It is a fundamental principle of democratic government that there should be an elected assembly representing the people, and that this assembly should have authority to make laws that apply to the entire population. But there is no universal agreement that such an assembly should have an absolute and unlimited power to make laws of whatever kind and subject matter. Indeed, in many national constitutions both the existence of the assembly and the extent of its powers are set out in the constitution itself. Without such a constitutional text, are there limits on legislative authority and, if so, where may they be found? And should measures enacted by Parliament prevail over all other rules of law?

This chapter examines the extent of the formal authority exercised today by the Westminster Parliament. We first consider briefly the stages by which that authority was established, since in the absence of a written constitution, the historical background to the authority of Parliament has great significance.

A. The growth of the legislative authority of Parliament

It is often claimed that the first Parliament was that assembled by Simon de Montfort in 1265 to give counsel to Henry III, which for the first time included representatives of the shires, cities and boroughs of England as well as the feudal barons. But to become a legislature in a modern sense, the enlarged council had to acquire a regular existence as a body with power to legislate and with settled procedure; and the measures which emerged from that procedure had to be accepted as law. By 1485, it was accepted that measures that had been considered by Parliament and enacted by the monarch could change the common law. With the English Reformation, there disappeared the belief that Parliament could not affect the authority of the Roman Church. Henry VIII and Elizabeth I made the Crown of England supreme over all persons and causes and used the English Parliament to attain this end.

Although wide authority was attributed to acts of the ‘King in Parliament’, two views were held as to the justification for this. The royalist view grounded legislative authority in the King, acting as Sovereign in exercise of divine right, but with the approval of Lords and Commons. By contrast, the parliamentarian view stressed the role of the two Houses, acting on behalf of the nobility and the common people, in exercising supreme authority with the monarch. There continued to be a view that certain natural laws could not be changed, even by the King in Parliament. To set against this view there was much authority in the law reports and in political writing which indicated that the courts had no power to review the validity of Acts of Parliament.

The struggle for supremacy

Legislative supremacy involves not only the right to change the law but also that no one else should have that right. At the heart of the conflicts of the 17th century that led to the civil war, Charles I’s execution, Cromwell’s Protectorate and the restoration of the monarchy in 1660, lay

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2 See Bonham’s case (1610) 8 Co Rep 114a, quoted below in text at note 66.

3 Goldsworthy (passim); and Gough, Fundamental Law in English Constitutional History.
the question whether the King could use his prerogative powers to govern without Parliament. In 1603, the King’s prerogatives were undefined. Despite the existence of Parliament and the common law courts, the King, through his Council, exercised not only full executive powers but also a residue of legislative and judicial power. Acts of Parliament which sought to take away any of the ‘inseparable’ prerogatives of the Crown were considered invalid.4 Four instances of the struggle for authority between Crown and Parliament may be mentioned.

1 Ordinances and proclamations. A clear distinction between the statutes of the English Parliament and ordinances of the King in Council was lacking long after the end of the 13th century. The Statute of Proclamations 1539 gave Henry VIII wide powers of legislating by proclamation without reference to Parliament. This statute did not give the King and Council power to legislate, but sought to clarify the obscure position of the authority possessed by proclamations. It safeguarded the common law, existing Acts of Parliament and rights of property, and prohibited the infliction of the death penalty for breach of a proclamation.5 Its chief practical purpose was to create machinery to enforce proclamations.6 Despite the repeal of the statute in 1547, Mary and Elizabeth continued to resort to proclamations. The judicial powers of the Council, and in particular of the Court of Star Chamber, were available to enforce proclamations. The scope of the royal prerogative to legislate remained undefined. James I made full use of this power, and in 1611 Chief Justice Coke was consulted by the Council, along with three of his brother judges, about the legality of proclamations. The resulting opinion is to be found in the Case of Proclamations:

(1) The King by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.
(2) The King hath no prerogative but what the law of the land allows him.
(3) But the King for the prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them upon punishment to be inflicted by law; the neglect of such proclamation aggravates the offence.
(4) If an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so.7

A definite limit was thus put upon the prerogative, the full force of which was effective only when the Star Chamber and other conciliar tribunals were abolished in 1640. The gist of the Case of Proclamations is that the King’s prerogative is under the law and that Parliament alone can alter the law which the King is to administer.8

2 Taxation. If the imposition of taxes is to be lawful, it must be authorised by legislation. But this basic principle was the subject of a long-running dispute between Parliament and the Stuart Kings, who claimed that the Crown had a prerogative right to levy certain forms of taxation without the consent of Parliament. It had been conceded by the time of Edward I that the consent of Parliament was necessary for direct taxation. The history of indirect taxation is more complicated, since the regulation of foreign trade was a part of the royal prerogative relating to foreign affairs. There was no clear distinction between the imposition of taxes in the form of customs duties and the exercise of prerogative powers over foreign trade and defence of the realm:

4 ‘No Act of Parliament can bar a King of his regality’: The Case of Ship Money (1637) 3 St Tr 825, Finch CJ, at 1235. For the leading 17th-century cases on prerogative, see Keir and Lawson, Cases in Constitutional Law, ch II. Also Tomkims, Our Republican Constitution, ch 3.
7 (1611) 12 Co Rep 74. This case was applied by the Court of Session in Grieve v Edinburgh and District Water Trustees 1918 SC 700.
8 The Crown retains broad prerogative power to make laws for its overseas territories, but this power is not unlimited: Campbell v Hall (1774) 1 Cowp 204; but cf R (Bancoult) v Foreign Secretary (No 2) [2006] EWHC 1038 (Admin).
In the Case of Impositions (Bate’s Case), John Bate refused to pay a duty on imported currants imposed by the Crown on the ground that its imposition was contrary to the statute 45 Edw 3 c 4 which prohibited indirect taxation without the consent of Parliament. The Court of Exchequer unanimously decided in favour of the Crown. The King could impose what duties he pleased for the purpose of regulating trade, and the court could not go behind the King’s statement that the duty was in fact imposed for the regulation of trade.

In the Case of Ship Money (R v Hampden), John Hampden refused to pay ship money, a tax levied by Charles I for the purpose of furnishing ships in time of national danger. Counsel for Hampden accepted that sometimes the existence of danger would justify taking the subject’s goods without his consent, but only in actual as opposed to threatened emergency. The Crown conceded that the subject could not be taxed in normal circumstances without the consent of Parliament, but contended that the King was the sole judge of whether an emergency justified the exercise of his prerogative power to raise funds to meet a national danger. A majority of the Court of Exchequer Chamber gave judgment for the King.

The decision was reversed by the Long Parliament, and this aspect of the struggle for supremacy was concluded by the Bill of Rights, art 4, which declared that it was illegal for the Crown to seek to raise money without Parliamentary approval.

3 Dispensing and suspending powers. The power of the Crown to dispense with the operation of statutes (for instance, by declaring that a statute need not be applied in a certain situation) may at one time have been necessary because of the form of ancient statutes and the irregular meetings of Parliament. So long, however, as the limits on the dispensing power were not clearly defined, this constituted a potential threat to the legislative authority of Parliament. In Thomas v Sorrell, the court took care to define the limits within which the royal power to dispense with laws was acceptable. But in Godden v Hales, an unduly compliant court upheld a dispensation from James II to Sir Edward Hales excusing him from taking religious oaths and fulfilling other obligations imposed by the Test Act; it was held that it was an inseparable prerogative of the Kings of England to dispense with penal laws in particular cases and upon necessary reasons of which the King is sole judge.

Thus encouraged, James II proceeded to set aside statutes as he pleased, granting a suspension of the penal laws relating to religion in the Declarations of Indulgence in 1687 and 1688. These acts of James were an immediate cause of the revolution of 1688. The Bill of Rights abolished the Crown’s alleged power of suspending laws and prohibited the Crown’s power to dispense with the operation of statutes, except where this was authorised by Parliament. Similar provision was made in the Scottish Claim of Right.

4 The independence of the judiciary. As was shown by Godden v Hales, so long as judges could be removed from office at the pleasure of the Crown, there was a continuing risk of their being subservient to the King in cases in which he had a direct interest. To ensure that English judges should not hold office at pleasure of the Crown, the Act of Settlement 1700 provided that they should hold office quasdiu se bene gesserint (during good behaviour) but subject to a power of removal upon an address from both Houses of Parliament.

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9 (1606) 2 St Tr 371; G D G Hall (1953) 69 LQR 200.
10 (1637) 1 St Tr 825.
11 For a full analysis, see D L Keir (1936) 52 LQR 546.
12 Shipmoney Act 1640.
13 Page XX above.
14 (1674) Vaughan 330.
15 (1686) 11 St Tr 1165. The judges were hand-picked by James II in advance, and gave cursory reasons for the decision: see A W Bradley [2008] PL 470, 470–2.
16 Articles 1 and 2 of the Bill of Rights, p 14 above. The Bill of Rights did not curtail the prerogative of pardon or the power to enter a nolle prosequi. Cf the present practice of granting extra-statutory concessions in taxation, ch 17 C.
17 Page XXX above.
18 See now Supreme Court Act 1981, s 11(3); Constitutional Reform Act 2005, s 33. See also ch 18 A.
Growth of ministerial responsibility

The Bill of Rights and the Act of Settlement established the legislative authority of the English Parliament vis-à-vis the Crown, while preserving the prerogatives of the Crown in matters which had not been called in question. The settlement reflected the fact that the common lawyers had joined with Parliament to defeat the Crown’s claim to rule by prerogative; and it is often said that the common lawyers thereby accepted that legislation by Parliament was of overriding authority as a source of law. However, executive power itself was left in the hands of the monarch and a more democratic base for government was established only by degrees during the two centuries after the Act of Settlement. The changed role of the monarch has been summarised in this way:

The position of affairs has been reversed since 1714. Then the King or Queen governed through Ministers, now Ministers govern through the instrumentality of the Crown.19

The development of Cabinet government and of ministerial responsibility20 was accompanied by changes in the electoral system, beginning in 1832 with the Reform Act and continuing until universal franchise for adults was achieved in 1928. But we know from our own time that, while the political authority of Parliament may be pre-eminent in relation to the monarch, government ministers exercise many powers for which it is difficult to achieve democratic accountability. As for the composition of Parliament itself, the result of the conflict between Commons and Lords in 1909–11 was to leave the House of Commons in a dominant position within Parliament. Thus it became possible to argue that the legislative authority of Parliament was founded upon the mandate given by the electorate to the party (or parties) holding a majority of seats in the Commons.

