

The legislative sovereignty of the Westminster Parliament

Introduction

Definition

The theory of ‘continuing’ sovereignty, as explained by Professor Dicey, is that there are no limits to the legislative competence of Parliament. Each Parliament is absolutely sovereign in its own time and may legislate as it wishes on any topic and for any place. That which has been enacted by Parliament has supreme force and cannot be invalidated or changed by any other domestic or external authority. As so outlined, the doctrine has been the very foundation of the British constitution since at least the latter days of the nineteenth century. Recent dicta suggest, however, that judicial attitudes may be changing and that support for the doctrine, at least in this wholly unqualified form, may not be as assured or predictable as has for long been assumed. These matters are considered in greater depth towards the end of the chapter.

The United Kingdom has no overriding written constitution against which the validity of Parliament’s enactments may be tested. It follows that the function of the courts in relation to Acts of Parliament is limited to interpreting and applying that which has been placed before them bearing on its face the official consents of the Commons, Lords and Monarch.

All that a Court of Justice can do is to look at the ‘parliamentary role’; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which was introduced in Parliament, not what was done previous to its introduction, or what passed in Parliament during its stages through both Houses (per Lord Campbell, *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710).

It has also been said that even if ‘an Act has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the courts are bound to obey it’ (per Willis J, *Lee v Bude and Torrington Railway Co* (1871) LR 6 CP 577). The reluctance of the courts to ‘go behind’ how a statute was enacted is well illustrated by the facts of *Manuel v Attorney-General*, above. The case concerned a challenge made by representatives of the Indian nations of Canada to the Canada Act 1982. Their challenge was based, *inter alia*, on the Statute of Westminster, s 4, which provided that the Westminster

Parliament would not legislate for a dominion ‘unless it is expressly stated in the Act that the Dominion has requested, and consented to, the enactment . . .’. The Canadian Indians argued that as neither they nor all of the Canadian provinces had given their consent to the Canadian government’s request for the legislation, the enactment was inconsistent with the 1931 Act and therefore invalid.

The argument did not convince the House of Lords. The Lords pointed out that all the 1931 Act required was that legislation affecting a dominion should simply *state* that it had been requested and consented to by the dominion concerned, and that a formula of words to this effect was contained in the preamble to the 1982 Act. It was not open to the court, therefore, to question the quality, validity, or even factual existence of this consent. If the Act stated that it had been given, that was not something a court could inquire into notwithstanding the substance of allegations to the contrary.

History

The doctrine of the unlimited sovereignty of Parliament really began to evolve in response to the political settlement of 1688. Prior to this, in a less secular society than exists today, examples may be found of judicial dicta suggesting that parliamentary enactments were subordinate to divine law or the law of natural reason.

Whatsoever is not consonant to the law of God or to right reason which is maintained by scripture, be it Acts of Parliament, customs, or any judicial acts of the Court, it is not the law of England (per Keble J, *R v Lowe* (1853) 5 St Tr 825).

Other well-known cases in which courts claimed the authority to regard legislation as void if it offended against ‘common right or reason’ or against ‘natural equity’ would include *Dr Bonham’s Case* (1610) 8 Co Rep 114, and *Day v Savadge* (1615) Hob 85.

The ‘revolutionaries’ of 1688 had, however, no intention of transferring sovereign power from the King to a Parliament genuinely representative of the people. Legal sovereignty was indeed to be vested in Parliament, but in a Parliament which, at the time, was returned by a tiny electorate consisting of the propertied and landed élite. Parliament’s sovereign status did not, therefore, derive from its democratic authority in the modern sense.

The 1689 settlement did succeed, however, in establishing a ‘balanced constitution’ – that is, one dominated by a sovereign Parliament representative of the three principal estates or interests of the realm: Monarch, Lords and Commons. The enactment of valid legislation required the assent of each element. Hence no single estate could entirely dominate the others or legislate purely in its own interests.

Legal and political sovereignty distinguished

According to Dicey and others, while legal sovereignty or the power to issue commands in the form of laws which prevail against all others resides in Parliament, political sovereignty – particularly with the existence of universal adult suffrage – lies with the people. This is either expressed or generally implicit in the various doctrines of the social contract promulgated by Hobbes, Paine, Locke and others (see respectively *The Leviathan* (1615), *The Rights of Man* (1791), *The Treatises of Government* (1690)). The essence of the social contract is that individuals voluntarily submit themselves to the authority of government, and agree to limits on their freedom, in return for peace, order and a system of government which accords with the popular will. Should the government act in ways

which abuse the trust and authority deposited in it, then 'the people have a right to act as supreme, and continue the legislative in themselves or place it in a new form, or new hands, as they think good' (Locke, *op. cit.*).

Application

Express repeal

Parliament is not bound by its predecessors and may amend or repeal any previous enactments by passing legislation stating its intentions to that end. Hence, were an Act to provide that it was not to be repealed, or to be repealed only according to some special parliamentary procedure, it is generally agreed that this would not bind a subsequent Parliament which could repeal or alter it in the normal way.

Implied repeal

As a general rule, if an Act is partially or wholly inconsistent with a previous Act, then the previous Act is repealed to the extent of the inconsistency. It does not matter that the later Act contains no express words to affect the repeal or alteration. This is known as the doctrine of implied repeal.

The doctrine of implied repeal was applied in the following case.

Vauxhall Estates v Liverpool Corporation [1932] 1 KB 733

The plaintiffs claimed compensation for property which had been compulsorily purchased from them. According to the defendants, this was to be assessed in compliance with the Housing Act 1925. This was refuted by the plaintiffs. They argued that the assessment should be calculated according to the more generous terms contained in the Acquisition of Land (Assessment of Compensation) Act 1919 which stipulated expressly that its provisions were to prevail over any others passed or to be passed. The court felt bound to apply the 1925 enactment. It was not within the competence of the Parliament of 1919 to impose fetters on the legislative authority of those which followed it. The fact that the 1925 Act made no express reference to the 1919 Act provisions was irrelevant. These had, by implication, been repealed.

The doctrine was given succinct expression in a much quoted dictum from a case with similar facts two years later:

The Legislative cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal (per Maugham LJ, *Ellen Street Estates v Minister of Health* [1934] 1 KB 590).



Clearly, as was evident in the language of Maugham LJ, the doctrine as originally conceived was understood to permit of no significant exceptions. Recent developments suggest, however, that it should now be understood as describing a general rather than an absolute rule and that a major departure from it is in the process of development in relation to what have been called 'constitutional statutes'. The argument here appears to be

that those statutes which were of fundamental importance in the shaping of the constitution and the rights guaranteed to those subject to it should only be repealed or altered by a clearly expressed intent to that end in subsequent legislation – an idea obviously premised on the view that, as the doctrine of sovereignty in general is judge-made, it remains open to the judges to adapt it to changing political and historical circumstances.



This modified version of the doctrine of implied repeal was articulated most clearly by Laws LJ in *Hunt v London Borough of Hackney; Thoburn v City of Sunderland; Harman v Cornwall County Council; Collins v London Borough of Sutton* [2002] EWHC (Admin) 195 (the ‘Metric Martyrs’ case).

Hunt v London Borough of Hackney; Thoburn v City of Sunderland; Harman v Cornwall County Council; Collins v London Borough of Sutton [2002] EWHC (Admin) 195

The case concerned a number of market traders who had been convicted of selling goods by imperial measurements, i.e. pounds and ounces, contrary to regulations made under the European Communities Act 1972, s 2 (ECA). These regulations gave effect to a European directive requiring the sale of goods in metric measurement only. By way of defence, the traders relied on the Weights and Measures Act 1985, which expressly permitted the use of both the imperial and metric systems. This, it was claimed, repealed impliedly any power in s 2 of the 1972 Act to make any regulations prohibiting the use of imperial measurements and to insist on pain of legal penalty that traders must use the metric system.

