Parliamentary sovereignty before and beyond Brexit

Orakhelashvili, Alexander

DOI:
10.1515/icl-2021-0024

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (Harvard):
Orakhelashvili, A 2021, 'Parliamentary sovereignty before and beyond Brexit', *Vienna Journal on International Constitutional Law*, vol. 15, no. 4, pp. 435-464. https://doi.org/10.1515/icl-2021-0024

Alexander Orakhelashvili*

Parliamentary Sovereignty before and beyond Brexit

https://doi.org/10.1515/icl-2021-0024
Published online November 9, 2021

Abstract: This article assesses the doctrine of parliamentary sovereignty against the background that, at the time of UK's withdrawal from the EU, UK parliament proclaimed it to be preserved despite the continuing domestic legal effect accorded, under 2018 and 2020 Acts, to pertinent EU law provisions in the UK legal system. The relevant evidence is analysed to show whether that position is one to which English law subscribes.

Keywords: parliamentary sovereignty, common law, interpretation, judicial review

1 Introduction

The lack of a written constitution in the UK is responsible for the absence of the plain and precise determination of the parliament's role the way it is expressed in written constitutions. This fact has since long facilitated the perception, observable across textbooks and case-law, that parliament in the UK legislates free of constitutional limitations. According to Dicey, parliament can 'make or unmake any law whatever'.[1] Lord Guthrie of the Scottish Court of Session suggested that parliamentary sovereignty implies

> first, the power of the Legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the nonexistence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.[2]

1 Albert V Dicey, *The Law of the Constitution* (8th edn, Liberty Classics 1915) 39 f.

2 *McCormick v Lord Advocate* [1953] SC 396 [403]. The difference between constitutional and other laws is at times emphasised in written constitutions, eg Article 44 of the 1920 Austrian Constitution provides that laws expressly designated as constitutional laws ought to be adopted by two-thirds majority of MPs present.

***Corresponding author: Alexander Orakhelashvili**, Department of Law, University of Birmingham, Birmingham, UK, E-mail: A.Orakhelashvili@bham.ac.uk

Speaking extra-judicially, Lord Neuberger has also suggested that 'Parliamentary sovereignty is absolute.'[3] Omnipotence of the legislative sovereign means that it is above the law and the constitution, its legislation can override any element of common law and any right of a subject, and courts owe unquestioned obedience to legislative provisions. This approach reflects the most conventional theory of parliamentary sovereignty, reiterated across most textbooks. Apart from various challenges, this theory has faced in terms of practical operation of English common law, the UK's exit from the European Union and the widely perceived recapture of sovereignty requires a fresh analysis of the global picture that accounts for the net value of parliament's legislative authority.

Denoting parliament – a specific organ of UK government – as sovereign is not free of analytical problems, because ordinarily sovereignty is a feature of States, not of their particular organs, however important their position within the national constitutional structure might be. Evelin Ellis and Dawn Oliver suggest that Parliament is both sovereign in the sense that it can legislate any way it pleases, and supreme in the sense that it has greater power than any of its possible rivals in the area of law-making,[4] notably courts. Logically and conceptually the two notions could work in tandem and parliament's supremacy could be seen to follow from its sovereignty. But does English law endorse that logical possibility?

The notion of sovereign legislator currently in use is owed to writings of Thomas Hobbes and John Austin who are often credited for having liberated jurisprudence and constitutional theory from the natural law dogma. On their version of positivism, as natural law would no longer be admitted to limit the authority of legislator, nothing at all under English law could limit it. Such self-explanatory portrayal of legislative sovereignty, without grounding its status in positive English law, has not only lingered on for very long but also has, impliedly at least, endorsed the premise that the irrelevance of natural law inherently generates the range of consequences under positive law. By contrast, the positivist approach that factors in English common law would require that the roots and scope of legislative supremacy as well as its limitations must be identified under the ordinary sources of English law.