B. Meaning of legislative supremacy

In this brief summary, we have examined the rise of Parliament to be at the centre of the constitutional system. We now consider the legal doctrine of the legislative supremacy of Parliament. This doctrine is referred to by many writers, notably by Dicey, as the sovereignty of Parliament. New constitutional developments are often debated in terms of their supposed effect on the sovereignty of Parliament. This was seen in the debate about British membership of the EC; those opposed to British membership proposed, without success, an amendment to the Bill which became the European Communities Act 1972 declaring that British membership would not affect the sovereignty of Parliament.21 Critics of British membership of the EU complain both at the loss of national sovereignty and at erosion of the sovereignty of Parliament. There is no doubt that Britain’s place in Europe affects the role of Parliament, since many laws are now made at a European level. But the same applies to every state that is a member of the EU. Moreover, many states (including the USA) enjoy sovereignty in international law without having a ‘sovereign’ legislature. In this chapter, the expression legislative supremacy will be used, partly because it is less likely to be confused with the notion of national sovereignty; and to avoid supporting the jurisprudential doctrine of John Austin and his successors that in every legal system there must be a sovereign.22

By the legislative supremacy of Parliament is meant that there are no legal limitations on the power of Parliament to legislate. Parliament here does not refer to the two Houses of Parliament individually, for neither House has authority to legislate on its own, but to the constitutional entity known as the Queen in Parliament: namely the process by which a Bill approved by Lords

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20 See ch 7.
and Commons receives the royal assent and thus becomes an Act of Parliament. Thus defined, Parliament, said Dicey, has ‘under the English constitution, the right to make or unmake any law whatever; and further . . . no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. 23 Dicey was writing at a time when England was often used as a loose synonym for Great Britain or the United Kingdom 24 and today it is necessary to discuss whether the law on this matter is the same throughout the United Kingdom. 25 But the positive and negative aspects of the doctrine emerge clearly from Dicey’s formulation, namely that Parliament has power to legislate on any matter whatsoever and that there exists no competing authority with power to legislate for the United Kingdom or to impose limits upon the competence of Parliament.

British membership of the European Union gives rise to the difficult issue of competing supremacies, the supremacy of Parliament on the one hand and the supremacy, or primacy, of Community law, on the other. This question will be considered later, 26 but we first examine the issue in terms of the law of the United Kingdom alone.

Legal nature of legislative supremacy

This doctrine consists essentially of a legal rule which governs the relationship between the courts and the legislature, namely that the courts are under a duty to apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional. As was at one time justifiably said, ‘All that a court of law can do with an Act of Parliament is to apply it.’ 27 In Madzimbamuto v Lardner-Burke, which concerned the effect of the unilateral declaration of independence in 1965 by the Rhodesian government on the Westminster Parliament’s power to legislate for Rhodesia, Lord Reid said:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid. 28

While the doctrine of legislative supremacy has great political significance, the legal rule defines the outcome of the process of legislation; it does not make a political analysis of whether that process is controlled by the governing party, the Cabinet or the Prime Minister. Certainly, how Parliament exercises its legislative authority is of great importance in the debate about whether its supremacy should be retained or modified. Craig has argued that Dicey’s exposition of sovereignty was advanced on the basis of assumptions about representative democracy which (in Craig’s view) were flawed even in 1885 and cannot be made today. 29 However, we must distinguish as far as possible between analysing the present law and considering how it should develop in future. Changes in the legislative process do not in themselves alter the legal effect of that process, although they might affect the case for further development of the law.

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24 Ch 3 A.
25 Section D in this chapter.
26 Page XX; and ch 8.
27 Keir and Lawson, Cases in Constitutional Law, p 1. For the position where an Act conflicts with EC law, see p XX below; and where an Act is incompatible with Convention rights, p XX below.
29 In Public Law and Democracy, ch 2, Craig argues that Dicey’s notion of sovereignty was ‘firmly embedded within a conception of self-correcting majoritarian democracy’ (p 15) since, in Dicey’s words, ‘The electors can in the long run always enforce their will’; further, that the British system ‘became one dominated by the top, by the executive and the party hierarchy’ (p 42) and that the danger has always been one of majoritarian tyranny.
Only an Act of Parliament is supreme

An Act of Parliament has a legal force which the courts are not willing to ascribe to other instruments which for one reason or another fall short of that pre-eminent status. Thus the following instruments do not enjoy legislative supremacy and the courts will if necessary decide whether or not they have legal effect:

(a) a resolution of the House of Commons;\(^\text{30}\)
(b) a proclamation issued by the Crown under prerogative powers for which the force of law is claimed;\(^\text{31}\)
(c) a treaty entered into by the government under prerogative powers which seeks to change the law within territory subject to British jurisdiction;\(^\text{32}\)
(d) subordinate legislation which appears to be issued under the authority of an Act of Parliament by a minister or government department,\(^\text{33}\) whether or not this has been approved by resolution of each House of Parliament;\(^\text{34}\)
(e) an act of a subordinate legislature,\(^\text{35}\) such as the Scottish Parliament or the Northern Ireland Assembly;
(f) by-laws made by a local authority or other public body;\(^\text{36}\)
(g) prerogative Orders in Council made for overseas territories, and laws purporting to be made under powers conferred by such Orders.\(^\text{37}\)

In all these cases, the courts must consider whether the document for which legislative force is claimed is indeed legally binding.\(^\text{38}\) So, too, when a litigant relies on an Act of Parliament, the court must if necessary decide whether the provision in question has been brought into force.

The difference between an Act of Parliament and lesser instruments is reflected in a distinction drawn by the Human Rights Act 1998 between ‘primary legislation’ and ‘secondary legislation’. Unfortunately, the line drawn in the 1998 Act does not coincide with the distinctions just drawn. Thus various measures (including prerogative Orders in Council) are treated by the Act as primary legislation.\(^\text{39}\)

Position different under written constitution

The doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limits on the legislature and entrusts the ordinary courts or a constitutional court to decide whether acts of the legislature comply with the constitution. In Marbury v Madison, the US Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the constitution.\(^\text{40}\) In a legal system which accepts judicial review of legislation, legislation may be held invalid on a variety of grounds: for example, because it conflicts with the

\(^{30}\) Stockdale v Hansard (1839) 9 A & E 1; Bowles v Bank of England (1913) 1 Ch 57.

\(^{31}\) Case of Proclamations (p XX above).

\(^{32}\) The Parlement Belge (1879) 4 PD 129, 154; A-G for Canada v A-G for Ontario (1937) AC 326. Cf Malone v Metropolitan Police Commissioner (1979) Ch 344. And ch 15 B.

\(^{33}\) E.g. Chester v Bateson (1902) 1 KB 829; ch 28.

\(^{34}\) Hoffmann-La Roche v Secretary for Trade & Industry (1975) AC 295.

\(^{35}\) Belfast Corpn v OD Cars Ltd (1960) AC 490.

\(^{36}\) E.g. Krause v Johnson (1898) 2 QB 91.

\(^{37}\) This is essentially what was done in R v Foreign Secretary, ex p Bancoult (No 2) (note 8, above); and R v Foreign Secretary, ex p Bancoult (2001) QB 1067.

\(^{38}\) This is essentially what was done in R (Jackson) v A-G (2005) UKHL 56, [2006] 1 AC 262 (p XX below).


\(^{40}\) 1 Cranch 137 (1803).
separation of powers where this is a feature of the constitution, or has not been passed in accordance with the procedure laid down in the constitution. By contrast, in the United Kingdom the legislative supremacy of Parliament appears to be the fundamental rule of constitutional law and this supremacy includes power to legislate on constitutional matters. In so far as constitutional rules are contained in earlier Acts, there seems to be no Act which Parliament could not repeal or amend by passing a new Act. The Bill of Rights of 1689 could in law be repealed or amended by an ordinary Act of Parliament. This was done in the Defamation Act 1996, section 13 of which amended Article 9 of the Bill of Rights regarding the freedom of speech in Parliament.

Legislative supremacy illustrated

The apparently unlimited powers of Parliament may be illustrated in many ways. The Tudor kings used Parliament to legalise the separation of the English Church from the Church of Rome: Sir Thomas More was executed in 1535 for having denied the authority of Parliament to make Henry VIII supreme head of the Church. In 1715, Parliament passed the Septennial Act to extend the life of Parliament (including its own) from three to seven years, because it was desired to avoid an election so soon after the Hanoverian accession and the 1715 uprising in Scotland. In vain did opponents of the Act argue that the supreme legislature must be restrained ‘from subverting the foundation on which it stands’. Less controversially, during the two world wars, Parliament prolonged its own life by amending the rule in the Parliament Act 1911 that a general election must be held at least every five years.

Parliament has altered the succession to the throne (in the Act of Settlement 1700 and His Majesty’s Declaration of Abdication Act 1936); reformed the composition of both Houses of Parliament; dispensed with the approval of the House of Lords for certain Bills (the Parliament Acts 1911 and 1949); made possible British membership of the EC (the European Communities Act 1972); given effect to the Scottish and Irish Treaties of Union and later departed from those treaties; and altered the territorial limits of the United Kingdom. Between 1997 and 2005, a flurry of constitutional legislation included the Scotland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999 and the Constitutional Reform Act 2005.