In terms of the traditional doctrine of implied repeal, this argument had much to commend it. Laws LJ, however, was of the view that the 1972 Act was a ‘constitutional statute’ and, as such, not subject to implied repeal. Given its clarity, significance and modernity, his reasons are worth quoting in full:

In the present state of its maturity the common law has come to recognise that there exist rights which should be properly classified as constitutional or fundamental . . . We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes . . . In my opinion a constitutional statute is one which (a) conditions the legal relationship between the citizen and the state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights . . . The special status of constitutional statutes follows the constitutional status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this category. It incorporated the whole corpus of Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community Law. It may be that there has never been a statute having such profound effect on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute . . . Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s actual – not imputed, constructed or presumed – intention was to affect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to the effect of the result contended for was irresistible.

Retrospective legislation

Parliament has the power to legislate retrospectively as well as prospectively. This means that Parliament can render illegal and impose penalties on actions which were perfectly lawful when they were committed. Also, actions which were unlawful at the time of commission, may be rendered lawful or not subject to any legal sanction or proceedings.

In *R v Londonderry Justices, ex parte Hume* [1972] NI 91, the Court of Appeal in Northern Ireland ruled that the Civil Authorities (Special Powers) Act 1922 (the principal emergency powers statute in force in Northern Ireland when the recent 'Troubles' began), conferred powers of arrest and detention on members of the RUC (the Northern Irish police) but not on British military personnel. This rendered illegal the arrests and detention of all those who had been taken into custody by the army – including those hundreds of suspects who had been 'rounded-up' in the internment operation of August 1971 and who were being held in internment camps. Within 48 hours of the decision the Westminster Parliament had enacted the Northern Ireland Act 1972. This provided that the armed forces were possessed of the necessary powers of arrest at the relevant time. The alternative would have been to release all the detainees.

Another famous example of legislative overruling of an 'awkward' judicial decision occurred in 1965. In *Burmah Oil v Lord Advocate*, above, the House of Lords held that the Crown was bound to compensate those whose property had been destroyed by British forces during the Second World War – except where this had occurred during the course of a battle. The decision would have resulted in a massive drain on the country's financial resources. Retrospective parliamentary intervention followed in the form of the War Damage Act 1965. The preamble to the Act recited that its purpose was to 'abolish rights at common law to compensation in respect of damage to property affected by the Crown during war'. Rights which existed prior to the Act were thus extinguished.

Retrospective legislation which imposes criminal penalties is inconsistent with the European Convention on Human Rights, Art 7, and with most modern conceptions of the rule of law. It contradicts the principle that persons should only be expected to regulate their conduct according to laws which are in existence and should not be punished 'on account of any action or omission which did not constitute a criminal offence . . . when it was committed' (Art 7). The constitutionally dubious nature of this type of legislation was recognised long before any of these more modern prescriptions were formulated. Hence in *Phillips v Eyre* (1870) LR 6 QB 1, Willes J stated that retrospective legislation was 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought . . . to deal with future acts and ought not to change the character of past transactions carried on upon the faith of their existing law'. He also emphasised the still existing rule that a court 'will not ascribe legislative force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislative'.

Acts of Parliament and international law

Parliament is not bound by international law. Should a parliamentary enactment be inconsistent with a rule of international law, the statute prevails. International treaties have only persuasive force in the United Kingdom. The judges assume that Parliament does not intend to legislate inconsistently with them. Hence ambiguities or uncertainties in English law will usually be interpreted in ways which accord with international rules.

Where, however, there is a clear and unavoidable inconsistency, the parliamentary provision takes precedence. To the extent that customary international law (international common law) is part of the law of England, it, like any other common law provision, gives way to statute.

Mortensen v Peters (1906) 14 SLT 227

In this case, the captain of a Norwegian trawler was convicted of fishing in the Moray Firth contrary to the Herring Fishery (Scotland) Act 1889. The court felt bound to apply the Act even though it restricted fishing beyond the three-mile territorial limit recognised by international law.

A challenge to the validity of elements of the annual Finance Act was mounted in *Cheney v Conn* [1968] 1 All ER 779. The argument was that the Act authorised the collection of revenue some of which would be used for purposes contrary to the Geneva Convention 1957, viz. the construction of nuclear weapons. The court's conclusion was:

What the statute itself enacts cannot be unlawful, because what the statute says is itself the law, and the highest form of law, that is known in this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment . . . is illegal (per Ungood-Thomas J).

Parliament's territorial competence

Parliament can and does legislate for places outside the executive competence of the British government. Jennings once said that Parliament could make it an offence to smoke in the streets of Paris. He was not suggesting that the British government could seek to implement domestic legislation in foreign jurisdictions but that the British courts and law enforcement agencies could enforce such legislation against allegedly guilty persons if, and when, they entered the United Kingdom.

Famous examples of statutes having extra-territorial effect would include the Continental Shelf Act 1964 which asserted British exploration and mining rights over the continental shelf beyond British waters, and the War Crimes Act 1991 which gave British courts the power to try war crimes committed outside the United Kingdom providing the accused had become a British citizen or was resident in the United Kingdom.

Parliament's extra-territorial competence was manifest as early as the fourteenth century in the Treason Felony Act 1351. This ancient statute, which is still in force, created the offence of adhering to the Crown's enemies in any place inside *or outside* the realm. The offence carries the death penalty. The Act was used in the two most famous treason trials of the twentieth century. In *R v Casement* [1917] 1 KB 98, the defendant, an Irish Nationalist and ex-member of the British diplomatic service, was convicted of treason and sentenced to death after he had tried to persuade Irish prisoners of war in Germany to join the German armed forces. The 1351 Act was also used to secure the conviction and execution of William Joyce (Lord 'Haw Haw') who was employed by the Germans to make propaganda broadcasts to the United Kingdom during the Second World War (*Joyce v DPP* [1946] AC 347).

In the case of some ex-colonies which were given their constitutions and independent dominion status by Acts of the Westminster Parliament, it was provided that alterations to key elements of those constitutions could be made only by further enactments from Westminster following a request from the dominion parliament concerned – according

to the procedure in the Statute of Westminster Parliament 1931, s 4. Hence in relatively recent times the Westminster Parliament has, pursuant to the appropriate requests, legislated for both Canada (Canada Act 1982) and Australia (Australia Act 1986). In both cases the purposes of the legislation was to transfer ('repatriate') to the countries concerned the power to legislate in all matters relating to their own constitutions. These two enactments may be regarded, therefore, as examples of Parliament exercising its extra-territorial jurisdiction albeit, in both cases, for the purposes of surrendering that jurisdiction to the appropriate national assemblies.

The extra-territorial competence of the Human Rights Act 1998 is considered in detail below (see Chapter 19, pp. XXX).

The succession to the throne

Since the revolutionary settlement of 1688, Parliament has regulated the succession to the throne. This right was embodied in the Act of Settlement 1700 which, following the death of the childless Queen Anne (1702–14), conferred the succession onto the House of Hanover in the person of George I (1714–27). From subsequent events it would also appear that parliamentary consent is necessary for any alteration in the normal line of succession. Hence when **Edward VIII** decided that he wished to abdicate in order to marry the divorcee Mrs Wallis Simpson, this, and his replacement by his brother **George VI**, was authorised by His Majesty's Declaration of Abdication Act 1936.

Immediately upon the Royal Assent being signified to this Act . . . His Majesty shall cease to be King and there shall be a demise of the Crown and accordingly the member of the Royal Family then next in succession to the throne shall succeed . . .

Defining the meaning of Parliament

Parliament is capable of redefining its constituent elements for the purpose of enacting legislation. Thus for most Bills Parliament will consist of the Commons, Lords and Monarch. By virtue of the Parliament Acts, however, a Bill rejected by the House of Lords in two successive sessions may go for the Royal Assent after one year has elapsed. 'Parliament', for such a Bill, would consist of the House of Commons and the Monarch – two elements rather than three. It has also been argued that, by the provision in the Statute of Westminster making a request from a dominion legislature a precondition to Westminster legislation affecting its territory, Parliament has again effectively redefined itself by adding a fourth element to its composition (viz. Commons, Lords, Monarch and the dominion parliament). Also note the provision in the Northern Ireland Constitution Act 1973, s 1, requiring the consent of the Northern Ireland people by referendum to any change in the province's constitutional status. This could be understood as redefining Parliament to include the Northern Ireland electorate for any relevant legislation.