The central research question pursued throughout the rest of this contribution is whether Parliament's broad legislative authority entails the outcome that its legislative activities are not regulated or circumscribed by the constitution. All themes dealt with below centre around the question of whether Parliament can

3 Lord Neuberger, 'Who Are The Masters Now?' (Second Lord Alexander of Weedon Lecture, 6 April 2011) paras 14 ff.

4 Evelin Ellis & Dawn Oliver, The Law of Parliament, in David Feldman (ed), *English Public Law* (2nd edn, OUP 2009) 127 f.

unilaterally determine the scope of its own authority, define or increase legal force of its own enactments, and unilaterally rearrange relations between itself and other branches of UK Government, essentially determining the scope of latter's authority. If Parliament's authority is that broad, then the thesis that UK constitution endorses separation of power becomes difficult to sustain. The analysis that follows will examine the constitutional evolution of Parliament's role in the historical perspective (section 2). Section 3 will illustrate the essentially common law make of the Parliament's constitutional status and of its particular elements, and how common law determines the constitutional scope of the judicial obedience rule. Section 4 will examine the ways in which courts can approach or question Parliament's legislative determinations under common law and under 1998 Human Rights Act, and what they can do about them. Finally, section 5 will focus upon the relevance of Parliament's own determinations as to its legislative sovereignty, which will be examined in historical and modern perspective, including with regard to the status of European Union law in the UK, both during the UK's membership in the EU and after UK's withdrawal from that organisation.

2 Unwritten Constitution and the Historical Evolution of the Parliament's Role

A feature common to theories of Austin and Dicey has been to advance the thesis of parliamentary sovereignty without addressing the common law basis of legislative supremacy. Austin's position that parliament is sovereign because constitutional law that ordinarily determines authority of legislative organs is not – in the British context – law properly so-called,[5] is easier to discard for its counter-factuality. Dicey seems to accept that constitutional law is law but gives only a partial account of it and fails to show how the unwritten constitution endorses the position that parliament is the absolute legislative sovereign. Sir Frederick Pollock's thesis is that UK parliament is sovereign and omnipotent because its status is different from legislative organs in the US, European countries or British colonies because the latter organs' status is determined and circumscribed by written constitutions.[6] Even though such supra-constitutional view of Parliament's status is represented across textbooks, it is not validated by historical evidence.

5 John Austin, *The Province of Jurisprudence Determined* (Weidenfeld & Nicolson 1954) 253.

6 Frederick Pollock, *First Book of Jurisprudence* (Macmillan 1923) 276; Laws LJ has also spoken of 'intermediate constitution' in that sense, *Roth* [2003] QB 728 [765].

According to Dicey, one of the chief features of the constitution in England since the Norman Conquest was 'the omnipotence or undisputed supremacy throughout the whole country of the central government' which 'was represented by the power of the Crown. The King was the source of law and the maintainer of order.' But subsequently 'this royal supremacy has … passed into that sovereignty of Parliament.'[7] Whether the transmission of what Dicey calls 'omnipotence or undisputed supremacy' took place is questionable. As Oakeshott explains, the ancient constitution of England did not reflect the idea of an absolute sovereign. Instead, the monarch's duty was to safeguard the rights of subjects.[8] The Monarch alone hardly ever exercised the totality of all public authority or even of its legislative element and could not make or unmake any law. Therefore, there simply was no equivalent 'sovereign' authority of the kind that could be transferred from the Crown to the Parliament as the new owner of that authority, and there never was a replacement in the way Dicey has described it.

Compared to Dicey, UK Supreme Court's recent description of the historical evolution process is somewhat more nuanced:

> Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the state (although it appears that even in the 11th century the King rarely attended meetings of his Council, albeit that its membership was at his discretion). However, over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges).[9]

The Supreme Court speaks here of a constitutional model of a shared and divided government and does not attribute legislative omnipotence to any branch of the government.

From the Middle Ages onwards, parliament operated as the High Court of Parliament, which would be petitioned and resulting action or remedy would at times take the form of a judicial decision and at times of more general arrangements known as legislation. Proceedings would have essentially judicial character.[10] Legislation in courts from the late Middle Ages onwards had important

7 Dicey (n 1) 179.

8 Michael Oakeshott, *Lectures in the History of Political Thought* (2012) 320.

9 *Miller* [2017] UKSC 5 [41].