Indemnity Acts and retrospective legislation

Parliament has exercised the power to legalise past illegalities and to alter the law retrospectively. This power has been used by a government with a secure majority in Parliament to reverse inconvenient decisions made by the courts. Retrospective legislation was passed after both world wars, protecting various illegal acts committed in the national interest. Retrospective laws are, however, 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

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42 E.g. Aptheker v Secretary of State 378 US 500 (1964) (Act of US Congress refusing passports to communists held an unconstitutional restriction on right to travel).
43 Harris v Minister of Interior 1952 (2) SA 428. Generally see Brewer-Carias, Judicial Review in Comparative Law.
44 See chs 11 A, 23 F.
45 Quoted in Marshall, Parliamentary Sovereignty and Commonwealth, p 84.
46 Ch 3 A, and section D in this chapter.
47 Island of Rockall Act 1972.
49 Indemnity Act 1920 and War Charges Validity Act 1925; Enemy Property Act 1953, ss 1–3.
on upon the faith of the then existing law... Accordingly the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.50

The rule of interpretation is that a statute will not be read as having a retrospective effect that impairs an existing right or obligation unless this result is unavoidable.51 The Immigration Act 1971 was held to empower the Home Office to deport Commonwealth citizens who had entered in breach of earlier immigration laws but against whom no such action could have been taken at the time the 1971 Act came into effect:52 but the Act did not make punishable by criminal sanctions conduct which had occurred before the Act was passed.53 Although art 7 of the European Convention on Human Rights provides that no one shall be held guilty of a criminal offence for conduct which did not constitute an offence at the time when it was committed,54 Parliament has power to legislate retrospectively in breach of this. However, ‘It is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation.’55 Legislation which authorises payments to be made to individuals in respect of past events is also retrospective,56 but it may be objectionable if it restricts existing claims or is discriminatory.

Legislative supremacy and international law

There are many reasons why Parliament should take into account the United Kingdom’s obligations at international law when it legislates, but the courts may not hold an Act void on the ground that it contravenes general principles of international law.

The Herring Fishery (Scotland) Act 1889 authorised a fishery board to make by-laws prohibiting certain forms of trawling within the Moray Firth, an area which included much sea that lay beyond British territorial waters. The Danish master of a Norwegian trawler was convicted in a Scottish court for breaking these by-laws. The High Court of Justiciary held that its function was confined to interpreting the Act and the by-laws, and that Parliament had intended to legislate for the conduct of all persons within the Moray Firth, whatever might be the position in international law. ‘For us an Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to its terms.’57

Nor may the courts hold an Act invalid because it conflicts with a treaty to which the United Kingdom is a party.

An assessment to income tax was challenged on the ground that part of the tax raised was used for the manufacture of nuclear weapons, contrary to the Geneva Convention Act 1957. It was held that the unambiguous provisions of a statute must be followed even if they are contrary to international law. Regarding an argument that tax had been imposed for an improper purpose, the judge said: ‘What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country.’58

50 Per Willes J in Phillips v Eyre (1870) LR 6 QB 1, 23. On retrospectivity in general, see Lord Rodger of Earlsferry (2005) 121 LQR 57; and Sampford, Retrospectivity and the Rule of Law.
53 Waddington v Miah [1974] 2 All ER 377, 379 (Lord Reid).
56 E.g. Employment Act 1982, s 2 and Sch 1.
57 Lord Dunedin in Mortensen v Peters (1906) 8 F(J) 93, 100. The Trawling in Prohibited Areas Prevention Act 1909 later made it an offence to land fish caught in prohibited areas of the sea, thus limiting the extra-territorial effect of the earlier ban.
58 Ungod-Thomas J in Cheney v Conn [1968] 1 All ER 779, 782; and see Inland Revenue Commissioners v Collico Dealings Ltd [1962] AC 1.
As far as UK courts are concerned, there are no territorial restrictions on the legislative competence of Parliament. Generally Parliament legislates only in respect of its own territory or in respect of the conduct of its own citizens when they are abroad, but occasionally legislation is intended to operate outside the United Kingdom: thus the Continental Shelf Act 1964 vested in the Queen the rights of exploration and exploitation of the continental shelf; the Act provided for the application of criminal and civil law in respect of installations placed in the surface waters above the continental shelf. A few serious crimes committed abroad by British citizens are justiciable in British courts, such as treason, murder, bigamy and some revenue offences; all torture, wherever it takes place, is a crime in UK law. The courts apply a rule of interpretation that statutes will not be given extraterritorial effect, unless this is expressly provided or necessarily implied. In general, Parliament does not pass laws which would be contrary to the comity of nations. Yet the law in Britain does not always keep pace with Britain’s changing international obligations. While the government under the royal prerogative may enter into treaties, treaties must be approved or adopted by Act of Parliament if national law is to be altered. The ratification of a treaty by the government may in some instances create a legitimate expectation that the government will act in accordance with the treaty, but such an expectation does not oblige Parliament to decide to implement the treaty in national law.

British membership of the European Union raises questions as to the relationship between UK law and Community law which cannot be answered by reference to the general principles of international law.

No legal limitations on Parliament

Many illustrations may be given of the use which Parliament has made of its legislative supremacy in legislating on constitutional matters, retrospectively, in breach of international law, and so on. It does not follow from a recital of this kind that the powers of Parliament are unlimited. As Calvert has said:

No one doubts that the powers of the UK Parliament are extremely wide . . . But that is not what is in issue. What is in issue is whether those powers are unlimited and one no more demonstrates this by pointing to a wide range of legislative objects than one demonstrates the contrary by pointing to matters on which Parliament has not, in fact, ever legislated.

There is much evidence from the law reports that, at least since 1688, judges have been strongly inclined to accept the legislative omnicompetence of Parliament. Yet this has not always been the judicial attitude. In his note on Dr Bonham’s case, Coke CJ said:

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

While English judges made similar statements only rarely after 1688, it is not possible from reported cases alone to demonstrate that they have utterly lost the power to ‘control’ an Act of
Parliament – or to show that a judge who is confronted with a statute repugnant to moral principle (for example, a law condemning all of a certain race to be executed) must either apply the statute or resign from office. Support for this has come from New Zealand, where Lord Cooke of Thorndon has urged that within the common law the judges exercise an authority which extends to upholding fundamental values that might be at risk from certain forms of legislation. In 1995, Lord Woolf argued that ‘if Parliament did the unthinkable and legislated without regard for the role of the judiciary in upholding the rule of law, the courts might wish to make it clear that ‘ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold’. Lord Steyn has said that the courts might have to revisit the principle of parliamentary supremacy, if Parliament sought ‘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’; in such circumstances, the courts might have to ‘qualify’ the supremacy of Parliament, ‘a principle established on a different hypothesis of constitutionalism’.

Short of such an extreme situation, it is very unlikely that the courts would of their volition exercise power derived solely from common law to review the validity of Acts of Parliament. Where in modern constitutional systems judicial review of legislation takes place, this is generally derived from a written constitution. But in the United Kingdom, Parliament enjoys an unlimited power to legislate on constitutional matters. Is it therefore possible that, on the initiative of Parliament itself, the courts could begin to exercise a power of judicial review derived from constitutional legislation passed by Parliament? This possibility has often been dismissed out of hand by invocation of the principle that no Parliament may bind its successors. It has been said that the rule that the courts enforce without question all Acts of Parliament is the one rule of the common law which Parliament may not change. But, it has been asked, ‘Why cannot Parliament change that rule; since all other rules of the common law are subject to its sovereignty?’ It is to this difficult and fundamental question that we now turn.

C. The continuing nature of parliamentary supremacy

Within a modern legal system, enacted laws remain in force until they are repealed or amended, unless they are declared when enacted to have a limited life. It is inherent in the nature of a legislature that it should be free to make new laws. The fact that legislation about, say, divorce or consumer protection was enacted five or 50 years ago is no reason why fresh legislation on the same subject should not be enacted today; even if social conditions have not changed, the legislature may wish to adopt a new approach. When Parliament does so, it is convenient if the new Act expressly repeals the old law or states the extent to which the old law is amended. Suppose that this is not done and a new Act is passed which conflicts with an older Act but does not expressly repeal it. There now appear to be two inconsistent statutes on the statute book. How is the apparent conflict to be resolved?


71 R (Jackson) v A-G, [102], note 118 below.


74 E C S Wade, Introduction to Dicey, p lv .

75 There has always been the position in English law (Greenberg, Clauses on Statute Law, p 382). But Scottish Acts passed before 1707 may by the doctrine of desuetude cease to be law through non-use and change of circumstances: M’Ara v Magistrates of Edinburgh 1913 SC 1059; Mitchell, Constitutional Law, pp 21–2.
The doctrine of implied repeal

It is for the courts to resolve this conflict because they must decide the law which applies to a given situation. Where two Acts conflict with each other, and the conflict cannot be resolved in another way, the courts apply the Act which is later in time; the earlier Act is taken to have been repealed by implication to the extent of the inconsistency.

If two inconsistent Acts be passed at different times, the last must be obeyed . . . Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.76

This doctrine is found in many legal systems, but in Britain the operation of the doctrine is sometimes considered to have special constitutional significance.

Before 1919, many public and private Acts of Parliament empowered public authorities to acquire land compulsorily and laid down many differing rules of compensation. In 1919, the Acquisition of Land (Assessment of Compensation) Act was passed to provide a uniform code of rules for assessing the compensation to be paid in future. Section 7(1) provided: 'The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect.' The Housing Act 1925 sought to alter the 1919 rules of compensation by reducing the compensation payable in respect of slum-housing. In Vauxhall Estates Ltd v Liverpool Corporation,77 it was held that the provisions of the 1925 Act must prevail over the 1919 Act so far as they were inconsistent with it. The court rejected the ingenious argument of counsel for the slum-owners that s 7(1) (and especially the words 'or shall not have effect') had tied the hands of future Parliaments so that the later Parliament could not (short of express repeal) legislate inconsistently with the 1919 Act. In a similar case, Ellen Street Estates Ltd v Minister of Health, Maugham LJ said: 'The Legislature 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. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of Parliament.'78

The correctness of these two decisions is not in doubt, for there were very weak grounds for suggesting that in 1919 Parliament had been attempting to bind its successors. But Maugham LJ went far beyond the actual situation in saying that Parliament could not bind itself as to the form of subsequent legislation. He would have been closer to the facts of the case had he said that Parliament could not bind itself as to the contents of subsequent legislation.79 However, these cases, which illustrate the doctrine of repeal by implication, have been used to support a broad constitutional argument that Parliament may never bind its successors.80

Can Parliament bind its successors?