Composition and membership

Parliament may decide who is and who is not qualified to sit and participate in its proceedings. This may be done by legislation or by mere resolution of either House. As such resolutions relate to the internal affairs of the sovereign body, they cannot be questioned by the courts. The measure which currently identifies those categories of persons disqualified from membership of the House of Commons is the House of Commons (Disqualification) Act 1975. Its precise content is set out in more detail below (see

Chapter 7). The power of the House to exclude by resolution is also considered in greater detail in Chapter 10 dealing with parliamentary privilege. Statutes relating to the composition of the House of Lords – particularly the Life Peerages Act 1958 and House of Lords Act 1999 – are explained in Chapter 9.

Procedure

Parliament is master of its own procedure and may, therefore, change the procedural process according to which Bills are enacted or any other parliamentary business is conducted. Hence, if, for reasons of expediency, the House of Commons were to dispense with the Committee and Third Reading Stages of a Bill, it is unlikely that this would prevent the measure from becoming a valid Act of Parliament – providing, that is, it was approved by the House of Lords and received the Royal Assent. According to the enrolled Bill rule, a court would be limited to inquiring whether the Bill had been assented to by Parliament as currently defined and recognised by the common law, i.e. Commons, Lords and Monarch. To go beyond this would involve the court inquiring into the validity of the processes through which Parliament had exercised its sovereign legislative power.

Pickin v British Railways Board [1974] AC 765

In this case, a challenge was made to the British Railways Act 1968. The Act sought to extinguish certain rights given to the owners of property on either side of a railway line. These rights had been granted by the Acts which had originally authorised acquisition of the land for the railway's construction. They provided that in the event of the line becoming disused, ownership of the land on which it ran should revert to the adjoining landowners. The standing orders of both Houses required that the promoters of Private Bills should give notice of the proposed legislation to any persons whose private interests would be affected thereby. Pickin alleged that this had not been done and that, as a result, the Bill had been put before and dealt with by Parliament, in error, as an unopposed Private Bill (i.e. according to the wrong procedure).

In a purely factual sense, Pickin's case was not without substance. The House of Lords, however, could not be persuaded that it had any constitutional authority to investigate the allegations.

Length of existence

Each Parliament may determine the length of its own existence. Hence, although the Parliament Act 1911 provides that parliaments may continue in existence for a maximum period of five years (previously seven years by virtue of the Septennial Act 1714), twice in this century Parliament has continued without a dissolution beyond the five-year period. On both occasions this was to avoid the divisive effects of an election during wartime. Thus, the Parliament of 1910 continued until 1918 and the Parliament of 1935 until 1945 (Prolongation of Parliament Acts 1940, 1941, 1942, 1943, 1944).

Civil liberties and human rights

Since the United Kingdom has no overriding written constitution, Parliament, by ordinary legislative procedure, may alter or reduce that which might be regarded as the citizen's basic civil liberties or freedoms. This position has not been altered by the Human

Rights Act 1998 (for discussion see Chapter 19). This was done in both World Wars when the executive was given powers to intern without trial (Defence of the Realm Act 1914 and Emergency Powers (Defence) Act 1939). Similar powers of unlimited detention were provided by the Northern Ireland (Emergency Provisions) Acts. The power of detention in the Prevention of Terrorism Act 1989 was limited to 7 days. A more extensive power was conferred by the Terrorism Act 2006 (28 days). Other significant and relatively recent enactments restricting individual freedoms would include the Police and Criminal Evidence Act 1984, the Public Order Act 1986, the Criminal Justice and Public Order Act 1994 and the Serious Organised Crime and Police Act 2005.

Parliament's sovereign status means that legislative curtailment of the freedoms of the individual is not a ground for judicial intervention (*R v Jordan* [1967] Crim LR 483).

Resolutions of the House and subordinate legislation

Mere resolutions of the House of Commons or the House of Lords do not make law and are not binding on the courts. Such resolutions are not made by Parliament as it is defined by the common law.

Stockdale v Hansard (1839) 9 Ad & E 1

In this case, the plaintiff sued for libel in respect of the contents of an official parliamentary report. The defendants pleaded a House of Commons resolution of 1839 to the effect that all such publications should be treated as absolutely privileged. The court refused to recognise the resolution as having any legal effect and awarded damages to the plaintiff. Lord Denham CJ explained the court's decision as follows:

... The House of Commons is not Parliament but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place anyone beyond its control.

This distinction between Acts of Parliament and parliamentary resolutions was also applied in *Bowles v Bank of England* [1913] 1 Ch 57. On this occasion it was held that the Bank was not entitled to deduct income tax from dividends owed to the plaintiff. The only authority for the tax in question was a Budget resolution of the House of Commons. For many years, and until this case, it had been the practice for tax proposals contained in the Budget (usually delivered in March) to be collected immediately or from the beginning of the new financial year and until the enactment of the annual Finance Act (late July/early August) merely on the authority of resolutions of the House. The court had no doubt that this was clearly unlawful and offended against the principle, recognised by the Bill of Rights, that taxation should not be imposed without statutory authority. The immediate result of the decision was the passing of the Provisional Collection of Taxes Act 1913. This gave legal effect to resolutions of the House approving variations of taxation during the period until the annual Finance Act came into force (see now, Provisional Collection of Taxes Act 1968).

The rule that the courts may not question or invalidate legislation applies only to Acts of Parliament or 'primary' legislation. Where, however, Parliament has delegated legislative power to subordinate bodies such as ministers or local authorities, legislation made by them ('secondary' legislation) is open to judicial review if it exceeds the powers delegated by the 'parent' or 'enabling' legislation (*Attorney-General v Wilts United*

Dairies (1921) 37 TLR 881), or was not made according to the correct procedure (*R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164).

Where secondary or subordinate legislation has been laid before and approved by Parliament, judicial intervention may appear to come close to questioning a decision of the sovereign body. The rule here appears to be that review of such legislation is restricted to procedural error, bad faith, improper motive or manifest absurdity (*R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521).

Possible legal limitations

The doctrine of manner and form

It has been suggested that, if a statute were to prescribe a particular procedure or 'manner and form' for its amendment or repeal, any subsequent legislative provisions seeking to achieve such alteration except by that method would be ineffective. This suggestion is sometimes said to be supported by the decisions in *Attorney-General for New South Wales v Trethowan* [1932] AC 526, and *Harris v Minister of the Interior* (1952) 2 SA 428.

Attorney-General for New South Wales v Trethowan [1932] AC 526

This case was concerned with the Constitution (Legislative Council Amendment) Act 1929, an Act of the New South Wales Parliament. The Act provided that the Parliament's upper House could not be abolished except by a Bill approved in a referendum after completing its parliamentary stages. In 1930, after an election in New South Wales had changed the political complexion of the state Parliament, a Bill to abolish the upper House was approved by both Houses but was not put to a referendum. An injunction was granted by the High Court of Australia and upheld by the Judicial Committee of the Privy Council to prevent the Bill going for the Royal Assent. It was held that since the Westminster Parliament was sovereign and had decreed in the Colonial Laws Validity Act 1865 that all colonial legislatures should legislate in accordance with 'such manner and form as might from time to time be required by an Act of Parliament or other law for the time being in force in the state', it was incumbent on the New South Wales Parliament to comply with the procedure contained in the 1929 Act.

Harris v Minister of the Interior (1952) 2 SA 428

In this case, the South African Supreme Court refused to accept the constitutional validity of one of the pieces of legislation introduced by the post-1948 Nationalist government for the purpose of establishing apartheid. The modern state of South Africa was given its first constitution by the South Africa Act 1909, an Act of the Westminster Parliament. This Act sought to protect the political rights of black citizens in the Cape Province. Section 152 provided that they could not be removed from the electoral register except by a Bill passed by a majority of two-thirds of both Houses of the South African Parliament sitting unicamerally. In 1951 the Nationalist-dominated Parliament sought to remove this guarantee by the Separate Registration of Voters Act. The Act was passed by simple majorities in both Houses with the requirement in s 152 of the 1909 Act being simply ignored.