10 Charles H McIlwain, *The High Court of Parliament and its Supremacy* (Yale University Press 1910) 204–208 (referring to Maitland).

weight in courts, but judges did not ordinarily treat it as having inherent or inevitable primacy over common law. Nor was parliament inevitably seen as anything more as a consultational organ. Not until the 19th century did 'legislation' as an instrument of public policy acquire any uniform meaning or supremacy over common law.[11]

Assertions of parliamentary supremacy in the 17th century became frequent as part of the campaign against the King assuming law-making or taxing functions.[12] It was only after 1688 that the role of parliament in creating new law was understood,[13] and this then dwarfed out its other functions.[14] According to one narrative, the main historical event to which the crystallisation of the modern idea of parliamentary sovereignty is attributed is the 1688 Glorious Revolution and the consequent adoption of the 1689 Bill of Rights, which is allegedly 'generally regarded as having settled the question of the relationship between Parliament and the courts.'[15] The pre-1689 position where courts could strike down statutes by resorting to 'common right or reason' as per Sir Edward Coke's pronouncement in *Dr Bonham*, was allegedly abandoned in favour of 'Dicey's dominant interpretation of the constitution'.[16] But such claim is hardly sustained by evidence. For, those who engineered the 1688 Glorious Revolution were concerned with preventing the Crown's encroachment upon legislative prerogatives, not with the role of courts in the area of judicial review or statutory interpretation. As Allott has pointed out, 'the [1689] Declaration was concerned to remove abuses of prerogative powers and not to define the status of Parliament. Needless to say, there is no mention of the supremacy or sovereignty of Parliament.'[17] All the Glorious Revolution and Bill of Rights did was to enshrine, consolidate and entrench the legal

11 Carleton K Allen, *Law and Orders – An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in England* (Stevens 1945) 19 f; see also McIlwain (n 10) 326 f (by reference to Pollock).

12 McIlwain (n 10) 148.

13 George Winterton, 'The British *Grundnorm*: Parliamentary Supremacy Re-examined' (1976) 92 LQR 591, 595.

14 David Lieberman, The Mixed Constitution and the Common Law, in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (CUP 2006) 319.

15 Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights* (2009) 27 f; for a similar view see Lord Irvine of Lairg, 'Judges and Decision Makers: The Theory and Practice of the *Wednesbury* Review' (1996) PL 59, 76.

16 Lord Reid in *Burmah Oil* [1965] AC 75 [108], in *Pickin* (n 30) 782; Ian Loveland, 'Parliamentary Sovereignty and the European Community: The Unfinished Revolution?' (1996) 49 Parliamentary Affairs 517, 520; Lord Irvine (n 15) 61.

17 Philip Allott, 'The Courts and Parliament: Who Whom?' (1979) 38 CLJ 98, 99.

principle that Monarch alone could not legislate or tax his subjects.[18] It did not endorse the thesis that Parliament could make or unmake any law.

Dicey refers to the 1716 Septennial Act whereby parliament extended its own legislative term, as manifestation of parliament's unlimited legislative authority.[19] However, Parliament has prolonged its own existence because there was no rule in the English legal system to prevent it from doing so. This is not a decision going against common law. All Parliament did was to amend an earlier statute, which was a simple legislative activity, not a manifestation of omnipotence with regard to the constitution.

The period from 1760 to 1830 was a period of legislative quiescence.[20] Before the 1832 electoral reform very few pieces of legislation aimed at social reform would be passed. Parliament was more reassured of its constitutional status, unlike the times of the 17th century conflicts, but the courts' independence provided a powerful counterweight.[21] With the gradual rise of democracy since the 1832 electoral reform, a qualitatively different view of legislation has begun to prevail, aimed at social reforms required by public policy and public utility and hence the view that Parliament's legislation enjoyed primacy over the existing rights of subjects has gained a greater currency.

This process had to do with the increased ideological relevance of utilitarianism to drive the doctrine of parliamentary sovereignty. Utilitarianism sees the majoritarian and representative democracy as a tool for adopting and legitimating policies required by the interests of the majority, even if those policies entail adverse implications against affected minorities. Lord Neuberger suggests that 'Parliamentary sovereignty is absolute, because the only true master is the electorate.'[22] The notion of 'unitary democracy', which also is 'self-correcting',[23] is another way of describing this phenomenon, and so is the notion of the 'majoritarian' democracy constitution endorsed by Laws LJ in *Roth*[24] if it were to be accepted in a wholesale and blanket manner, as yet another representation of the Austinian premise of legislative sovereignty.

