What is Parliamentary Sovereignty?

Quebec's Bill 96, *An Act respecting French, the official and common language of Québec* would add the following paragraph to the preamble of the *Charter of the French Language*:

> "Whereas, in accordance with parliamentary sovereignty, it is incumbent on the Parliament of Québec to confirm the status of French as the official language and the common language and to enshrine the paramountcy of that status in Québec's legal order, while ensuring a balance between the collective rights of the Québec nation and human rights and freedoms."

In addition, the following was included in the preamble to Bill 21, *An Act respecting the laicity of the State:*

> "AS, in accordance with the principle of parliamentary sovereignty, it is incumbent on the Parliament of Québec to determine the principles according to which and manner in which relations between the State and religions are to be governed in Québec."

Parliamentary supremacy – although it's referred to as sovereignty in both the preambles above – represents a core element of United Kingdom constitutional law. This is a principle to provide the legislative branch of government, Parliament, with the ultimate legal authority to create (or repeal) any law. In theory, British courts cannot overturn or change laws passed by Parliament. This is because the power to make laws is vested with the elected House of Commons, with the House of Lords reviewing legislation. British courts doled out the monarch's (the executive branch of government) justice. In a nutshell, if the courts could overturn laws passed by the legislative branch, the monarch would be able to make an end-run and be empowered to thwart the will of the House of Commons. This system was carefully built on a series of compromises following the English civil wars of the 17th Century….

Because Canada has a "Constitution similar in Principle to that of the United Kingdom (preamble, *Constitution Act, 1867*)," both our federal and provincial legislatures possess a level of Parliamentary supremacy. However, unlike the United Kingdom, Canada is a federation with constitutionally grounded legislative powers delegated between the federal and provincial levels. So, in Canada, there has always been a limit to the principle of Parliamentary supremacy.

When Canada's Constitution was repatriated in 1982, it contained an entrenched bill of rights, the *Canadian Charter of Rights and Freedom*s. The *Charter* enshrines the fundamental freedoms and rights of all Canadians. It 'binds' – or limits the powers of – both levels of government, federal and provincial.

In effect, the principle of Parliamentary supremacy (limited though it was) was replaced by Constitutional supremacy: the "…sole claim to exercise lawful authority rests in the powers allocated to [the legislative and executive branches] … under the Constitution, and can come from no other source (*Reference re Secession of Quebec* [1998] 2 SCR 217 at para 72)."

Elements of Parliamentary supremacy still exist and remain important. Section 33 of the Canadian Charter of Rights and Freedoms for example permits legislatures the ability to temporarily permit law that otherwise offend Charter rights from operating. And the associated concepts of Parliamentary privilege and immunity are vital because they ensure that parliamentarians (whether federal or provincial) can speak freely within their respective chambers without fear of prosecution or civil liability.

The great French political philosophers of the 17th and 18th Centuries exerted a profound influence on the development of written constitutions for Russia, Poland, and post-revolutionary France. Ironically, they advocated for firm and widely understood limitations on government power – like the kinds of constraints imposed by Canada's Constitution. Canada's constitution is based on this principle; that the power of legislative and executive branches of government must be constrained. In a liberal democracy like Canada, this power to constrain the legislative and executive branches of government rest with the courts.

The role of the courts in the application of the *Charter* is contained in section 24(1), which reads, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." And Section 52(1) of the Constitution Act, 1982, provide that, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Individuals may therefore seek remedy from the courts on government actions that infringe upon their rights or challenge the constitutionality of a law. So, it is the judiciary's role in our system of government to determine what laws mean, whether they are constitutional, and adjudicate legal disputes. They are the only branch of government empowered to provide remedies where the Constitution has not been respected by the legislature or executive branches.

Bill 96, An Act respecting French, the official and common language of Québec pre-emptively invokes the notwithstanding clause of the *Canadian Charter of Rights and Freedoms* as did the *Act respecting the laicity of the State* (Bill 21). Bill 96 expressly removes the courts from a role in balancing collective and individual rights, leaving this solely in the hands of the legislature, on the grounds of unchecked Parliamentary supremacy. This upends our current system of government and is an affront to the rule of law and liberal democratic governance, the subject of our next blog post.