South Africa's most senior court held that since the South African Parliament had been created and given its powers by the 1909 Act, it was bound to exercise its legislative powers in

accordance with the Act's requirements. Legislation seeking to alter the rights protected by s 152 was, therefore, invalid unless the prescribed procedure was adhered to.



It was for long assumed that the only sure principle which could be derived from the *Trethowan* and *Harris* cases was that subordinate parliaments were bound to legislate within the procedural restraints imposed by the 'mother' Parliament at Westminster, but that neither case could be regarded as conclusive authority for the view that the Westminster Parliament could also impose procedural **fettters** upon itself. There are clear indications, however, that the assumption is no longer reliable as was once the case. That it is now being questioned at the highest level is evidenced by dicta from the House of Lords in *Jackson v Attorney-General* [2005] UK HL 56, and, in particular, Lord Steyn's clearly expressed approval for a relevant academic argument first advanced in 1935:

The very power of Constitutional alteration cannot be exercised except in the form and manner which the law for the time being prescribes. Unless the legislative observes that manner and form, its attempt to alter its constitution is void. It may amend or abrogate for the future the law which prescribes that form or that manner. But in doing so it must comply with its very requirements. (Dixon, *The Law and the Constitution*, 51 LQR 590).

Lord Steyn's comment on this was:

The law and customs of Parliament regulates what the constituent elements [Monarch, Lords and Commons] must do to legislate: all three must signify their consent to the measure. But apart from the traditional method of law-making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for specific purpose. Such redefinition could not be disregarded.

The self-embracing theory of parliamentary sovereignty

More convincing and perhaps substantial – albeit purely academic – support for the relevance of the manner and form argument in the British context may perhaps be found in the 'self-embracing' theory of parliamentary sovereignty as originally advanced by Sir Ivor Jennings (*The Law of the Constitution* (5th edn), 1959).

According to this approach, and given the importance of statute as a source of English law, the common law requires and has developed a rule or formula for determining what constitutes a valid Act of Parliament. This had been referred to as the common law's 'rule of recognition' and is satisfied by that which has been consented to by the Commons, Lords and Monarch. Judicial statements that the court must simply interpret and apply that which had been so enacted, and may not question the procedure by which these consents were given, represent, therefore, no more than the rule of recognition in practice. It follows, according to Jennings, that if a statute were to prescribe an alternative definition of Parliament for the purpose of amending or repealing a particular enactment – say a requirement for two-thirds majorities in both Houses – this would lay down a new rule of recognition for the purpose of altering the Act in question. Moreover, since this would have been imposed by statute, it would be bound to prevail over the otherwise generally applicable common law rule. Essentially, therefore, the self-embracing theory of sovereignty is founded on the straightforward principle that the common law must give way to statute.

The essence of Jennings' theory is contained in the following statement:

Legal sovereignty is merely a name indicating that the established legislature has for the time being power to make laws of any kind in the manner prescribed by law. That is, a rule expressed to be made by the Queen, 'with the advice and consent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled . . .' will be recognised by the courts including a rule which alters this law itself. If this be so, the legal sovereign may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself (*ibid.*).

Academics differ on the validity of this theory. Professor Wade has pointed out that its validity depends on the assumption that the rule of recognition is indeed nothing more than a common law principle. His view, explained in 1955, was that the supremacy of Parliament in its traditional and accepted form was of greater authority than that normally attributed to a common law rule and was one of the basic political facts which resulted from the 1688 revolution. This was then accepted and applied by the judiciary through the evolution of the doctrine of sovereignty in its traditional or continuing sense. As a result, only something equivalently momentous in the political sense – perhaps a further revolution or major constitutional rearrangement – would be sufficient to break the continuity of the post-1688 government order, and thus entrench and give constitutional authority to a redefined version of the power of Parliament (see Wade; 'The Legal Basis of Legal Sovereignty' (1955) CLJ 172).

The Acts of Union

While most would accept that Parliament has the sovereign power to repeal and alter almost every other type of legislation, regardless of content, it has been suggested that this same legislative freedom might not apply to those major statutes which gave effect to the political settlements which brought the UK and its existing constitutional arrangements into existence. In turn, this has led to considerable speculation about the position of the Acts of Union with Scotland (1707) and with Ireland (1800) which provide the legal basis of the political entity known as the United Kingdom. The issue for debate is whether these statutes may be amended or repealed in the normal way or whether their special constitutional status gives them added authority and, therefore, protection from parliamentary interference.

Although the arguments in this context tend to be couched in legalistic terms, the issue is essentially political. Hence the particular perspective taken on whether such Acts are repealable tends to depend on the advocate's view of the validity of the present structure of the United Kingdom. It is not unusual, therefore, to find unionists – whether Scottish or Irish – taking the view that the Acts of Union are beyond the legislative competence normally attributed to the Westminster Parliament. Nationalists, on the other hand, may be more inclined to believe that Parliament has the legal authority to do that which its members regard as politically expedient in the circumstances and that the Acts in question, therefore, impose no absolute fetter on Parliament's authority to undo the Union.

Acts of Union with Scotland 1707

These were enacted by the pre-existing Parliaments of England and Scotland and brought into existence 'one Kingdom by the name of Great Britain' (Art 1). The Scottish and English Parliaments thus extinguished themselves and formed the Parliament of Great

Britain sitting at Westminster. The Acts provided that the Union was to remain in being 'forever' (Art 1) and attempted to impose certain limits to the legislative competence of the Parliament thus created. In particular it was stipulated that the private law of Scotland was not to be altered except for the 'evident utility' of the Scottish people (Art 18). Other articles were to remain in force 'for all time coming'. These included provisions seeking to guarantee the separate existence of the Scottish courts and legal system (Art 19) and the position of the Presbyterian religion and Church of Scotland (Protestant Religion and Presbyterian Church Act 1707).

These prescriptions, it has been suggested, could be interpreted to mean that the Westminster Parliament was born 'unfree' and that its authority can be no greater than that allocated to it by its founding instruments. The limits on the Westminster Parliament's freedom should thus be understood as being the conditions upon which the two Parliaments, and particularly the Scottish one, agreed to abandon their separate identities. It is this which gives the Acts their special constitutional status and provides the guarantee for the provisions outlined above.

Whatever the weight of this argument, it has not proved entirely effective to give the Acts the type of protection which those responsible for their formulation might have intended. Hence a number of statutes have been passed which would appear to be inconsistent with the guaranteed provisions. The most notable of these was the Scottish Universities Act 1853. This reduced the special position of the Church of Scotland by abolishing the requirement that professors in Scottish universities should be members of the Presbyterian Church. It is not possible to say, however, at least with any certainty, that such post-1707 legislative intrusions have completely undermined the case for regarding the Acts of Union as being constituent or entrenched elements of the constitution. De Smith and Brazier, for example, have argued that, although it may be difficult to discern any strictly legal impediment to their repeal, the Acts may be regarded as the basis of a general conventional principle that Parliament will not enact legislation which substantially undermines their principal provisions, i.e. those relating to the Scottish Church and legal system. Nor is it possible to be absolutely sure about how the Scottish courts would react to such legislation if it were to be approved by the Westminster Parliament as presently constituted. Thus in *MacCormick v Lord Advocate* 1953 SC 396, Scotland's most senior judge, the Lord President, opined that although the Scottish courts might be reluctant to question an Act of Parliament, this did not mean that such legislation would be regarded as constitutionally valid:

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish Constitutional Law . . . Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into existence as the successor of the separate Parliaments . . . contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming . . . I have not found in the Union legislation any provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that Parliament should be free to alter the Treaty at will (per Lord Cooper).