---

18 It was in this sense that the Supreme Court in *Miller* described the Executive's attempt to subvert the effect of primary legislation as 'a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom', *Miller* (n 9) 78.

19 Dicey (n 1) 44 ff.

20 Albert V Dicey, *Law and Public Opinion in England* (1880) 62 f, 70.

21 McIlwain (n 10) 103 (by reference to Maitland); Allen (n 11) 22.

22 Neuberger (n 3) para 74.

23 Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 4.

24 *Roth* [2003] QB 728 [759]–[760] (*per* Laws LJ).

In practice, UK's constitution has never embraced the principle that the scope of parliament's authority is coextensive with the extent to which Parliament represents the general public. UK Parliament always was and remains an institution created under England's ancient constitution and comprises, alongside with elected House of Commons, two unelected parts, namely the Monarch and House of Lords. Due to the budgetary crisis the Asquith cabinet encountered in the early 20th century, the 1911 Parliament Act was adopted whereby the power of the Lords to block the legislation was replaced by their power to delay its entry into force for two years, which period was then reduced to one year under the 1949 Parliament Act. The two Acts led to a gradual emancipation of the popular representation element. However, that process had to do with details of the legislative process, and involved no qualitative alteration of parliament's constitutional status or its overall authority.

More generally, democracy, public interest, public good and public representation are at most political, ethical and ideological motivators towards developing and proposing a particular view of parliament's status, but they do not contribute directly to legal position on this subject-matter. These extra-legal considerations ought, therefore, to be excluded from the legal analysis. Legal analysis should be constrained to matters arising under the constitution.

3 Constitutional Basis of Parliament's Law-making Authority and of the Interaction between Courts and Parliament

3.1 The Unwritten Constitution

Parliament operates as one element of UK's unwritten constitution. On terms resembling Dicey, as late as in 2016, the Supreme Court has said that 'Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes.'[25] However, statutes could not sustain the basis of parliamentary sovereignty but could at most be specific exercises of it.

As Dicey has observed, UK constitution 'is a judge-made constitution' and 'little else than a generalisation of the rights which the Courts secure to individuals.'[26] As FA Mann has explained, fundamental rights in English law, such as personal freedom, fair trial, freedom of speech, peaceful assembly were

25 *Miller* (n 9) 43.

26 Dicey (n 1) 192, 196.

developed by courts as part of common law.[27] Allott contradicts the thesis of parliamentary omnipotence and instead suggests that the 'fundamental laws [of the British constitution] persist unless and until they are changed by agreement among the supreme organs of the constitution.'[28] The Supreme Court in *HS2* went even further, suggesting that some principles of common law rank even above constitutional statutes such as 1972 ECA.[29]

3.2 Judicial Confirmation of Aspects of Legislative Supremacy

In practice, courts have confirmed several elements of parliament's authority to enable it to perform its constitutional role of democratic representation. According to Lord Simon in *Pickin*, it is a 'concomitant of the sovereignty of Parliament … that the Houses of Parliament enjoy certain privileges. These are vouchsafed so that Parliament can fulfil its key function in our system of democratic government.' Without this privilege the Parliament 'would sink into utter contempt and inefficiency.' One such privilege is parliament's 'exclusive right to determine the regularity of their own internal proceedings'.[30] More recently, the Supreme Court in *HS2* has singled out issues as to the process by which legislation is enacted by parliament, as opposed to content of and requirements arising under acts of parliament.[31] In *Jackson v Attorney-General*, the House of Lords rejected the argument that the 2004 Hunting Act could not take its intended effect. This was because the 1949 Parliament Act – the 2004 Hunting Act was premised upon – itself was adopted in the excess of powers that the 1911 Parliament Act had conferred to the Monarch and the Commons in terms of legislating without the assent of the Lords.[32] Parliament was entitled to re-design or re-structure the relationship between its three constituent elements. As Bradley and Ewing suggest, *Jackson* confirms that judicial determination may be necessary to ascertain what the rule of parliamentary sovereignty precisely means and requires.[33] On this position, the Judiciary essentially approved and validated this legislative change as constitutional. In line with the thesis of supremacy shared between courts and

