its decision n° 98-405 DC of 29 December 1998 that it was not its role to examine whether a *loi* was compatible with a directive, the present decision suggests that the duty to implement a directive is a constitutional requirement, so this has left French lawyers perplexed as to whether the Conseil intends to examine whether legislation is correctly implementing a directive.[13] After all, where the implementation of a directive falls

[11] Considérant 8 of the decision.

[12] A rather extreme interpretation would be to suggest that the logic of this change of constitutional basis for the status of EU legislation would be to give the whole of Community law constitutional status and to permit any national law to be reviewed by the Conseil constitutionnel for its compatibility with EU law: J Roux 'Le Conseil constitutionnel, le droit communautaire derive et la Constitution' RDP 2004, 912 at 923–4.

[13] See B Genevois 'Le Conseil constitutionnel et le droit communautaire dérivé' Rfda 2004, 651.

within the legislative competence of the executive under Article 37 of the Constitution, the review exercised by the Conseil d'Etat would certainly cover this issue of whether the directive had been properly transposed. Since this issue was not directly at stake, it will have to be seen whether the Conseil will go back on its case law. The suggestion from one of its members, Dutheillet de Lamothe, that there would be no direct reversal of *Abortion Law,* case law suggests that the 1998 decision still stands, but is heavily criticized. [14] In relation to the European Convention on Human Rights, the Cour de Cassation and the Conseil d'État have held that the Constitution retains its priority.[15] But only the Conseil d'État has held that the same applies to EU legislation.[16] Certainly, the Conseil does not want to become a judge of community law.

Some have welcomed the decision as ensuring legal certainty, since the EU directive effectively makes the questioning of the constitutionality of the implementing *loi* almost impossible.[17] A leading commentator on constitutional law, Genevois, is critical of the formulation that the Conseil will only review transposing legislation that infringes 'express provisions' of the Constitution. He considers correctly that the clarity of formulation of provisions of the Constitution in no way affects their normativity. Some fundamental principles are not found in express texts.[18] In his view, the Conseil should have said that it would only strike down a *loi* that infringed specific constitutional provisions.[19] It is not clear to me that this would be any more successful, and the real thrust of the Conseil's approach is to suggest a minimum control over European legislation. The control over administrative discretion is often described as varying in intensity according to a sliding scale.[20] The same could be said for constitutional review. Where fundamental liberties are at stake, there is often very strict scrutiny. In normal control, the question is whether the text is compatible. In the sort of minimal control proposed by the Conseil here, there is review only where there is a manifest violation of the Constitution. This is, after all, the sort of control exercised in other countries, such as Sweden. Under Article 11, § 14 of the Swedish Constitution, a court or an administrative agency can only refuse to apply a provision which is obviously and manifestly contrary to the Constitution.[21] It offers a weaker obstacle to the implementation of European legislation than the 'reserve power' of review which the Italian and German Constitutional Courts have maintained in order to protect fundamental rights.[22] The Conseil was clearly aware of the position of the Austrian Constitutional Court, which has treated EU legislation as immune from

[14] Above n 9, 25 ; cf Commentary, AJDA 2004, 2261 at 2265.

[15] CE Ass plén, 2 June 2000, *Mlle Fraisse*, D 2000 J 865, note Mathieu et Verpaux; CE Ass, 30 Oct 1998, *Sarran*, Rfda 1998, 1081 concl Maugüé.

[16] CE 3 Dec 2001, *Syndicat national de l'industrie pharmeceutique*, AJDA 2002, 1219 note Valenbois. This is in line with the broader thrust of the *Cohn-Bendit* decision of 1978, for which Genevois was commissaire du gouvernement, and Dutheillet de Lamothe was an approving commentator.

[17] See D Chamussy AJDA 2004, 1937 at 1940 and B Mathieu, D 2004 Chr 1739.

[18] See fundamental principles recognized by the laws of the Republic. A similar criticism of the concept of a 'express provision' of the Constitution is offered by H Oberdorff, 'Le Conseil constitutionnel et l'ordre juridique communautaire: coopération et contrôle' RDP 2004, 869.

[19] Above n 13, 657.

[20] See Bell 'The Expansion of Judicial Review over Discretionary Powers in France' [1986] PL 99 at 103–7.

[21] See further, I Cameron 'The Protection of Constitutional Rights in Sweden' [1997] PL 488.

[22] *Brunner* [1994] 1 CMLR 57, § 13.

constitutional review.[23] The French have not wished to go that far, but a large degree of freedom from review is created.