To date, however, no Scottish court has crossed the Rubicon (point of no return) and openly questioned the validity of any public general Act relating to the issues protected by the Acts of Union. In *Gibson v Lord Advocate* [1975] 1 CMLR 563, the Court of Session was asked whether permitting EEC nationals to fish in Scottish waters pursuant to the EEC Act 1972 could be for the 'evident utility of the Scottish people'. Lord Keith's opinion was that questions of this type should be resolved by political rather than legal means:

I am . . . of the opinion that the question whether a particular Act of the United Kingdom Parliament altering a particular aspect of Scots private law is or is not for the evident utility of the subjects within Scotland is not a justiciable issue in this court. The making of decisions upon what must essentially be a political matter is no part of the function of the court.

He was, however, more circumspect about how the Scottish courts would receive an Act seeking to alter substantially or irradiate the Union's essential provisions:

I prefer to preserve my opinion on what the position would be if the United Kingdom Parliament passed an Act purporting to abolish the Court of Session or the Church of Scotland or to substitute English Law for the whole body of Scots Law.

Acts of Union with Ireland 1800

For a variety of reasons it is not possible to express similar reservations about the validity of legislation inconsistent with the Acts of Union with Ireland. These Acts created the United Kingdom of Great Britain and Ireland. They declared that the Union was to last forever and sought to guarantee the position of the Anglican Church in Ireland. Despite being adhered to by only a minority of the population, this was to remain the established church in Ireland 'forever', being deemed as an 'essential and fundamental part of the Union' (Art 5). The separate Irish Parliament was thereby extinguished and Ireland given increased representation in the United Kingdom Parliament at Westminster.

History proved, however, that the guarantees contained in the Acts of Union were inadequate to withstand the determination of the majority of Irish people to have a degree of political and religious freedom not envisaged when the Union was created. This may give support to the view that constitutions can do little more than recognise and give expression to political facts and cannot prevent political evolution from taking place. In 1869 the Irish Church Act disestablished the Church of Ireland. In *Ex parte Canon Selwyn* (1872) 36 JP 54, an attempt to question the validity of the Act was found to be non-justiciable. In 1922 the Irish Free State (Agreement) Act gave effect to the political settlement which brought to an end 'The Troubles' or Irish War of Independence 1919–21. The 26 southern counties were given dominion status and the Union, at least as envisaged in 1800, was effectively brought to an end. The Irish constitution of 1937 asserted that the country was a sovereign independent state. Its status as a republic was recognised by the Ireland Act 1949.

It is significant, however, that the 1949 Act provided that Northern Ireland – the six counties excluded from the Free State in 1922 – should not cease to be part of the United Kingdom without the consent of the Parliament of Northern Ireland. The Northern Ireland Parliament having been abolished in 1972, the Northern Ireland Constitution Act 1973 stipulated that Northern Ireland would remain in the United Kingdom until a majority of its electorate should decide and vote otherwise. This guarantee was repeated

in the Anglo-Irish Agreement 1985 and in the Joint Declaration of the British and Irish Governments on the Future of Northern Ireland in 1994.

The intention behind these guarantees appears to be that the unionist majority in Northern Ireland should be able to veto any proposed change to the status of the province which does not have their consent. How a court would, or should, view a statute affecting Northern Ireland's position in the United Kingdom and which was clearly opposed by the majority there remains, however, a matter of debate. The previous history of the Union and the events of 1922 clearly suggest that the traditional doctrine of absolute sovereignty would determine the issue. On the other hand, those with unionist sympathies might be tempted to argue that, for the purpose of altering the union with Northern Ireland, Parliament has changed the rule of recognition by adding the requirement of a referendum amongst the Northern Ireland electorate. It is, therefore, remotely conceivable that some judges might be reluctant to recognise legislation which blatantly ignored the requirement of consent which has been the basis of British policy towards Ireland since 1922. What is perhaps more certain is that the repeated assertions of the need for consent have established, at least for the time being, a convention that Parliament will not seek to legislate contrary to or without this requirement. As has been pointed out, however, conventions are flexible rules of political behavior. They can and have been abandoned or modified when it was deemed politically expedient so to do. This may explain why there are those in the majority community in Northern Ireland who remain unconvinced as to the practical political reliability of the assurances which they have been given.

Constitutional statutes

The recent development of the concept of constitutional statutes was considered above in the context of the doctrine of implied repeal.

A constitutional statute is one which is of fundamental importance in the creation of the state and/or in determining the relationship between the state and the individuals within it. Examples have been said to include Magna Carta 1215, the Bill of Rights 1689, the Act of Union 1707, the nineteenth-century Reform Acts, the European Communities Act 1972, the Wales Act 1998 and the Scotland Act 1998 (Laws LJ, *Thoburn v Sunderland Council City*, above). This list was not intended to be exhaustive and the concept would probably extend to such enactments as the legislation determining the relationship between Great Britain and Northern Ireland. In particular, given the importance of the political agreement to which it gave effect, it would be difficult to argue that the Northern Ireland Act 1998 does not also fall into this special category.

It is not argued that this special status leaves such enactments immune from repeal or amendment. Rather the contention is that, for this to be effected, express words must be used. In this way such basic constitutional prescriptions are given a degree of entrenchment. They may not be altered unless this is the open and declared intent of the legislation in question as formulated by governments in power at the time the issue arises.

International Transport Roth GmbH and Others v Secretary of State for the Home Department [2002] EWCA Civ 158, was one of the first cases in which the concept of constitutional statutes was considered by the Court of Appeal. On that occasion, with the Human Rights Act 1998 in mind, Law LJ put the emerging rule as follows: 'Here the courts protect the right in question, while acknowledging the legislative sovereignty of Parliament, by means of a rule of construction. The rule is that while the legislature

possesses the power to override fundamental rights, general words will not suffice. It can only be done by express or specific provision.'

Political restraints

In an everyday sense, the forces which restrain Parliament from extreme uses of its sovereign power are essentially political. They are both subtle and diverse and thus beyond precise definition. Some of the more obvious factors, however, would include the following.

The party system

The House of Commons does not conduct its affairs as a united entity. It is composed of a variety of political parties within which there are further subdivisions on policy generally and on specific issues (e.g. European integration). It is necessary, therefore, for the government to maintain the support of the parliamentary majority and to keep its own party united if it is to get its legislative programme through Parliament. This, to some extent, operates as a restraining influence on the subject matter and content of legislation. Governments will be reluctant to propose measures so controversial as to precipitate dissent or even defection within their own ranks.

The electorate

There is no constitutional or political rule in the United Kingdom which formally inhibits Parliament from legislating contrary to the apparent wishes of the electorate nor is there any requirement for controversial measures to be put to a referendum. What Parliament is asked to do in the legislative sense is, however, affected by the government's knowledge that, as Dicey put it, ultimate political sovereignty lies with the people. The electorate may change the composition of Parliament when its opinion is sought at least once every five years. Too many unpopular legislative measures may be a factor in determining the opinion expressed by the electorate.

The doctrine of the mandate

The essence of this is that since the majority group in a particular Parliament has been elected to execute a declared political and legislative programme (the party 'manifesto'), it has no authority to introduce important measures not included therein. This is primarily a political argument of limited constitutional significance. Governments must be free to respond to unforeseen and changing circumstances and to any emergencies which may arise by promoting the appropriate legislation. The argument may, however, have some validity in the early days of a new government and in relation to the making of major constitutional changes (e.g. leaving the European Union) without some further reference to the electorate (e.g. referendum).

Territorial competence and grants of independence

Despite what has already been said on this issue, Parliament is unlikely to enact legislation for places where the executive power of the British government does not operate.

Hence, although in theory it could repeal the various statutory grants of independence to former colonial territories, it would do so in the sure knowledge that such legislation would be likely to be ignored.

The futility, if not the **illegality**, of such legislative action, and the fact that such grants of independence are now beyond Parliament's competence, has been recognised in judicial comment. Hence in *British Coal Corporation v The King* [1935] AC 500, the attitude of the Privy Council was that, while 'in abstract law' Parliament could revoke the undertaking in the Statute of Westminster 1931, s 4 not to legislate for a dominion without its consent, legal theory was bound to 'march alongside political reality'. This sentiment was repeated by Lord Denning MR, *Blackburn v Attorney-General* [1971] 1 WLR 1037.

Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can anyone imagine that Parliament could or would reverse that statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse these laws and take away their independence? Most clearly not. Freedom once given cannot be taken away.

International law

Parliament is unlikely to enact legislation which, by contravening international legal standards, could cause diplomatic and political embarrassment in the United Kingdom's relationships with foreign states. When such legislation has been introduced, generally without intent to offend international rules, it has usually been amended forthwith (see *Golders v United Kingdom* (1975) 1 EHRR 524, *X v United Kingdom* (1982) 4 EHRR 188, and *Malone v United Kingdom* (1985) 7 EHRR 14).

This may be illustrated by the facts of *Dudgeon v United Kingdom (No. 2)* (1982) 4 EHRR 149, where the European Court of Human Rights found legislation in Northern Ireland criminalising homosexual relationships between consenting adult males to be contrary to the right to respect for private life in Art 8 of the European Convention on Human Rights. This was followed by the Homosexual Offences (Northern Ireland) Order 1982 which removed the offending restrictions.

The relationship between EU law and Acts of Parliament

The EEC Act 1972

International treaties to which the United Kingdom is a party are binding on the state in international law only. They do not create legal obligations which are enforceable in the domestic legal system either between individuals or against the state. The content of a treaty may only become operative in domestic law if incorporated or given effect by an Act of Parliament. Hence the United Kingdom's signature of the Brussels Treaty of Accession in 1972 was, of itself, insufficient to implement the obligations contained therein and, in particular, that of giving effect to the European legal order in the United Kingdom. This was done by the EEC Act 1972 which became effective on 1 January 1973. The concept of directly applicable EEC law is recognised by s 2(1) of the Act:

All such rights, powers, liabilities, obligations and restrictions from time to time arising by or under the Treaties . . . are without further enactment to be given legal effect . . . in the United Kingdom.

Section 2(2) provides for the making of Orders in Council and statutory regulations for the purpose of implementing those European rules – particularly directives – which are not directly applicable.

Section 2(4) contains the key provision that any domestic legislation ‘passed or to be passed’ should be ‘construed and have effect’ subject to s 2(1) and (2), i.e. subject to all the ‘rights, powers, liabilities, obligations and restrictions . . . arising . . . under the Treaties’ including the obligation to give primacy to Community law (now EU Law) (see below).

Section 3(1) states that the European Court of Justice should be recognised as the final arbiter concerning the meaning of EC/EU law:

. . . for the purpose of all legal proceedings, any question as to meaning or effect of any of the Treaties or as to the meaning, validity or effect of any Community instrument shall be treated as a question of law (and if not referred to the European Court, be for determination as such in accordance with any principles laid down by the European Court or any court attached thereto).

Inevitably the incorporation of EC law into the United Kingdom’s domestic legal system raised the question of how a court should react if dealing with a case to which both a rule of EC law and an inconsistent provision in an Act of Parliament appeared to be applicable.

National sovereignty and the ECJ

The European Court’s attitude to the above question had been made abundantly clear well before the United Kingdom’s accession to the Community in 1973. According to the Court, every member state by, and as a condition of, joining the Community had transferred legislative sovereignty to the Community in relation to those matters within the competence of the Community’s law-making institutions.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty on a transfer of powers from the states to the Community, the members states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves (*Costa v ENEL* [1964] ECR 585).

The principle of the supremacy of Community/EU law was restated emphatically by the ECJ in *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorrattstelle für Getreide* [1970] ECR 1125 (‘the law stemming from the Treaty, an independent source of law, cannot by its very nature be overridden by rules of national law, however framed’), and in *Simmenthal SpA v Italian Minister for Finance* [1976] ECR 1871 (‘every national court must . . . apply Community law in its entirety . . . and must accordingly set aside . . . national law which may conflict with it, whether prior or subsequent to the Community rule’).

The ECJ has also made clear that the supremacy of EU law applies to entrenched and fundamental rights in national constitutions (*Hauer v Land Rheinland-Pfalz* [1979] ECR 3727).

The judicial approach in the United Kingdom

The doctrine of implied repeal

It was apparent from the outset that the views of the ECJ were incompatible with traditional domestic perceptions of the sovereign status of Parliament. This was not likely to cause difficulty in the event of an inconsistency between a rule of EU law and a provision in a statute enacted prior to the EEC Act 1972 itself. In such cases the problem could be disposed of by straightforward application of the doctrine of implied repeal – i.e. in so far as Parliament in the 1972 Act had stated that all legislation ‘passed or to be passed’ should have effect subject to Community/EU law, this demonstrated a clear intent to repeal all inconsistent provisions in pre-1973 legislation.

The doctrine of implied repeal would not be applicable, however, if and when a statute enacted after 1 January 1973 was found to be inconsistent with either directly or indirectly effective Community/EU law. This potentiality was not dealt with in explicit terms by the 1972 Act.

Section 2(4): a rule of constructions?

Although phrased in the rather cryptic terms which are so typical of domestic legislation, s 2(4) appeared to provide the only direct indication of Parliament’s intentions in these matters. It soon became apparent that most judges were at least prepared to regard the section as imposing on them an obligation to construe words in domestic legislation in ways which accorded with the requirements of *directly effective* EC/EU law and in this way to minimise the likelihood and incidence of conflict.

... it is a principle of construction of United Kingdom statutes ... that the words of a statute passed after the treaty has been signed and dealing with the subject of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of being given such a meaning, as intending to carry out the obligation and not to be inconsistent with it (per Lord Diplock, *Garland v British Rail Engineering Ltd (No. 2)* [1983] 2 AC 751).

It was even suggested that statutory provisions should be given a meaning consistent with directly effective Community/EU law albeit that this involved obvious departure from the literal meaning of the words used:

... a construction which permits the section to operate as proper fulfillment of the United Kingdom’s obligations under the treaty involves not so much doing violence to the language of the section as filling a gap by an implication which arises not from the words used, but from ... the manifest purpose of the legislation, by its history, and by the compulsive force of section 2(4) ... (per Lord Oliver, *Pickstone v Freemans plc* [1989] AC 66).

Although obiter only, this appeared to be suggesting that judges should, in effect, be prepared to ‘rewrite’ statutes where, in the literal sense, these did not accord with Community law. According to this view, therefore, a judge should only be prepared to give a statutory provision a meaning inconsistent with Community/EU law where the statute evinced an unequivocal intention to that effect. In other words, simple literal inconsistency with EC/EU law in a post-1972 statute should not be regarded as sufficient to override the requirement in s 2(4) of the 1972 Act that future legislation should be construed in accordance with relevant EC/EU provisions. Therefore, s 2(4) could not be overridden by mere implication.

Sovereignty 'surrendered'

From this it was only a 'short step' to the view that s 2(4) of the 1972 Act was not intended solely as a rule of construction but as an expression of Parliament's willingness to effect a voluntary surrender of its sovereign legislative power in those matters falling within the directly effective law-making competence of the Community/Union. That such meaning could be given to the section had already been contemplated by the Court of Appeal in *Macarthys Ltd v Smith* [1979] 3 All ER 325, where Cumming-Bruce LJ said that if the ECJ adjudged a statute to be incompatible with directly effective Community law 'the European law will prevail over that municipal legislation'.

The *Factortame* saga

This articulation of a further intent behind s 2(4) of the 1972 Act was finally confirmed by the House of Lords in the *Factortame* cases 1989–98.

A controversy arose when Spanish-owned trawlers were registered in the UK and began competing with British fishermen for the British 'quota', i.e. the limited weight of fish which, according to the Common Fisheries Policy, could be landed by the British fishing fleet (i.e. those vessels registered in the UK) on an annual basis. The British Merchant Shipping Act 1988 was the government's attempt to deal with the obvious concerns of the domestic fishing industry. The Act provided that foreign-owned vessels could not be registered in the UK. Hence their catches would not count against the British fishing quota.