27 F A Mann, 'Britain's Bill of Rights' (1978) 94 LQR 512, 514 f.
28 Allott (n 17) 116.
29 *HS2* [2014] UKSC 3 [207] (*per* Lords Neuberger and Mance).
30 *Pickin v British Railways Board* [1974] AC 765 [798]–[799].
31 *HS2* (n 29) 79, 116 (*per* Lord Reed); 205–206 (*per* Lords Neuberger and Mance).
32 *Jackson v Attorney General* [2005] UKHL 56 [160].
33 Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (15th edn, Trans-Atlantic Publications 2010) 66.

the Parliament, the effect of legislation on Parliament's self-redesigning depends ultimately on common law.

Courts have also confirmed the rule of implied repeal. Maugham J in *Ellen Street* has reasoned that

> [t]he 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 the Legislature.[34]

Avory J in *Vauxhall Estates* observed that this position was required by 'the principle of the Constitution.'[35] Sir William Wade explains such dependence of this aspect of legislative supremacy on judicial recognition the way that *Ellen Street* & *Vauxall* were 'two decisions where it was held that the law-making process was not at the mercy of Parliament for the time being, but was guarded by the courts in order that future Parliaments might be unfettered.'[36] Thus, the viability of the implied repeal rule that safeguards the 'supremacy' of a later parliament depends on its judicial recognition, which again demonstrates the legal insufficiency of legislative supremacy premised on parliament's self-sustaining position.

Overall, the above practice shows that even the confirmation of obvious aspects of legislative supremacy depends on courts and their assessment of constitutional requirements. The above specific and disparate instances hardly sustain a wholesale and blanket principle that parliament possesses absolute legislative sovereignty or that its authority is independent of common law. What parliament can do with regard to its own structure and internal working procedures does not go to what it can do with regard to common law and individual rights.

3.3 Courts and Judicial Obedience of Statutes

Allan observes that 'the requirement of judicial obedience to statutes constitutes a principle of common law – it clearly cannot itself have a statutory foundation … a higher-order law confers it, and must of necessity limit it.'[37] Bradley and Ewing further point to 'the common law rules according to which the courts recognise or

34 *Ellen Street Estates, Limited v Minister of Health* [1934] 1 KB 590 [597] (emphasis added).

35 *Vauxhall Estates, Limited v Liverpool Corporation* [1932] 1 KB 733 [743].

36 H R W Wade, 'The Legal Basis of Sovereignty' (1955) *CLJ* 172, 176 (emphasis added).

37 T R S Allan, 'Parliamentary Sovereignty: Law, Politics and Evolution' (1997) LQR 443, 449; see to the same effect Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 OJLS 61, 64.

identify an Act of Parliament.'[38] Laws LJ in *Thoburn* referred to 'courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided'.[39] The House of Lords in *Jackson* was of the view that the supremacy of parliament 'is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.'[40]

And it could not be otherwise, because a self-conferral by the Parliament of legislative authority or omnipotence is simply out of the question. Elliott rightly observes that Parliament's authority was not 'judicially created in the same way as regular common law rules.'[41] Of course, no analogy with creating detailed specific rules of land law or criminal law would be warranted. But there has been nothing other than common law to acknowledge legal implications of the fact and socio-political and historic process that parliament exists and legislates. Neither MPs nor their electors have created the UK's legal system. Instead, and over centuries, they have always voted, been elected or legislated against the background of a pre-existing legal system.

Parliament can obviously alter individual rules of common law, but common law as a system is not for its validity premised on parliament's will or supremacy. Courts used to make law before parliament's legislative function in its current form was even thought of. Moreover, if legislation cannot be the source of sovereignty, the rule that statute can prevail over common law is also of extra-statutory origin, based on common law, and its parameters are in the hands of courts. There is no constitutional provision empowering the parliament to unilaterally alter that position.