The rule that Parliament may not bind its successors (and that no Parliament is bound by Acts of its predecessors) is often cited both as a limitation on legislative supremacy and as an example of it. To adopt for a moment the language of sovereignty: if it is an essential attribute of a legal sovereign that there should be no legal restraints upon him or her, then, by definition, the rules laid down by a predecessor cannot bind the present sovereign, for otherwise the present holder of

76 Lord Langdale, in Dean of Ely v Bliss (1842) 5 Beav 574, 582. See also Thoburn v Sunderland Council [2002] EWHC (Admin) 934, [2003] QB 151 and p 146 below check; Bennion, Statutory Interpretation, pp 254–7 check; and Young, Parliamentary Sovereignty and the Human Rights Act, ch 2.
77 [1932] 1 KB 713.
78 [1934] 1 KB 590, 597.
79 H R Gray (1953) 10 Univ of Toronto LJ 54, 67.
the post would not be sovereign. Dicey, outstanding exponent of the sovereignty of Parliament, accepted this point:

The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any parliamentary enactment.81 (italics supplied)

Thus to state that no Parliament may bind its successors is to assume that all future Parliaments must have the same attribute of sovereignty as the present Parliament. But why must this be so? The problem is less intractable than the comparable conundrum of whether an omnipotent deity can bind itself,82 for even sovereign Parliaments are human institutions; and there is nothing inherently impossible in the idea of a supreme Parliament having power to make fresh constitutional arrangements for the future. Merely to state that Parliament may not bind its successors leaves unclear both the nature of the obligation which a present Parliament is unable to impose on its successors and also the meaning of `successors’.83 Indeed, the doctrine that Parliament may not `bind’ its successors is an oversimplification.

(a) Some matters authorised by legislation are of such a kind that, once done, they cannot be undone by a later Act. Thus, over 60 years after Parliament approved the cession of Heligoland to Germany in 1890, Parliament repealed the statute by which cession was approved.84 But in so doing, Parliament did not expect that this would recover the territory for the United Kingdom. On the many occasions after 1960 when independence was conferred on an overseas territory, it was the practice after 1960 for Parliament to provide that no future Act of the UK Parliament `shall extend or be deemed to extend’ to the independent country as part of its law; and that the UK government should thereafter have no responsibility for the government of the country in question.85 Earlier Independence Acts were less categorical, since it was thought that it might sometimes be convenient for the Westminster Parliament to continue to legislate at the request of the territory concerned.86 At one time it was suggested that provisions conferring independence could be revoked by the Westminster Parliament.87 The true position is that conferment of independence is an irreversible process: ‘freedom once conferred cannot be revoked’.88 Thus, by ceding territory or conferring independence, Parliament may restrict the geographical area over which future Parliaments may legislate effectively. In the Canada Act 1982, which conferred full power of constitutional amendment on Canada, it was provided that no subsequent Act of the UK Parliament `shall extend to Canada as part of its law’. If Westminster in future should seek to reverse the historical clock by attempting to legislate for Canada, Canadian courts would ignore any such attempt, unless the Canadian Parliament had authorised them to give effect to the legislation from Westminster. But British courts would be bound to give effect to the Westminster legislation so far as it lay within their jurisdiction to do so.89

(b) In a different way, Parliament may bind future Parliaments by altering the composition of the two Houses or the succession to the throne. Thus in 1832, when Parliament reformed the House of Commons to secure more democratic representation, later Parliaments were bound by that legislation inasmuch as the only lawful House of Commons was one elected in accordance with the 1832 Act. The pre-1832 House had ceased to exist. The present House of Commons was elected under election laws that are different from what they were in 1900 or in 1945. As for

81 Dicey, p 68.
82 Cf Hart, The Concept of Law, p 146; Marshall, Parliamentary Sovereignty and the Commonwealth, p 13; and H R Gray, note 79 above.
84 Anglo-German Agreement Act 1890, repealed by Statute Law Revision Act 1953, s 1.
85 E.g. Kenya Independence Act 1963, s 1; and see Roberts-Wray, Commonwealth and Colonial Law, p 261.
86 Statute of Westminster 1931, s 4 and e.g. Ceylon Independence Act 1947, s 1, ch 15 C.
87 British Coal Corpn v R [1935] AC 500, 520.
the House of Lords, in 1958 authority was given for creating life peerages and in 1999 all but 92 hereditary peers were removed from the House. Every change in the composition of the Lords must either be approved by that House (as constituted for the time being), or in the absence of such approval be enacted under the Parliament Acts 1911 and 1949. In 1936, His Majesty’s Declaration of Abdication Act altered the line of succession to the throne laid down by the Act of Settlement 1700, by removing Edward VIII from the throne: if a later Parliament had wished the throne to revert to Edward VIII, the assent of the Sovereign (George VI or his descendant) would have been required, just as Edward VIII’s assent was needed for the Abdication Act itself. Thus, the supreme Parliament may alter the rules that determine who the successors of the component parts of Parliament are to be (and, it might be added, may abolish one of these component parts, e.g. the House of Lords, though this issue receives separate discussion below).

By contrast, when Westminster creates an assembly or parliament with devolved power to make law for part of the United Kingdom, it takes care to ensure that this does not limit its own power to legislate for the whole United Kingdom. The Scotland Act 1998, s 28, empowered the Scottish Parliament to make laws on devolved matters; but the Act stated that conferment of that power to make laws ‘does not affect the power’ of the UK Parliament to make laws for Scotland (s 28(7)). A similar provision is found in the Northern Ireland Act 1998 (s 5(6)). The same declaration in grander language was in the Government of Ireland Act 1920, which established a parliament for Northern Ireland and by s 75 provided that the ‘supreme authority’ of the UK Parliament ‘shall remain unaffected and undiminished over all persons, matters and things’ in Northern Ireland. The power retained by Westminster includes in law the power to repeal the entire scheme of devolution. Thus in 1972 Westminster abolished the Stormont Parliament. On the Diceyan view of supremacy, it is not necessary in law to include express provision in a devolution Act to preserve Westminster’s legislative powers. But such provision serves a deeper political purpose, as the existence of the Scottish Parliament presents a definite challenge to Westminster’s continuing legislative authority over Scotland.

The rule that Parliament may not bind its successors presents difficulties for certain constitutional reforms (for example, the creation of an entrenched Bill of Rights, discussed below). But it presents no obstacle to the adoption of a new constitutional structure for the United Kingdom. As was said about Gladstone’s first Home Rule Bill for Ireland, ‘if the Irish Government Bill had become law the Parliament of 1885 would have had no successors’. The object of securing that no subsequent Parliament enjoyed the attribute of legislative supremacy could be achieved in a variety of ways, for example by creating a federal system in the United Kingdom under which England, Scotland, Wales and Northern Ireland would each have its own legislature and executive; these bodies, together with a federal legislature and executive, would all be subject to the constitution as interpreted by a federal court. The creation of such a system would be inconsistent with the continuing supremacy of the present Parliament. The legislative ground for the new constitution would be laid by the supreme Parliament before it ceased to exist.

With the possible exception of the Union between Scotland and England in 1707 and the Union between Ireland and Great Britain in 1800, no actual reforms have been intended to go as far as this. However, as with British accession to the European Community, problems have arisen where the clear intention of Parliament to divest itself of legislative supremacy has not been manifested and where it may be argued that the overriding rule of supremacy has not been affected. The question is not, ‘May a supreme Parliament bind its successors?’ but ‘What must a supreme Parliament do (a) to express the definite intention that future Parliaments should not be supreme and (b) to ensure (whether by positive direction or structural changes) that the courts
will give effect to that intention? The second part of the question is important: for if the matter were to rest merely on the stated intention of the present Parliament, it is likely (in the absence of significant structural changes) that the courts would hold that a later Parliament would be free to depart from that intention. Moreover, it would only be by subsequent judicial decisions, taken in the light of relevant political events, that it would be known whether or not the (supreme) Parliament had successfully achieved its stated objective.

We must at this point examine more fully a question which has already been mentioned, namely the need for legal rules identifying the measures which are to be accepted as Acts of Parliament.

What is an Act of Parliament?

In an extremely simple community, where all powers within the human group are exercised by one person recognised as sovereign, no legal problems of identifying acts of the sovereign arise. But, as R T E Latham said:

Where the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.97

Latham pointed out that Parliament, regarded only as an assembly of human beings, was not sovereign. ‘It can only be sovereign when acting in a certain way prescribed by law. At least some rudimentary “manner and form” is demanded of it: the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible.’98

In the absence of a written constitution to guide the courts in identifying an Act of Parliament, the definition of an Act of Parliament is primarily a matter of common law.99 The rule of English common law is that for a Bill to become law, it must have been approved by Lords and Commons and have received the royal assent. In the ordinary case, this simple test will be satisfied by a rapid inspection of the Queen’s Printer’s copy of an Act of Parliament which will bear at its head formal words of enactment.100 When Acts of Parliament have been challenged on the ground of procedural defects during their passage through Parliament, the judges have laid down the ‘enrolled Act’ rule.

In Edinburgh & Dalkeith Railway v Wauchope, a private Act which adversely affected Wauchope’s rights against a railway company was challenged by him on the ground that notice of its introduction as a Bill into Parliament had not been given to him, as required by standing orders of the Commons. The court rejected this challenge. Lord Campbell said: ‘All that a court of justice can do is to look to the Parliament roll: 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 it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.’101 And in Lee v Bude & Torrington Railway Co it was said: ‘If an Act of Parliament 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.’102

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95 Page XX above.
98 (1939) King’s Counsel, 153, quoted in Heuston, Essays in Constitutional Law, pp 7–8.
99 Sir Owen Dixon (1957) 31 ALJ 240. And see Prince’s Case (1606) 8 Co Rep 1, 20b. Also R (Jackson) v A-G, discussed below.
101 (1842) 8 Cl and F 710, 725.
102 (1871) LR 6 CP 577, 582 (Willes J).
This principle was reaffirmed in 1974, when the House of Lords in *Pickin v British Railways Board* held that a local or private Act of Parliament was binding whether or not the standing orders of each House had been complied with.