The only provision in the decision that was struck down was an ancillary amendment to the press law of 1881, dealing with the limitation period for penalties and the right of reply arising from unlawful messages posted on websites. Whereas under the existing press law, the limitation period of 3 months runs from the date of publication of written media, the new *loi* stipulated that the limitation period would run from the date on which the electronic message was taken down from the website. This was not required by the directive, but was considered by the legislator a useful piece of tidying up. It did, however, introduce an inequality in treatment, which the Conseil Constitutionnel did not consider to be justified.

The issue of how derived European legislation and the Constitution could be reconciled was raised immediately in a number of decisions. The Conseil Constitutionnel mainly chose to restate its recent pronouncement without seeing the need to declare any implementing *loi* unconstitutional. For example, in its decision n° 2004–499 DC of 29 July 2004 on the treatment of personal data, the Conseil was faced with a *loi* implementing directive 95/46 EC. Given that the *loi* merely made the necessary amendments to the existing French law of 1978 in response to the unconditional and precise provisions of the directive. The new approach was neatly re-formulated in decision n° 2004–498 DC of 29 July 2004 on bioethics. Directive 98/44 CE of 6 July 1998 on the protection of biotechnological inventions was implemented by a French *loi*.[24] The Conseil remarked that 'since the criticized provisions are confined to drawing the necessary consequences from unconditional and precise provisions of art. 5 of the directive . . ., it is not for the Conseil Constitutionnel to pronounce on their validity'.

The obvious importance of the decision of 10 June 2004 is the timing. Coming in the middle of the final stages of the approval of the European Constitution, the Conseil Constitutionnel was clearly staking out a position for the future. This is confirmed by the relative ease with which it accepted the supremacy provisions of the European Constitution when this treaty was referred to it in November 2004. In its decision nº 2004–505 DC of 19 November 2004, the Conseil ruled that the label 'Constitution' given to the new instrument did not affect its status as a treaty, since 'this label has no effect on the existence of the French Constitution and its place at the summit of the internal legal order'.[25] At the same time, the Conseil relied on Article 88-1 of the Constitution to establish that the constituent power had already accepted the existence of a community legal order that is integrated into the internal legal order and is distinct from the international legal order. In a rare case of citing its own previous decisions, the Conseil used the four decisions of 10 June, 1 July and 29 July as the benchmark for the character of the primacy of European Union law. Interpreting the provisions of the Treaty in the light of the declaration annexed to it, the Conseil held that Article I-6 of the European Constitution 'does not confer on the principal of the supremacy a meaning other than that which it had previously'.[26] In this light, given that there was no

[23] See J Schwarze (ed) *The Birth of a European Constitutional Order* (Nomos Baden-Baden 2000) 362–6.

[24] In this decision, as in CC decision no 2004-497 DC of 1 July 2004, *Telecommunications Package*, Giscard d'Estaing did sit as a member of the Conseil.

[25] Considérant 10.

[26] Considérant 12.

change to the character of the Union, there was no need to amend the French Constitution to deal with this aspect of the new treaty.

As has been noted by Anne Levade,[27] the Conseil Constitutionnel has used the interpretation of texts to ensure that directives are compatible with the Constitution. The compatibility of the provisions of the Constitution and EU law depends on how the two are interpreted. The Conseil can effectively impose its interpretation on French courts, but it cannot exercise any influence over the ECJ or the European Court of Human Rights. If they change their interpretations or disagree with the Conseil Constitutionnel's view, then a conflict between European law and constitutional law cannot be avoided. The interpretative approach can be seen in relation to the Charter of Fundamental Rights as it appears in Part II of the European Constitution. The Conseil relied on paragraph 4 of Article II-112, which provides that the Charter is to be interpreted consistently with the constitutional traditions of the Member States. It therefore concluded that Articles 1–3 of the French Constitution were respected to the extent that they preclude the recognition of collective rights to groups defined by ethnic origin, culture, language, or belief. This is consistent with the Conseil's view on the 'rights' of minorities, especially linguistic and cultural minorities, but depends on a particular view of the social unity of France, which might not be shared in Belgium or even the UK. This focus on interpretation is seen by the very detailed focus on secularism ('*laicité*') in the decision on the European Constitution and especially the Charter, a preoccupation which few other countries will share.

The decision on the European Constitution cites in its visas the judgment of the European Court of Human Rights in the case of *Leyla Sahin v Turkey*,[28] a recent decision on secularism and human rights. The Praesidium of the Convention had declared that the Charter would be interpreted in the light of national constitutional traditions. Article II-70 CT protects religious freedom and should be interpreted in this way, so as to respect the French constitutional tradition. This had been the approach of the European Court of Human Rights applying Article 9 of the European Convention in the *Leyla Sahin* case. Here, in the light of the Turkish secular tradition a female student could not complain that the wearing of the Muslim veil was not permitted in the university. Interpreting the Charter in this light, the Conseil concluded that the French view of secularism would be permitted 'which prohibits anyone from relying on religious beliefs to exempt themselves from general rules governing the relationships between public authorities and individuals'.