In the 17th century, Chief Justice Sir Edward Coke has endorsed wide powers of the tripartite parliament as a check on Crown's unilateral exercise of public authority in the matters of taxation and legislation. Yet in 1610 he also held in *Bonham* hat common law can control acts of parliament and adjudge them to be void. Both Coke and Sir William Blackstone a century and a half later have said that Parliament's authority was transcendent (in the sense of not being created by a positive enactment)[42] and absolute (in terms of adopting laws on any subject-matter), but they both expressly spoke against the thesis that acts of parliament could never be

38 Bradley and Ewing (n 33) 68.

39 *Thoburn* (n 106) 60.

40 *Jackson v Attorney General* [2005] UKHL 56 [102] (*per* Lord Steyn); [159] (*per* Baroness Hale).

41 Mark Elliott, 'The Sovereignty of Parliament, the Hunting Ban and the Parliament Acts' (2006) 65 CLJ 1, 4.

42 Which, as we shall see below in section 4, applies to the High Court as well.

questioned in courts.[43] Blackstone's opinion has followed the one expressed by Holt LJ in *Wood v City of London* (1701) which in its turn adopted the same approach as Sir Edward Coke in *Bonham*.[44]

Growth of Parliament's legislative authority from 18th century onwards was accompanied by clarifications within the judiciary, notably by Sir Henry Hobart and Lord Ellesmere approving the Sir Edward Coke's approach to this matter, that statute law was subject to judicial supervision to mould statutes to their best use or even to deny effect to legislative provisions.[45] Even if it is asserted that judges back in those times would be using natural reason in the process, their authority to do so was clearly accepted under the positive law of England.

According to Lord Hope, it is no longer right to say that parliamentary sovereignty is unqualified.[46] Again, as Lord Steyn specified,

> [i]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

Earlier Lord Woolf has observed in the similar spirit that

> [i]f Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. … there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.[47]

If Parliament could expressly provide that courts are not permitted to review primary legislation, then it would be the author of the constitution and could itself determine what its powers are. Empirically at least, such legislative determination would presuppose that Parliament was not free of review before and this would aggravate the challenge as to whether Parliament would be entitled to alter that position unilaterally.

---

43 'Where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.' Sir William Blackstone, *Commentaries* (Philadelphia 1893) 90.

44 Sir Frederick Pollock's analysis does not give full account of Blackstone's position and also seems to obscure the fact that there was continuity of opinion from Coke to Holt to Blackstone, see Pollock (n 6) 268 ff.

45 McIlwain (n 10) 261 f, 264.

46 *Jackson* (n 32) 104 (*per* Lord Hope).

47 Lord Woolf, 'Droit Public – English Style' (1995) Public Law 57, 69.

4 The Common Law Constitutional Basis for the Review and Interpretation of Acts of Parliament

4.1 Review and Interpretation under Common Law

We have now to examine the ways in which courts deal with legislative policy choices, what aspects of those choices they can assess or re-examine, and what decisions they can adopt about them. Courts deal with legislation by using their constitutional authority of statutory interpretation or of judicial review of public authorities' decisions, and the outcome in either of those cases could be undesirable to political branches of the government. Whether court decisions are based on direct judicial review or enhanced use of statutory interpretation does not always make a big difference.

Dicey was already inclined toward a compromised view on legislative supremacy, suggesting that

> [b]y every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.[48]

In this similar spirit, the House of Lords has reasoned in *Waddington v Miah* that 'it is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation.'[49] When common law is engaged, heavy statutory interpretation presumptions apply to protect the rule of law and constitutional liberties.[50] A final determination of the matter of whether objectionable legislation has been passed and what is possible to do about it rests with courts.

The thesis that Parliament's legislative authority is unlimited, however, is unlikely to be used the way that curtails liberty and fundamental rights does offer some constitutional safeguards against the utilitarian pressure. Still, under this theory of likelihood, protection of an individual against public authority is left to presumptions that may not always be reliable, in terms of how and when people can expect to be treated by oppressive legislation and what courts would do about it. Laws LJ has observed extra-judicially that

---

48 Dicey (n 1) 414.

49 *Waddington v Miah* [1974] 1 WLR 683 [694] (*per* Lord Reid).