Private Acts of 1836 and 1845 authorised the taking of land for a railway and provided that, if the line were ever abandoned, the land should vest in the owners of the adjoining land. In 1968, another private Act was passed, promoted by the British Railways Board, which abolished this rule. In 1969, Pickin bought a small piece of adjoining land and, when the railway was discontinued, claimed a declaration that under the 1836 and 1845 Acts he was entitled to a strip of the old line. He alleged that the board had fraudulently misled Parliament when promoting the 1968 Act, and had not complied with the standing orders of each House requiring individual notice to be given to owners affected by private legislation. Although the Court of Appeal held that these allegations raised a triable issue, the House of Lords held that the courts had no power to disregard an Act of Parliament, whether public or private, nor had they any power to examine proceedings in Parliament to determine whether an Act had been obtained by irregularity or fraud.

There are several reasons for this reluctance of the courts to inquire into the internal procedures of Parliament. One important reason is the privilege of each House to regulate its own proceedings. For officers of Parliament to be summoned before a court to give evidence about the internal proceedings of Parliament would create a danger of the courts infringing art 9 of the Bill of Rights. On many matters of parliamentary procedure, the courts have declined to intervene whether or not alleged breaches of statute were involved. The rule that a Bill must be read three times in each House is not a requirement of the common law but is part of the ‘law and custom of Parliament’ and on this the standing orders of each House are based. If one House wished to alter the requirement, say by abolishing the third reading, this change would not affect the duty of the courts to apply the ‘enrolled Act’ rule.

But some comments must be made on the ‘enrolled Act’ rule. First, there is today no Parliament roll: in case of necessity, all that a court could inspect is the two vellum prints of an Act which since 1849 have been signed by the Clerk of Parliaments and preserved in the National Archives and the House of Lords Record Office. Second, the rule is reinforced by the provision in the Interpretation Act 1978 that every Act passed after 1850 shall be a public Act and judicially noticed as such, unless the contrary is expressly provided by the Act. Third, if it should appear that a measure has not been approved by one House, then (unless the Parliament Acts 1911–49 apply) the measure is not an Act. Fourth, where there is a written constitution, this may lay down the procedures which must be followed before a Bill can become an Act. Thus in South Africa, the former constitution provided that certain entrenched rights could be revoked only by legislation adopted at a joint sitting of both Houses of the South African Parliament, voting by a two-thirds majority: when this procedure was not followed, the result was not a valid Act of Parliament.

105 Ch 11 A. The Scottish Parliament does not enjoy this privilege (*Whaley v Lord Watson of Invergowrie* 2000 SC 125) but by the Scotland Act 1998, s 28(5), the validity of an Act of that Parliament is not affected by any invalidity in proceedings leading to its enactment.  
106 Page XX above.  
109 For an explanation of this rule, see *Craies on Statute Law*, pp 23–4.  
110 *The Prince’s Case* (1606) 8 Co Rep 1a.  
Could the ‘enrolled Act’ rule be changed by Act of Parliament? To an extent this has already occurred. Thus the Regency Acts 1937–53 make permanent provision for the infancy, incapacity or temporary absence abroad of the monarch.112 A regent appointed under these Acts may exercise all royal functions, including assenting to Bills, except that he or she may not assent to a Bill for changing the order of succession to the Crown or for repealing or altering the Act of 1707 securing Presbyterian Church Government in Scotland. If, which is unlikely, a regent did assent to a Bill for one of these purposes, the courts ought not to regard the resulting measure as an Act of Parliament.

Similarly, the Parliament Acts 1911–49113 provide that in certain circumstances a Bill may become an Act without having been approved by the Lords. The 1911 Act provides special words of enactment which refer to the Parliament Acts (s 4(1)) and also provides that the Speaker’s certificate that the requirements of the Acts have been complied with shall be conclusive for all purposes (s 3). But this procedure does not apply either to a Bill to extend the life of Parliament or to private or local Bills. If it were attempted to extend the life of Parliament by a measure which had not been approved by the Lords, a court should decline to regard the result as an Act of Parliament: the ‘conclusiveness’ of the Speaker’s certificate would not bar such a decision by the court.114

In respect of the Regency Acts and the Parliament Acts, it has been argued that measures which become law thereunder are Acts of a subordinate legislature to which the supreme Parliament has made a limited delegation of its powers; such measures must therefore be regarded as delegated legislation.115 In other contexts, courts have been reluctant to apply to a legislature the principle that delegated power may not be sub-delegated (delegatus non potest delegare)116 and a contrasting view is that, except for the excluded purposes, Parliament has provided a procedure for legislation which is alternative to the procedure of legislation by the supreme Parliament.117

This question came up for decision in the unusual case of R (Jackson) v Attorney-General.118

The Hunting Act 2004, which made fox hunting with dogs unlawful and had been strongly opposed in the Lords, had been enacted under the Parliament Act 1911, as amended by the Parliament Act 1949. Supporters of hunting claimed that the Hunting Act was invalid; they argued that the Parliament Act 1949 was invalid as it had not been passed by the supreme Parliament, yet it had amended the conditions on which power to legislate without the approval of the Lords had been created in 1911 (by reducing the delaying power of the Lords from two years to one). The Court of Appeal had held that ‘major constitutional changes’ could not be made under the Parliament Act 1911, but that the reduction in the period of delay was not a major change. The nine Law Lords who heard the appeal held, unanimously, that both the 1949 Act and the Hunting Act were valid. The broad consensus that emerged from eight separate judgments was that in 1911 Parliament had intended to restrict the powers of the Lords by enabling the Commons and monarch to legislate without the Lords’ approval. The procedure was an alternative to the usual process of legislation, and a measure passed under the Parliament Acts was primary (not delegated) legislation. The power to enact legislation in this way was not subject to implied exceptions but, as expressly stated in the 1911 Act, the life of Parliament could not be extended without consent of the Lords. A majority of the judges held obiter that the Parliament Act procedure could not be used to remove this exception from the 1911 Act.

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113 Ch 10 B.

114 Section 3 of the 1911 Act requires that the Speaker’s certificate shall be given ‘under this Act’; in interpreting this section, a court could hold that the test of ultra vires had not been ousted: cf Minister of Health v R [1931] AC 494 and Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; ch 31.


116 R v Burah (1878) 3 App Cas 889 and Hodge v R (1883) 9 App Cas 117.

117 P Mirfield (1979) 95 LQR 36, 47–50.

The judgment of Lord Steyn included some obiter remarks that questioned whether Dicey’s account of the ‘pure and absolute’ nature of parliamentary supremacy was ‘out of place in the modern United Kingdom’. Taken with similar comments by Lord Hope and Lady Hale, this raised the possibility of circumstances in which a court might refuse to apply an Act of Parliament that breached a fundamental constitutional principle, for instance by seeking to abolish judicial review of executive decisions.\textsuperscript{119} For present purposes, Jackson decided that the definition of an Act of Parliament differs according to whether it has been enacted with the consent of both Commons and Lords, or with consent of the Commons alone. Moreover, the judges accepted that legislation by means of the Parliament Acts may include matters of constitutional importance (for instance, changes in the composition and functions of the House of Lords), although there was disagreement about the extent of this power. Further, despite hesitation by some of the judges, on an issue that was not contested by the Attorney General in this case, Jackson confirms that the courts have jurisdiction to decide whether an instrument relied on in litigation is or is not an Act of Parliament, at least where the issue turns on a matter of statutory interpretation. In 1974, a different view was expressed by Lord Morris in Pickin’s case:

'It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have been followed.'\textsuperscript{120}

That was said in the context of an alleged departure from the standing orders of the Commons, where the issue was rightly held to be a matter of internal procedure, not one for the courts to decide. But Jackson may be said to confirm that, in the rare situation where there is an issue as to the status of a legislative instrument, the court must decide whether that document satisfies the ‘enrolled Act’ rule at common law, or any other rule that a statute may have laid down for the enactment of legislation.

In the light of Jackson, we may consider a question that has been much discussed,\textsuperscript{121} namely whether a parliament with supreme legislative authority may bind itself by laying down rules that determine the ‘manner and form’ of future legislation. Although the case concerned a subordinate legislature, A-G for New South Wales v Trethowan\textsuperscript{122} illustrates issues that may arise when a legislature departs from rules governing the process of legislation which it had itself enacted.

Under the Colonial Laws Validity Act 1865, the legislature of New South Wales had power to make laws respecting its own constitution and procedure, provided that these laws were passed ‘in such manner and form’ as might be required by a law for the time being in force in the state. In 1929, an Act provided that the upper House of the legislature should not be abolished until a Bill approved by both Houses had been approved by a referendum of the electorate; the requirement of a referendum applied also to amendments of the 1929 Act. Following a change of government, a Bill passed through both Houses which sought to abolish both the upper House and the requirement of a referendum. The government did not intend to submit the Bill to a referendum. An injunction was granted by the New South Wales court to restrain the government from presenting the Bill for the royal assent unless a majority of the electors had approved it. On appeal, the Privy Council held that the requirement of a referendum was binding on the legislature until it had been abolished by a law passed in the ‘manner and form’ required by law for the time being, i.e. with the approval of a referendum.

\textsuperscript{119} On what Lord Steyn might have meant by ‘a different hypothesis of constitutionalism’, see J Jowell [2006] PL 562.

\textsuperscript{120} [1974] AC 765, 790. There is an ambiguity here: does ‘Parliament’ refer to an Act of Parliament, or to a decision made by resolution of one of the two Houses?

\textsuperscript{121} The work of Jennings, Latham, Marshall and others is examined in Oliver, The Constitution of Independence, ch 4. See also M Gordon [2008] PL 519 (Jennings’ understanding of Parliament’s power to alter the ‘manner and form’ of legislation is contrasted with the ‘increasingly antiquated’ orthodoxy associated with Dicey and Wade).