In *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 1)* [1989] 2 CMLR 353, the applicant contended that the 1988 Act violated its rights under Community law, particularly the right of establishment in Art 52 of the EC Treaty. The Divisional Court referred the question of the Act's compatibility with EC law to the ECJ under Art 177 and, pending the ECJ's decision, granted an interim injunction against the Minister of Transport, ordering that the Act should not be enforced. In effect, therefore, the court was claiming jurisdiction to suspend the operation of an Act of Parliament. This had not happened before and, according to the traditional doctrine of sovereignty, was not something which an English court was competent to do.

The decision was appealed to the House of Lords ([1989] 2 All ER 692). Its decision was:

- (a) the British Merchant Shipping Act 1988 should be read as including an implied clause rendering its interpretation as subject to s 2(4) of the EEC Act 1972, i.e. 'as if a section were incorporated in . . . the Act of 1988 which in terms enacted that the provisions with respect to the registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC';
- (b) the Crown Proceedings Act 1947, s 21 expressly precluded the issuing of injunctions against ministers of the Crown acting in their official capacity (see Chapter 13);
- (c) according to English law, it was not within the competence of the Divisional Court, or any other English court, to suspend or disapply an Act of Parliament.

The questions as to whether findings (b) and (c) offended Community law, and whether there was an overriding obligation on national courts not to give effect to national laws alleged to be incompatible with Community law pending a determination by the ECJ, were then referred to the ECJ under Art 177.

The ECJ's response came in *Factortame Ltd v Secretary of State for Transport* [1991] 1 All ER 70. It was as follows:

- (a) national courts should grant interim relief for the purpose of suspending national legislation where this appeared to be in conflict with directly effective provisions of Community law;
- (b) any rule of national law which sought to inhibit the granting of such relief – e.g. as in this case, the Crown Proceedings Act 1947, s 21 – was, therefore, inconsistent with Community law and should not be applied.

[A] national court which in a case before it concerning Community law considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

The case was then remitted to the House of Lords for application of these principles. Its decision was that, as the applicant could show a strong *prima facie* case of inconsistency, the interim injunction should be issued to prevent the Minister enforcing the relevant provisions of the 1988 Act (***R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*** [1991] 1 AC 603).



A short time later, the ECJ gave its ruling on the initial reference by the Divisional Court. It accepted the applicant's contention that the disputed provisions in the Merchant Shipping Act 1988 were inconsistent with Community law and, in particular, the right of establishment. The Divisional Court then granted a declaration to that effect (***R v Secretary of State for Transport, ex parte Factortame (No. 3)*** [1992] QB 680), following which the 1988 Act was duly amended (Merchant Shipping (Registration) Act 1993).

A breach of Community law having been established, the applicants made a claim for damages according to the principles laid down in *Francovich v Italy*, above. In ***R v Secretary of State for Transport, ex parte Factortame (No. 4)*** [1996] 2 WLR 506, the ECJ, in a preliminary ruling, held that a state may be sued for damages where this results from a serious breach of Community law by a national legislature. Such breach will be sufficiently serious for the purpose of attracting liability in damages where the legislature 'manifestly and gravely disregarded the limits of its discretion' (per Lord Hoffman, ***R v Secretary of State for Transport, ex parte Factortame (No. 5)*** [1999] 3 WLR 1062). In the same case the House of Lords went on to decide that by the enactment of the British Merchant Shipping Act 1988 which discriminated against 'community nationals on the grounds of their nationality . . . the legislature was, *prima facie*, flouting one of the most basic principles of Community law' (*ibid.*). The requirements for liability in damages were, therefore, established. The issue of state liability in damages for breach of Community law is dealt with in greater detail in Chapter 13.

Statute and indirectly effective Community/EU law

The primary concern of the above cases was with the relationship between statutes and directly effective European provisions. As such, therefore, these cases did not decide how a domestic court should proceed if faced with an apparent inconsistency between a rule of indirectly effective Community/EU law (e.g. a directive) and a provision in an Act of Parliament.

The attitude of the ECJ to this question would appear to be that all national authorities, including courts, are under an obligation to interpret national law in a way which, 'as far as possible', complies with Community/EU rules, albeit that such rules are of indirect effect only and regardless of whether the national law in question was introduced to give effect to them (***Marleasing SA v La Comercial Internacional de Alimentación SA*** [1992] 1 CMLR 305).

So far as English courts are concerned, there is House of Lords authority for the view that, where an inconsistency exists between a directive and a legislative provision intended to give effect to it, the legislative provision in question should be interpreted in a way which achieves that effect even though this involves some distortion of the literal meaning of the words used (*Pickstone v Freemans*, above; *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546). Where the inconsistency occurs between a directive and a legislative provision not specifically intended to give effect to it, the 'English' position would appear to be that the courts should seek consistency only so far as this is permitted by the words used in legislation in issue. This was the view taken by the House of Lords in *Webb v EMO Cargo (UK) Ltd* [1992] 4 All ER 929. In this case the House was of the opinion that it was for 'a United Kingdom court to construe domestic legislation in any field covered by a Community/EU directive so as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation' (per Lord Keith).

In cases where construction in accord with indirectly effective EU law is not possible this may expose the state to legal proceedings by the Commission for failure to fulfil its obligations under the Treaty.

Absolute sovereignty retained – in theory

It is clear from the matters considered above that the attitude of English judges to the relationship between English statute and European Community/EU law remains founded on an interpretation of Parliament's will as expressed in the EEC Act 1972, s 2(4). Hence, in construing legislation in accordance with Community/EU law and, in the event of conflict, giving primacy to the same, the judges claim to be doing no more than was intended and authorised by the sovereign body. This is much different from (and falls far short of) recognising Community/EU law as part of a superior constitutional and legal order to which the legislative sovereignty of the United Kingdom has been sublimated for so long as the Community, now EU, remains in being. According to this English view of things, therefore, it remains possible for Parliament to reassert its sovereign power, even in relation to directly effective Community/EU law, providing its intention to do so is clear and unequivocal.

If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament (per Lord Denning MR, *Macarthy's Ltd v Smith*, above).

It should be remembered, however, that the doctrine of the unlimited legislative sovereignty of Parliament was formulated by the judges in response to the political events of the seventeenth century. The doctrine cannot be considered, therefore, to be immutable. It was formulated to recognise and give legal effect to a significantly altered constitutional order established by force of arms and in which the authority of the executive branch of government ('the King') was made subject to the overriding will of Parliament. In the same way, therefore, should the United Kingdom join with other states in the move towards greater European integration, leading perhaps towards a federation of European states, it remains possible for judges to redefine the doctrine of sovereignty to give legal expression and foundation to such fundamental political developments. Having formulated the doctrine to give effect to the constitutional restructuring and the shifts of power which took place around three hundred years ago, judges may presumably repeat the

exercise to take account of the further restructuring and movements of political and legal power (i.e. from national governments to common European institutions) which appeared to be in train as the twenty-first century commenced.

Change in the wind: the *Jackson* decision

At the time of writing the doctrine of the unlimited legislative power of the Westminster Parliament would appear still to be in place as the cornerstone of the British constitution. There are signs, however, that some judges may at least be prepared to contemplate whether the time is approaching when the doctrine should be re-cast to take account of changed political and constitutional realities, particularly the ever-growing power of an executive dominated House of Commons and the limited restraining powers of the upper House.

The seminal case in this context is the House of Lords decision in *Jackson v Attorney-General* [2005] UKHL 56.

On its face the case concerned a challenge to the validity of the Hunting Act 2004. The claimants argued that the authority conferred on Parliament by the Parliament Act 1911 did not include a power to use that same procedure to amend the 1911 Act itself. It followed, they said, that Parliament had no authority to enact the Parliament Act 1949, which reduced the 'delaying power' in the 1911 Act from two years to one year, and that the 1949 Act, and all those measures 'enacted' under it, had no legislative validity. The claimants did not seek to challenge 'head on' the well-established principle that courts could not question an Act of Parliament, but contended that this did not apply in the particular circumstances of the case. This was because, in their view, statutes enacted under the 1911 Act should be regarded as delegated rather than primary legislation and, therefore, open to judicial scrutiny. In other words, according to this analysis, what in effect happened in 1911 was that Parliament in its sovereign entirety (Monarch, Lords and Commons) conferred limited legislative authority on the Monarch and Commons only. The subordinate and limited authority so conferred was intended to allow subsequent Parliaments to enact 'ordinary' legislation without the consent of the Lords, but, absent such consent, the 1911 Act did not delegate to or empower subsequent Parliaments to alter its own 'sovereign' provisions.