50 *B (A Child) v DPP* [2000] 2 AC 428 [470] (*per* Lord Steyn); and *Sweet v Parsley* [1970] AC 132 [148] (*per* Lord Reid); *Regina v Lord Chancellor, ex parte Witham* [1998] QB 575 [581]–[583] (*per* Laws LJ); *Simms* [2000] 2 AC 115.

> I am not much impressed with a constitution in which the freedoms of the people are in the end protected only by the expectation, however confident, that the Government will behave decently, though at law it might do otherwise.[51]

FA Mann similarly suggests that we 'do not evade the issue, do not avoid the legal test by asserting that, as we all hope and believe, no English parliament would ever pass such statute.'[52] In the same spirit, Laws LJ has observed in *Roth* that 'Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.'[53]

It was admitted soon after the 1832 electoral reform that the interpretation of statutes by courts may involve questioning and judging parliament's will. In *R v Pease*, dealing with public nuisance arising out of the use of railways, it was said that

> we are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified.[54]

On this approach, reflecting on Blackstone's views above, courts can judge whether the parliament's will expressed in legislation is reasonable and if it is not, then modify the content of the statute. With regard to legislation involved in that case and the ways in which that legislation balanced conflicting interests, the court emphasised that

> there is nothing unreasonable or inconsistent in supposing that the Legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandize along the new railroad. Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another?

The court here concedes to the parliament to be the judge of the public interest and public utility, because it agrees that construction of railways and underlying infrastructure is a matter of great public interest. But the court also expresses its own view on that matter. Thus, the court does not concede the legislative

51 Sir John Laws, 'Judicial Remedies and the Constitution' (1994) 57 MLR 224.

52 F A Mann, 'Britain's Bill of Rights' (1978) LQR 512, 513.

53 *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 [54] (*per* Simon Brown LJ).

54 *R v Pease*, 110 ER [1832] 366 [371].

omnipotence to the Parliament. Overall, courts from that period onwards seem to have understood that Parliament was now operating with the task of social reforms and represented the public to a greater extent than before the electoral reform. However, that was not the same as its supremacy with regard to every single aspect of common law. Gradually a more transparent compartmentalisation of the relevance of each common law and statute law took place: the latter cannot be questioned in courts for the reason of its inconvenience or unreasonableness (which is now accepted to be essentially a political task to determine). But that does not sustain a further and more extensive proposition that an act of Parliament could not be judicially questioned or disapplied or have its effects curtailed if it contradicts certain principles of positive common law of the land. It is to that extent that the duty of judicial obedience to statutes has been accepted and the primacy of statute law over common law has been recognised by courts. Even that primacy on policy issues is what courts have conceded to parliament.

In *Duport Steels*, a case which has dealt with an industrial action undertaken on a drastic scale, Lord Scarman addressed 'the constitution's separation of powers' which prevented judges to act on their sense of 'what is right'; otherwise they would stray 'beyond the limits set by judicial precedent and by our (largely unwritten) constitution.'[55] Lord Diplock reasoned that

> [t]hese [were] *matters on which there is a wide legislative choice* the exercise of which is likely to be influenced by the political complexion of the government and the state of public opinion at the time amending legislation is under consideration.[56]

His Lordship continued that

> [i]f [then] the national interest requires that some limits should be put upon the use of industrial muscle, the law as it now stands must be changed and this, effectively as well as constitutionally, can only be done by Parliament — not by the judges.[57]

Therefore, the rights conferred to unions by the Parliament could not be questioned by courts just because it was alleged that the exercise of those rights caused a social or political problem.

In the *Marcic* case dealing with legislation to deal with sewer flooding, the House of Lords has emphasised that 'In principle this scheme seems … to strike a reasonable balance. Parliament acted well within its bounds as policy maker.'[58] According to Lord Hope, through the 1991 Water Industry Act,

---

55 *Duport Steels* (n 56) 169 (*per* Lord Scarman).

56 *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 [157] (*per* Lord Diplock) (emphasis added).

57 *Duport Steels* (n 56) 164.

58 *Marcic* [2004] 2 AC 42 [60] (emphasis added).