One view of Trethowan’s case is that it depended solely on the fact that the legislature was a subordinate legislature, subject to the rule in the Colonial Laws Validity Act that a constitutional amendment had to be enacted ‘in such manner and form’ as the law required from time to time. On this view, Trethowan is not relevant to the Westminster Parliament. Another view is that there is a rule at common law that legislation may be enacted only in such manner and form as is laid down, that this rule applies to the UK Parliament, and that the 1865 Act put into statutory form a rule that is fundamental to the court’s task of deciding whether a measure has the force of law. The judgments in the Hunting Act case certainly give support to the view that identifying an Act of Parliament depends on the rules as to ‘manner and form’ currently required of legislation. But they are not conclusive of how a future court would resolve a dispute concerning the Westminster Parliament on facts resembling those in Trethowan.

The Human Rights Act 1998 provides an example of a change in procedure that might give rise to a ‘manner and form’ argument. By s 19, a minister who is in charge of a Bill in Parliament must, before it is debated on second reading, state either that the Bill is compatible with the rights protected by the 1998 Act or, if it is not so compatible, that the government wishes the Bill to proceed. Would failure by a minister to make such a statement affect the validity of the resulting Act? For several reasons, the answer to this question is no. The requirement of a ministerial statement would be seen as a parliamentary procedure, enforceable only by Parliament. And a court would be unlikely to hold that in enacting s 19, Parliament was intending to alter the ‘enrolled Act’ rule.

We have seen that the doctrine of implied repeal has been used in support of the argument that Parliament may not bind its successors. Has Parliament the power to modify the doctrine of implied repeal itself? Two recent developments suggest that it can. The first, the ‘metric measures’ case, concerned the relation between Community law and English law. The court held that Parliament could not abandon its sovereignty by stipulating that a statute may not be repealed. However, it also held that where (as with the European Communities Act 1972) Parliament legislates on a subject with ‘overarching’ constitutional importance, such an Act (unlike an ‘ordinary’ statute) is not subject to implied repeal; it may be repealed only where a later Parliament declared expressly that this is its intention. Second, the scheme of the Human Rights Act 1998 in effect excludes the ordinary operation of implied repeal: if Parliament wishes in future to legislate in breach of the Convention rights protected by that Act, it will succeed in doing so only if it uses express words or in some other way makes absolutely clear its intention to legislate with that effect.

Summary

The argument in this chapter may be summarised as follows. In principle, a legislature must remain free to enact new laws on matters within its competence: if a conflict occurs between the laws enacted at different times, the courts apply the later of the two laws. The authority of Parliament includes power to legislate on constitutional matters, including both the composition of Parliament and the ‘manner and form’ by which new legislation may be made. While the courts may not of their own accord review the internal proceedings of Parliament, the scope for

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124 E.g. Jennings, The Law and the Constitution, p 153; R T E Latham (1939) King’s Counsel 152, 161; O Dixon (1935) 51 LQR 590, 603.
125 See in particular in R (Jackson) v A-G, Lady Hale’s observations at [160]–[163].
128 This effect arises from the novel duty of interpretation imposed by the Human Rights Act 1998, s 3; and see ch 19 C. For a different view, see Young, Parliamentary Sovereignty and the Human Rights Act, ch 2.
judicial decision could be extended if, by statute, Parliament altered the common law rules according to which the courts recognise or identify an Act of Parliament. The doctrine of parliamentary supremacy is no bar to the adoption of a written constitution for the United Kingdom which imposes judicially enforceable limits upon a future legislature, at least if such structural changes are made that the new legislative process is materially different from the present process involving Lords, Commons and royal assent. However, if changes were not made in the structure of the legislature but an attempt were made to limit or restrict the powers of Parliament, the courts would be unlikely to regard the purported limits or restrictions as ousting the continuing legislative supremacy of Parliament. It is not possible to predict the outcome of changes made by Parliament to the ‘manner and form’ of the legislative process since, depending on the nature and reasons for such changes, the courts might still be influenced by a deep-seated belief in the Diceyan proposition that Parliament cannot bind itself.

These general principles will now be discussed briefly in relation to some specific constitutional issues.

1 Constitutional guarantees for Northern Ireland. An account is given elsewhere of the events by which the Irish Republic broke from the United Kingdom. In the Ireland Act 1949, the UK Parliament recognised the independence of the Republic. The Act also declared that ‘in no event’ would Northern Ireland ‘or any part thereof’ cease to be part of the United Kingdom ‘without consent of the Parliament of Northern Ireland’.

However, the 1949 Act did not guarantee the continued existence of the Parliament of Northern Ireland. When that Parliament was abolished in 1973 by Westminster, a new guarantee was given that Northern Ireland would not cease to be part of the United Kingdom without the consent of the majority of the people. Today the Northern Ireland Act 1998, s 1, declares that Northern Ireland ‘in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland’ voting in a poll held for the purpose. The guarantee is of great political significance. But has Parliament fettered itself from, say, ceding Londonderry to the Republic without first obtaining the consent of the majority of the people of Northern Ireland? Or could Parliament at a future date repeal the 1998 Act and provide nothing in its place? The strongest legal argument for the proposition that Parliament could not breach the guarantee takes the form that for the purposes of legislating for the future status of Northern Ireland, Parliament has redefined itself so that an additional stage, namely approval by a border poll, is mandatory. But would the courts hold that this intention had been so clearly expressed that a subsequent Parliament had lost the legal capacity to repeal the 1998 Act, expressly or by implication? At one time, a court might have been reluctant to recognise an individual’s standing to challenge action by Parliament, and reluctant to grant injunctive relief. However, standing to sue has presented few difficulties in recent public law cases and a declaratory judgment would be an appropriate remedy. It has been suggested that the Northern Ireland guarantee is an example of a limitation which Parliament may impose on itself but which does not incapacitate Parliament from acting. In reality, the political constraints against breach of the guarantee provide a greater safeguard for the Ulster Unionists than reliance on litigation to establish that in 1998 Parliament had limited the powers of future Parliaments.

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131 Ch 3 A.

132 For an analogous provision in Gladstone’s first Home Rule Bill, see Marshall, Parliamentary Sovereignty and the Commonwealth, pp 63–6.

133 Northern Ireland Constitution Act 1973, s 1.

134 Ch 31.

135 See e.g. R v Employment Secretary, ex p EOC [1995] 1 AC 1.

136 Mitchell, Constitutional Law, p 81.
2. British membership of the European Union. A later chapter will outline the structure of the European Union and discuss the relationship between national law and Community law. Community law has been held by the European Court of Justice to prevail over any inconsistent provisions of the national law of the member states:

the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed . . . without the legal basis of the Community itself being called into question. 137

The European Communities Act 1972 gave effect within the United Kingdom to those provisions of Community law which were, according to the European treaties, intended to have direct effect within member states. This applied both to existing and future treaties and regulations. The Community organs therefore may legislate for the United Kingdom, as they do for all member states. While Britain remains a member of the EU Community, the Westminster Parliament is not the sole body with power to make new law for the United Kingdom. Nor can Community law appropriately be described as delegated legislation. 138

The extent to which Community law overrides inconsistent national law was seen in R v Transport Secretary, ex p Factortame Ltd: 139

Spanish fishing interests that had formed companies registered in the United Kingdom challenged as contrary to Community law the Merchant Shipping Act 1988. This Act, by defining the term ‘British fishing vessels’ in a restrictive way, sought to prevent non-British interests from having access to the British fishing quota. In interim proceedings to protect Spanish interests pending decision of the substantive case, the European Court of Justice held that a national court must set aside a rule of national law if this was the sole obstacle to the granting of temporary relief to protect Community rights. Thus the British courts must disregard s 21 of the Crown Proceedings Act 1947 [no injunctions to be granted against the Crown] 140 and must also not apply the Merchant Shipping Act 1988. In the House of Lords, Lord Bridge challenged the view that ‘this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament’. He stated that long before the United Kingdom joined the Community, the supremacy of Community law over the laws of member states was well established. ‘Thus whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.’ 141

In R v Employment Secretary, ex p EOC, 142 the House of Lords declared that provisions in the Employment Protection (Consolidation) Act 1978, making protection for part-time workers (who were mainly female) subject to conditions that did not apply to full-time workers (who were mainly male), were incompatible with the right of female workers under Community law to equal treatment with male workers.

These decisions establish that the British courts must not apply national legislation, whether enacted before or after the European Communities Act 1972, if to do so would conflict with Community law. In the late Sir William Wade’s view, decisions such as Factortame effected a ‘constitutional revolution’, by holding that Parliament in 1972 did bind its successors. 143 A narrower explanation is that the 1972 Act created a rule of construction requiring the courts to apply UK legislation consistently with Community law, except where an Act expressly overrides

137 Case 11/70, Internationale Handelsgesellschaft case [1970] ECR 1125, 1134. And see ch 8 B.
139 [1990] 2 AC 85 and (the same) (No 2) [1991] 1 AC 603. See also N Gravells [1989] PL 568 and [1991] PL 180; and ch 8 D.
140 See ch 32 C.
143 (1996) 112 LQR 568.
Part I · General principles of constitutional law

Community law. Whichever explanation is preferred, the primacy of Community law is an inescapable consequence of membership of the European Union.

3 The Human Rights Act 1998. The doctrine that Parliament may not bind its successors is a major obstacle to enactment of a Bill of Rights intended to protect human rights against legislation by later Parliaments. In outlining its scheme for the Human Rights Act, the government denied that it was trying to transfer power from future Parliaments to the courts:

To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly this Government has no mandate for any such change.

This stance applied to both existing and future Acts of Parliament, although Parliament in 1998 undoubtedly could have provided that the rights protected by the Human Rights Act should prevail over all existing statutes. On whether those rights should be entrenched against subsequent legislation, the government mentioned the procedure for amending the US constitution and stated:

an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.

Certainly, if a wholly new constitution for the United Kingdom were to be created, it could include entrenched fundamental rights. Short of that, are there ways in which fundamental rights could be protected against infringement by a future Parliament? In 1979, a select committee of the House of Lords, considering the desirability of a Bill of Rights for the United Kingdom, said:

there is no way in which a Bill of Rights could protect itself from encroachment, whether express or implied, by later Acts. The most that such a Bill could do would be to include an interpretation provision which ensured that the Bill of Rights was always taken into account in the construction of later Acts and that, so far as a later Act could be construed in a way that was compatible with a Bill of Rights, such a construction would be preferred to one that was not.