This approach of using interpretation to avoid conflict with the Constitution was used in relation to Articles II-107 (fair trial including a public trial), II-110 (no prosecution after acquittal within the union), and II-112 (proportionality in restrictions on rights). As a result, the Charter was declared compatible. But, of course, this relies on the interpretations presented by the Praesidium or adopted by the Conseil Constitutionnel being those which prevail within the Union, after the Constitution comes into force.

The limits of the scope for achieving compatibility through interpretation were shown in relation to the provisions on institutional changes that gave greater powers to

[27] 'Le Conseil constitutionnel aux prises avec le droit constitutionnel dérivé' RDP 2004, 889. On reservations of interpretation generally, see Bell *French Constitutional Law* 53–4.

[28] Case No 4774/98 of 29 June 2004.

EU institutions. The Conseil did not consider that the principle of subsidiarity in Article I-11 was sufficient to prevent the use of the powers of the European Union expanded through the European Constitution potentially interfering with areas of national sovereignty.[29] New areas of competence for the European Union were identified as effecting a transfer of powers from national sovereignty. These areas included border controls (Article III-265), judicial cooperation in civil and criminal matters (Article III-269, -270 and -271), as well as the creation of the European Prosecutor (Article III-274). Equally, changes in the voting regime for other areas, moving to qualified majority voting rather than unanimity (which reduced French scope to object). This included judicial co-operation in criminal matters, the functioning of Eurojust and Europol or on proposals from the European Foreign Minister.[30] Giving decision-making powers to the European Parliament through the 'reinforced cooperation' procedure in the use of the Euro (Article III-191) and in the European area of liberty, security and justice (Article III-419) would also reduce the scope of French initiative and so reduce national sovereignty. The reduction of national initiative was also found in the provisions which required a joint initiative of a quarter of Member States rather than just of individual states in the area of liberty, security and justice, Eurojust or Europol.[31] A similar limitation of national initiative was found in the 'passerelle clause' enabling a transfer of decision-making from unanimity to qualified majority voting by a decision of the European Council, a decision which would not be susceptible to question before the Conseil Constitutionnel to ensure that it was compatible with the Constitution.[32] The Conseil betrays here a suspicion about how the new powers might be used and, in the absence of the kinds of specific reassurance found in the declarations of the Praesidium or in the existing case law of the ECJ, the Conseil required the revision of the French Constitution to permit explicitly the transfers and limitations on sovereignty identified. But there is also a desire that any change in the institutional structures of the French Constitution is authorized explicitly. Thus the new powers accorded to the French Parliament to object to the simplified revision of the Treaty or to refer matters to the European Court of Justice, given in Article IV-444 CT, also required amendment to the Constitution.

Overall, in both the four decisions on directives and in relation to the European Constitution, the Conseil has generally strained to find compatibility between European law and French constitutional law. The strategy of minimal control over issues of potential conflict between derived European legislation and the Constitution is innovative, whilst not going as far as the Austrian Constitutional Court in accepting an effective immunity for national legislation implementing directives from constitutional review. The justification for leaving open the possibility of constitutional review is made explicit in the decision on the European Constitution—the view, shared by the German Constitutional Court, among many, that European law gains its authority from the national Constitution. As the Conseil also makes clear in its November decision, despite its title, the European Constitution is not, from a national point of view, a

[29] Considérant 25.
[30] Art III-270, -271, -273, -276 and -300 § 2 (b) CT.
[31] Art III-264, -273, -275, -276, and -277 CT.
[32] A number of provisions on the areas if judicial cooperation in criminal matters and common foreign and security policy were identified here in considérant 34 of the Conseil's decision, as well as the generalized 'simplified revision' procedure of Arts IV-444 and IV-445. The necessary amendments to the Constitution were made by the Constitutional Law of 1 March 2005.

Constitution at all, whatever the Conseil's ex officio member, absent for that decision, might think. In a country whose constitutional writers have been strongly influenced by the Kelsenian hierarchy of norms, we find ourselves faced with two hierarchies of norms, depending on whether you are sitting in the rue de Montpensier in Paris or in Luxembourg. It seems that, as the Belgians Ost and Van de Kerchove have suggested, the pyramidal hierarchy of norms is effectively replaced by a network of norms that co-exist without a proper hierarchy.[33] Indeed, it may be that the co-existence of the modern couple that Dutheillet de Lamothe identified may offer a sensible, if sometimes uncomfortable, alternative to the concept of undivided sovereignty. The constitutional order of the EU and that of the Member State can adjust happily to each other, as long as the ultimate question of who is sovereign is never put to the test.

JOHN BELL*

[33] Above n 4.

* Professor of Law, University of Cambridge.

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