The opinion of the House of Lords

- (a) In the circumstance of the case, but not for the reasons they had advanced, the complainants were right to argue that the rule excluding courts from questioning Acts of Parliament did not apply. Cases such as *Pickin* and others established that the courts had no jurisdiction to inquire into the process or procedure by which a legislative proposal had passed through its parliamentary stages. This, however, was not the issue in *Jackson*. The complainants were not challenging the Hunting Act on the basis of anything that had transpired as it passed through Parliament, but on the ground that the 'enactment' of the Parliament Act 1949 was founded on a fundamental misconstruction of the intention behind the Act of 1911. The essence of the case was, therefore, a matter of statutory construction and, as such, something which was properly within the sphere of judicial competence.

These proceedings are highly unusual. At first sight a challenge in court to the validity of a statute seems to offend the fundamental constitutional principle that courts will

not look behind an Act of Parliament and investigate the process by which it was enacted . . . In the present case the claimants do not dispute this constitutional principle . . . Their challenge to the lawfulness of the 1949 Act is founded on a different and prior ground the proper interpretation of . . . the 1911 Act. On this issue the court's jurisdiction cannot be doubted. This question of statutory interpretation is properly cognizable, by a court of law. The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's Constitution as the principle that Parliament has exclusive cognizance . . . over its own affairs (per Lord Nicholls).

- (b) The 1911 Act states clearly and unequivocally that that which passes through Parliament according to those provisions allowing for a Bill to be presented for the Royal Assent after being rejected by the House of Lords constitutes an 'Act of Parliament'.

The meaning of the expression 'Act of Parliament' is not doubtful, ambiguous or obscure. It is as clear and well-understood as any expression in the lexicon of the law. The 1911 Act did, of course, effect an important Constitutional change, but the change lay not in authorizing a new form of sub-primary parliamentary legislation but in creating a new form of enacting primary legislation (per Lord Bingham).

In general terms, therefore, the 1911 law should not be understood as having delegated limited legislative power to the Monarch and Commons, but rather as recognising that ultimate legislative authority lay in the elected lower chamber and as providing a means whereby disputes between the upper and lower chambers could be determined without embroiling the Monarch in political matters.

The overall objective of the 1911 Act was not to delegate power: it was to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a majority of the Commons, and thereby obviate the need for the Monarch to create (or for any threat to be made that the Monarch would create) peers to carry the government's programme in the Lords. This was a procedure unwelcome to a constitutional Monarch, rightly anxious to avoid any appearance of participation in politics, and one which constitutionally minded politicians were accordingly reluctant to misuse (per Lord Bingham).

That Parliament had so intended legislation passed according to the provisions of the 1911 Act to have full legislative status and validity was evidenced by the fact that a number of equally controversial measures have been placed on the statute book, without the consent of the House of Lords, yet on no such occasion had the legislative status of any such measure, whether primary or secondary in nature, even been raised (see the War Crimes Act 1991, the European Elections (Amendment) Act 2000, and the Sexual Offences (Amendment) Act 2000).

- (c) It was not possible to interpret the 1911 Act as intending that the power to enact legislation without the consent of the House of Lords should not be applicable to Bills seeking to amend the 1911 Act itself. In this the Law Lords expressed agreement with the Court of Appeal that there is

no constitutional principle or principle of statutory construction which prevents a legislature from altering its own constitution by enacting alterations to the very instrument by virtue of powers in that same instrument if the powers, properly understood, extend that far (Lord Bingham).

A different hypothesis of constitutionalisation

As indicated, however, and apart from these various findings concerning the validity and status of the 1949 Parliament Act, the opinions delivered by the House of Lords in *Jackson* provide some interesting pointers concerning current or emerging judicial attitudes towards the doctrine of sovereignty in its traditional form, i.e. the view that as Parliament is sovereign its legislative power is continuing and permits of no limitations of any kind. Of particular significance in this context are the comments of Lord Steyn in which he canvassed the view that the time might not be far distant when certain constitutional fundamentals, at the very cultural and political heart of the British system of government, should be regarded as beyond Parliament's ordinary legislative competence. Such are the long-term implications of these ideas and their possible impact for the doctrine of legislative sovereignty in place at least since the time of A V Dicey (in late nineteenth century), that Lord Steyn's words are worth quoting in full.

The Attorney-General said . . . that the government might wish to use the 1949 Act to bring about constitutional changes such as the altering of the composition of the House of Lords. The logic of this proposition is that the procedure of the 1949 Act could be used by the government to abolish the House of Lords. Strict legalism suggests that the Attorney-General might be right. But I am deeply troubled about assenting to such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legislation and constitutional legal principle in the courts at the most fundamental level.

But the implications are much wider. If the Attorney-General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney-General implausibly asserts. In the European context, the second *Factortame* decision made that clear. The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal order. One must not assimilate the European Convention . . . with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but to all other individuals within its jurisdiction. The classic theory given by Dicey of the supremacy of Parliament is still the general principle of our Constitution. It is a construct of the common law. The judges created this principle. If that is so it is not unthinkable that circumstances may arise where the court may have to qualify a principle established on a different hypothesis of constitutionalism involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a compliant House of Commons cannot abolish.

Traces of similar revisionist proclivities were also evident in Lord Hope's judgment.

. . . it is of the supremacy of the law that the courts shall regard as unauthorized and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form now reinforced by the European Convention on Human Rights and the enactment by Parliament of the

Human Rights Act 1998, the principle protects the individual from arbitrary government. The Rule of Law enforced by the courts is the ultimate controlling factor on which our constitution is based.

All of this suggests that the judges may be in the early stages of developing an alternative and less absolute version of the original conception of Parliamentary sovereignty according to which, in high constitutional matters at least, the doctrine would give way to demands of the Rule of Law. Such notions would appear to be premised on mounting judicial unease relating to dangers posed to constitutional fundamentals by the short-term party-political caprice of those 'in power' from time to time and perhaps possessing an electoral 'mandate' from no more than 30 per cent of the enfranchised adult population.

Should it come to pass that the doctrine of sovereignty is recast in the way outlined by Lords Steyn and Hope, this would clearly effect a radical alteration, not only in the role of the judiciary, but in the distribution of power in constitutional matters between the judiciary and Parliament. Lest, however, this should be thought to be something entirely new or unprecedented, it is perhaps worth recalling the sentiment expressed by Coke CJ as long ago as 1610 in *Dr Bonham's Case* (1610) 8 Co Rep 114, to the effect that even an Act of Parliament could be declared void if it offended 'common right and reason'. This, in itself, merely serves to reinforce, as reiterated by the House of Lords in *Jackson*, that just as the judges were responsible for formulating and articulating the doctrine of Parliamentary sovereignty in its original form, it would appear to lie within their competence to restate the doctrine in response to changed political circumstances and that which Lord Steyn described as 'a different hypothesis of constitutionalism'.

Summary

The chapter explains the extent of the legislative power of Parliament and, in the absence of a written constitution, considers whether the power is subject to any meaningful legal or political restraints. Detailed comment is also devoted to the implications for Parliament's legislative power of British membership in the EU. The chapter concludes with a consideration of recent judicial indications that the time may be approaching when certain constitutional 'fundamentals' should receive a greater degree of protection from politically motivated legislative intrusions.

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Use Case Navigator to read in full some of the key cases referenced in this chapter:

Ellen Street Estates v Minister of Health [1934] 1 KB 590

Jackson v Attorney-General [2006] 1 AC 262; [2005] 4 All ER 1253

R v Secretary of State for Transport, ex parte Factortame (No 2) [1991] 1 AC 603; [1991] 1 All ER 70

Thoburn v Sunderland City Council [2003] QB 151; [2002] 4 All ER 156