As will be seen later, the Human Rights Act 1998 did not attempt to bind future Parliaments from legislating in breach of rights protected by the Act. Instead, the Act (s 3) imposed a new duty on the courts to interpret all legislation, whatever its date, consistently with the Convention, if such an interpretation is possible. If such an interpretation is not possible, the conflicting provision remains in effect, but it may be declared by a superior court to be incompatible with Convention rights, in which case the government may make a ‘remedial order’ removing the incompatibility from the statute. This scheme preserves the formal authority of an Act of Parliament, while extending the powers of the judiciary to subject Parliament’s work to detailed scrutiny. As Judge LJ said in 2001, ‘The Act is carefully drafted to ensure that the court cannot and must not strike down or dispense with any single item of primary legislation.’ Yet under the scheme of the Act, all other Acts of Parliament (regardless of their date) are subject to judicial scrutiny to determine whether they are compatible with the Convention rights.

144 P Craig (1991) 11 YBEL 221, 251. And see ch 8 D.
145 Rights Brought Home, Cm 3872 (1997), para 2.13. And see ch 19 C.
146 Ibid, para 2.16 (emphasis supplied). Note the use of the word ‘attempt’ in the italicised phrase.
150 Re K (a child) [2001] Fam 377, para 121.
4 Abolition of the House of Lords. In chapter 10 B we examine the role of the House of Lords under the Parliament Acts 1911 and 1949. Here we deal only with the issue of whether, as one of the component parts of the supreme legislature, the House of Lords can be abolished.\textsuperscript{151} It would indeed be a fundamental change if ‘whatever the Queen, Lords and Commons enact is law’ were to become ‘whatever the Queen and Commons enact is law’. If, as argued earlier, the former proposition is founded upon decisions of the courts, the latter proposition would be authoritatively established only when the courts accepted the legislative supremacy of the Queen and Commons in place of the former supreme legislature. Arguably this change could be regarded as a legal revolution or a breach in legal continuity,\textsuperscript{152} but would use of this language be accurate if the courts had given direct effect to a change expressly authorised by the former legislature?

Two issues of practical significance might arise. First, if the Act abolishing the House of Lords included a Bill of Rights which was declared to be incapable of amendment by the new legislature (Queen and Commons), the courts would then have a choice between whether (a) to give effect to the stated intention of the former legislature, by holding that the Bill of Rights must prevail over any Acts passed by the new legislature or (b) to hold that the new legislature was as legislatively supreme as its predecessor. Since the courts might not wish to create a legislative vacuum (i.e. a situation in which certain legislation is totally impossible), the outcome might depend on whether any procedure was available if it became necessary in an emergency to encroach upon the Bill of Rights.

Second, could the House of Lords be lawfully abolished against the wishes of the House, by use of the Parliament Acts 1911 and 1949? In \textit{Jackson v A-G} ,\textsuperscript{153} it was held that the Parliament Acts could be used to achieve major constitutional changes without the consent of the upper House.\textsuperscript{154} The rejection of the ‘delegated legislation’ argument in that case strengthens the view that these major changes include abolishing the House of Lords. But the question did not arise for decision, and most of the judgments do not deal with it.\textsuperscript{155}

D. The Treaty of Union between England and Scotland

In section C, we discussed whether the Westminster Parliament may impose legal limitations upon its successors. The Anglo-Scottish Union of 1707 raises the different question, ‘Was the United Kingdom Parliament born unfree?’\textsuperscript{156} The main features of the Treaty of Union have already been outlined.\textsuperscript{157} Now it is necessary to examine more closely provisions of the Treaty concerning the power to legislate after the Union.

The Treaty contemplated that the new Parliament of Great Britain would legislate both for England and Scotland; but no grant of general legislative competence to Parliament was made in the Treaty. Article 18 provided that the laws concerning regulation of trade, as well as customs and excise duties, should be uniform throughout Britain; subject to this, all other laws within Scotland were to remain in force,

\textsuperscript{151} For the main arguments, see P Mirfield (1979) 95 LQR 36 and G Winterton (1979) 95 LQR 386. And Dicey, \textit{The Law of the Constitution}, pp 64–70.

\textsuperscript{152} Mirfield, pp 42–5.

\textsuperscript{153} Above, p XX.

\textsuperscript{154} In 2000, the royal commission on reform of the House of Lords recommended that the Parliament Acts be amended to exclude the possibility of their being further amended by use of Parliament Act procedures: Cm 4534, para 5.15.

\textsuperscript{155} But note, at para [101], Lord Steyn’s observations (obiter) on this point.

but alterable by the Parliament of Great Britain, with this difference betwixt the laws concerning public right, policy, and civil government, and those which concern private right; that the laws which concern public right, policy and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern private right except for evident utility of the subjects within Scotland.

By art 19, the Court of Session and the Court of Justiciary were to remain ‘in all time coming’ within Scotland as then constituted and with the same authority and privileges as before the Union, ‘subject nevertheless to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain’. Other courts were to be subject to regulation and alteration by Parliament. No causes in Scotland were to be capable of being heard by the Courts of Chancery, Queen’s Bench, Common Pleas (or any other court in Westminster Hall). An Act for securing the Protestant religion and Presbyterian Church government in Scotland was passed at the same time by the English and Scottish Parliaments and was declared to be a fundamental and essential condition of the Treaty of Union ‘in all time coming’.

There is substantial evidence that, while the framers of the Union intended the new Parliament to be the sole legislature, they sought to distinguish between matters on which Parliament would be free to legislate, matters on which it would have a limited authority to legislate, and matters which were declared fundamental and unalterable. The Treaty made no provision for future amendment of itself or for future renegotiation of the terms of the Union. The former English and Scottish Parliaments ceased to exist. No machinery was provided for applying the distinction drawn in art 18 between the laws concerning ‘public right, policy and civil government’ and the laws concerning ‘private right’ or, in the latter case, for discovering what changes in those laws might be for ‘evident utility’ of the Scottish people.

The argument that the Union imposed limitations upon the new Parliament can be summarised as follows: the new Parliament entered into its life by virtue of the Union; its powers were limited by the guarantees in the Treaty, which had been enacted by the separate Parliaments before the united Parliament was born. The assertion that a sovereign Parliament may not bind its successors may be countered by the view that even if both the English and Scottish Parliaments were supreme before 1707,158 each committed suicide in favour of a common heir with limited powers. The Treaty of Union, concludes the argument, is a fundamental constitutional text which prevents the British Parliament from itself enjoying the attribute of legislative supremacy. When, as in Cheney v Conn, an English judge remarks, ‘what the statute says and provides is the highest form of law that is known to this country’, 159 a Scots lawyer might reply: ‘Not so: the Treaty of Union is a higher form of law and may prevail over inconsistent Acts of Parliament.’

This viewpoint is subject to both theoretical and historical difficulties. First, no legislature other than the British Parliament was created. If circumstances changed, and amendments to the Union became desirable, how could they be made except by Act of Parliament? Thus in 1748, the heritable jurisdictions were abolished and, when Scottish local government was reformed in 1975, the royal burghs were abolished.160 In 1853, the Universities (Scotland) Act abolished the requirement that the professors of the ancient Scottish universities should be confessing members of the Church of Scotland, thus repealing an ‘unalterable’ provision of the Act for securing the Presbyterian Church. Second, the distinction between laws concerning ‘public right, policy and civil government’ and laws concerning ‘private right’ is a very difficult one. For example, power to tax private property or to acquire land compulsorily for public purposes concerns both public and private right; and is the law of education or industrial relations a matter of public or private right? Third, the test of ‘evident utility’ for changes in the law affecting private right is obscure: who is to decide – Scottish MPs, the Scottish Parliament, the Scottish Ministers, the courts or

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158 On whether the Scottish Parliament was supreme before 1707, see Donaldson, Scotland: James V–James VII, ch 15; Dicey and Rait, Thoughts on the Union between England and Scotland, pp 19–22, 242–4.
159 Page XX above.
160 Cf arts 20 and 21 of the Treaty of Union.
other bodies in Scotland?161 Fourth, after the Union the Westminster Parliament continued to conduct its affairs exactly as before, subject only to its enlargement by members from Scotland.162 As dominant partners in the Union, the English assumed that continuity from pre-Union days was unbroken. On a matter left silent by the Treaty of Union, the House of Lords in its judicial capacity heard appeals from Scotland in civil cases for 200 years following the case of Greenshields in 1709 (the House of Lords was not a court within Westminster Hall within the meaning of art 19 of the Union) but it had no jurisdiction in Scottish criminal cases, a position that is maintained in the jurisdiction of the new Supreme Court.163 Fifth, even if the framers of the Union intended there to be limitations on the British Parliament, this might not be sufficient to vest jurisdiction in the courts to hold Acts of Parliament invalid on the ground that they conflicted with the Treaty. In Dicey’s view, the subsequent history of the Union ‘affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body’.164 These matters have been debated in several important Scottish cases.

In MacCormick v Lord Advocate,165 the Rector of Glasgow University challenged the Queen’s title as ‘Elizabeth the Second’, on the grounds that this was contrary to historical fact and contravened art 1 of the Treaty of Union. At first instance, Lord Guthrie dismissed the challenge for the reason, among others, that an Act of Parliament could not be challenged in any court as being in breach of the Treaty of Union or on any other ground. In the Inner House of the Court of Session, the First Division dismissed the appeal against Lord Guthrie’s decision, but on narrower grounds. After holding that MacCormick had no legal title or interest to sue, that the royal numeral was not contrary to the Treaty, and that the Royal Titles Act 1953 was irrelevant, Lord President Cooper said: ‘The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.’ He had difficulty in seeing why it should have been supposed that the Parliament of Great Britain must have inherited all the peculiar characteristics of the English Parliament but none of the Scottish Parliament. He could find in the Union legislation no provision that the Parliament of Great Britain should be ‘absolutely sovereign’ in the sense that it should be free to alter the Treaty at will. He reserved opinion on whether breach of such fundamental law as is contained in the Treaty of Union would raise an issue justiciable in the courts; in his view there was no precedent that the courts of Scotland or England had authority to determine ‘whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent States and merged their identity in an incorporating union’. Lord Russell, who concurred, stressed the limited functions of the courts in political matters, suggesting that a political remedy would be more suitable for MacCormick than a judicial remedy.

Lord Cooper’s judgment went beyond what was necessary for decision of the case and much uncertainty remained on fundamental issues. In particular, the denial that the courts have jurisdiction to decide whether ‘a governmental act of the type here in controversy’ conformed to the Treaty must be read in relation to the disputed royal title. If the Westminster Parliament were to pass an Act which sought to deprive persons in Scotland of access to the Scottish courts in matters of private right, the courts would be bound to decide whether to give effect to that Act.

In 1975, a Scottish fisherman unsuccessfully claimed in the Court of Session that British membership of the European Community was incompatible with the Treaty of Union.

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161 The court was prepared to find a statute to be of ‘evident utility’ in Laughland v Wansborough Paper Co 1921 1 SLT 341, but cf Gibson v Lord Advocate (p 76 below).
162 Hence the comment by Bryce, Studies in History and Jurisprudence, vol 1, p 194, that in 1707 England altered the constitution of the enlarged state no further than by admitting additional members to Parliament and suppressing certain offices in Scotland.
163 Constitutional Reform Act 2005, s 40(3).
164 Dicey, The Law of the Constitution, p 65; and cf Dicey and Rait, p 252.
165 1953 SC 396.
In Gibson v Lord Advocate, Gibson claimed that an EC regulation granting EC nationals the right to fish in Scottish waters and the European Communities Act 1972, which gave this legal effect in Britain, were contrary to art 18 of the Union, since this was a change in the law concerning a private right which was not for the ‘evident utility’ of the Scottish people. Lord Keith held that the control of fishing in territorial waters was a branch of public law, which might be made the same throughout the United Kingdom and was not protected by art 18. Obiter, Lord Keith said that the question whether an Act of Parliament altering Scots private law was for the ‘evident utility’ of the Scottish people was not a justiciable issue. ‘The making of decisions upon what must essentially be a political matter is no part of the function of the court.’

Both in MacCormick and in Gibson the question was held open of the validity of legislation seeking to abolish the Court of Session or the Church of Scotland, both being institutions safeguarded by the Union. Short of such an extreme situation, the Scottish courts are reluctant to claim a power to review the validity of Acts of Parliament. This attitude was maintained when the Court of Session declined to hold that the community charge (or poll tax) legislation, which applied to Scotland a year earlier than in England and Wales, was contrary to art 4 of the Treaty of Union.

The Scotland Act 1998 conferred on the courts a new jurisdiction to decide ‘devolution issues’, namely questions as to the extent of the powers of the Scottish Parliament and Executive. But this new jurisdiction would not cause the Scottish courts to review the validity of Acts of the Westminster Parliament. A related question is whether the Scotland Act affected the historical jurisdiction of the Scottish courts on matters relating to government and the people. Section 37 of the 1998 Act declares that the Union with Scotland Act 1706 and the Union with England Act 1707 shall ‘have effect subject to this Act’. This provision aims ‘to ensure that neither the Scotland Act 1998 nor legislation or actions authorised under its terms should be vulnerable to challenge on the ground of their inconsistency with the Acts of Union’.

In 1999, the Committee of Privileges in the House of Lords considered whether the proposal to remove Scottish hereditary peers from the House along with other hereditary peers would breach the Treaty of Union, art 22 of which entitled 16 peers of Scotland to sit in the House. In fact, the Peerage Act 1963 had removed the limit of 16 and entitled all surviving Scottish peers to sit; and art 22 had later been repealed. The Committee of Privileges unanimously held that removal of the Scottish peers would not breach the Treaty of Union. Lord Hope left open, without deciding, whether the courts have jurisdiction to decide whether some provisions of the Treaty of Union might have binding force. Even if the exclusion of the Scottish peers had been considered to breach the Union, it is not at all likely that the validity of the House of Lords Act 1999 would have been affected.

E. Conclusions

This chapter has examined whether there are legal limits on the legislative supremacy of Parliament, in particular whether there are, or could be, any limits capable of being enforced judicially. While British tradition has been strongly against judicial review of primary legislation, the courts must if necessary decide whether a document for which legislative authority is claimed is indeed an Act of Parliament. While the basic rule of legislative supremacy is a matter of common law that has political significance, it cannot be demonstrated from existing precedents...
that under no circumstances could this rule be qualified by judicial decision – still less that the rule could not be changed by Act of Parliament. It is therefore not possible to assert dogmatically that the legislative supremacy of Parliament will continue to be the primary rule of constitutional law in the United Kingdom. According to Lord Hope in *R (Jackson) v Attorney-General*, ‘Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is not longer, if it ever was, absolute’.\(^{172}\) Indeed, the advancing pace of European integration has already made extensive inroads into Dicey’s doctrine of legislative supremacy; the Human Rights Act 1998 stops short of enabling the courts to set aside an Act of Parliament but authorises them to review legislation for compliance with the European Convention on Human Rights; and the advent of devolution means that Westminster is not the only legislature in the United Kingdom.

**Political significance of legislative supremacy**

There are difficulties in assessing the political significance of the legislative supremacy of Parliament. For one thing, constitutional and legal rules tend to reflect political facts, but sometimes only with a considerable time lag. Moreover, the doctrine has always been affected by a tinge of unreality since it would empower Parliament to do many unlikely, immoral or undesirable things which no one wishes it to do. Does Parliament really need power to condemn all red-haired males to death or to make attendance at public worship illegal? Or to create criminal offences retrospectively? Yet it would be wrong to ignore the strong political argument for retaining supremacy, particularly when the wishes of a newly elected House of Commons can be identified with the will of the majority. Legislative supremacy is well suited to a centralised, unitary system of government in which the needs of the executive are closely linked with the dominant political voice in Parliament; and in which the judiciary exercise an important but subordinate role. Even in such a system, there are many factors that limit the use to which the executive can put Parliament’s legislative powers. Dicey suggested that political sovereignty, as opposed to legislative sovereignty, lay in the electorate and that ultimately the will of the electorate would prevail on all subjects determined by the British government.\(^{173}\) Certainly, the electoral system influences the use of legislative powers, but this influence is very generalised and sporadic in effect: and depends in turn on the political parties, on the media, on economic and social groups and on other means by which public opinion is formed and expressed. Moreover, the electoral system produces a House of Commons which does not accurately reproduce the distribution of views among the electorate\(^{174}\) and provides only weak protection for unpopular minorities.

**Parliament and the electorate**

Under the British system, the electorate takes no direct part in legislative decision-making, save by electing the House of Commons. In some constitutions, for example in Ireland and Australia, constitutional amendments take effect only if they are approved by referendum. In other constitutions (for example, Denmark and Switzerland) legislative proposals may be subject to referendum. Until 1975, the United Kingdom found no place for direct democracy, save in the case of the border poll in Northern Ireland.\(^{175}\) Where major political issues are concerned, the outcome of a general election may indicate the degree of popular support for key changes. In 1910, two elections were held because of the legislative veto of the Lords and the need to gain support for the changes involved in overcoming that veto. In general, however, it is difficult to decide from the result of a general election the state of opinion on particular issues. Since the party which wins an election can claim to have a mandate to implement its manifesto, a government cannot be criticised for carrying out its election programme. Conversely, a government may be criticised for proposing

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\(^{174}\) Ch 9 F.

\(^{175}\) Page XX above.
major reforms which have not been put to the electorate. The Conservative government elected in 1970 was criticised by those opposed to British membership of the European Communities for having signed the Treaty of Accession and secured the European Communities Act 1972 without allowing the electorate the opportunity to vote on this issue.

For these reasons, but mainly because of the division of opinion within the Labour party, a referendum on Britain’s membership of the Communities was held in 1975. In 1979, and again in 1997, referendums were held in Scotland and Wales on schemes for a Scottish Parliament and a Welsh Assembly.176 There is increasing support for use of the referendum on other constitutional issues, such as changing the electoral system or approving a new European Constitution. While advisory referendums do not directly affect the authority of Parliament, it would affect the position of Parliament if referendums were to become mandatory for certain purposes. It has been argued that referendums should be used ‘as an extra check against government, an additional protection to that given by Parliament’.177 This would entrench certain matters against action by the elected majority in the Commons.

What aspects of the constitution should be protected in this way? There is a case to be made for requiring a referendum whenever it is proposed to transfer the powers of Parliament; as John Locke said, ‘it being but a delegated power from the People, they who have it cannot pass it to others’.178 Recent use of referendums has been on an ad hoc basis, with the ground rules being laid down afresh for each referendum. The Political Parties, Elections and Referendums Act 2000 introduced rules on public funding for campaign groups, and broke new ground with rules on spending limits during a referendum campaign, and a supervisory role for the Electoral Commission.179

Summary

The view taken in this chapter has been that Parliament’s legislative authority includes power to make new arrangements under which future Parliaments would not necessarily be supreme. The argument for retaining legislative supremacy is strengthened if it can be shown that the political system provides safeguards against legislation which would be contrary to fundamental constitutional principle or basic human rights. It is, however, doubtful whether the political system does adequately protect individuals or minority groups who may be vulnerable to oppressive action by the state. In reality, Parliament’s role within British government depends less on exercising absolute legislative power than on its effectiveness as a forum in expressing public opinion and in exercising control over government. As for the consequences of European development, the United Kingdom’s place in the EU has necessarily caused cherished constitutional tenets to be revised, in order to gain the benefits of a more closely integrated Europe.

Visit www.mylawchamber.co.uk/bradley to access updates to major changes in the law relating to this chapter.

Use Case Navigator to read in full some of the key cases referenced in this chapter:
Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590
R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2) [1991] 1 AC 603

176 Ch 3 B.
178 Second Treatise on Civil Government, quoted in Bogdanor, p 77.
179 See K D Ewing [2001] PL 542, 562–5; and ch 9 E.
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