> Parliament has decided that the most appropriate method of achieving a fair balance between the competing interests of the individual and the community is by means of a statutory scheme administered by an independent expert regulator, whose decisions are subject to judicial review if there is a doubt as to whether the necessary balance has been struck in the right place.[59]

Again, the scheme was assessed and approved judicially.

But there are also aspects of common law that Parliament and its legislative policies cannot displace. Lord Evershed's dissent in an earlier case of *Ridge v Baldwin* suggested that 'Parliament may by appropriate language in a statute make it clear that the activity or discretion of the body constituted by the statute is not to be subject to any control or interference by the courts.'[60] That approach was not favoured in *Ridge v Baldwin* itself, among others because, as the argument in the case has eloquently put, 'the rules of natural justice are concerned with a fair form of procedure, not with controlling policy.'[61] Observance of legal requirements arising under common law cannot be put on the same footing as making policy decisions.

The House of Lords in *Anisminic* addressed section 4 (4) 1950 Foreign Compensation Commission Act which required that 'The determination by the commission of any application made to them under this Act shall not be called in question in any court of law'. The House of Lords held that this provision did not cover 'determinations' which were tainted with nullity even though, on its face, parliament had expressly determined that they should stand.[62] At the same time, this judicial review authority was presented on a rather broad terms. As the key passage by Lord Pearce explains,

> [l]ack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.[63]

59 *Marcic* (n 58) 68 (*per* Lord Hope).
60 *Ridge v Baldwin* [1964] AC 40 [86] (*per* Lord Evershed).
61 *Ridge* (n 60) 61 (*per* Lord Reid).
62 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
63 *Anisminic* (n 62) 195 (*per* Lord Pearce).

This reasoning offers a range of grounds on which Parliament's legislative choices may be judicially hampered and outcomes envisaged by the Parliament not be allowed to stand. All those grounds arise under common law, which makes courts constitutional judges to determine what the effect of legislation ought to be.

On the other hand, has Parliament really purported here to say that invalid decisions were also free from judicial review? If Parliament were to say that an organ's decisions should not be questioned even if they involve errors of fact or law, irrelevant considerations or are disproportionate, this would plainly defeat the legislative and policy objectives sought by Parliament. For, an organ endowed this way would be expressly mandated by Parliament itself to do things contrary to Parliament's aims for which that organ was created. If Parliament were to purport to validate invalid acts of subordinate organs, then it would essentially outsource legislative supremacy to them, by saying that they can do X under any condition or in any situation, or even go beyond doing X. That outcome could not be a position, which could be defended on constitutional terms, or even under the representative democracy thesis. Parliament is not constitutionally allowed to abdicate its supremacy and transfer it to any subordinate organ. Hence, courts read words in the statute to prevent such outcome from materialising; and in effect they carry out constitutional judicial review. If a plain meaning of a statute contradicts the constitution, the difference between its reinterpretation and refusal to obey it becomes rather relative.

In a later case of *Evans*,[64] the Supreme Court has disrupted the calculus of competences clearly, if unilaterally, arranged by an act of parliament as between courts and the Executive, and did so by reference to rule of law and separation of power. The Court did not allow the Attorney-General's use of the power under section 53(2) Freedom of Information Act 2000, purporting to enable ministers to override a decision notice or an enforcement notice served under the Act to comply with a court's decision.

Lord Neuberger suggested that this outcome was owed to the clear language of the Act, and added that 'it is not as if the grounds for this conclusion could have been unforeseen by Parliament.'[65] But dissenting Lords Hughes and Wilson have demonstrated that the text of and scheme operating under the Act did enable the Executive to act that way, and that holding otherwise would be not interpretation but rewriting of section 53.[66] This latter view appears to be more accurate but the Court was constitutionally entitled to proceed regardless. But even if *Evans* is an exercise in statutory interpretation, statutory interpretation principles, deriving

64 [2015] UKSC 21.

65 *Evans* (n 64) 88 (*per* Lord Neuberger).

66 *Evans* (n 64) 154 (*per* Lord Hughes) 168 (*per* Lord Wilson).

directly from common law and constitution, could enable courts to interpret statutes the way that prevents them from attaining unconstitutional results, in this case the executive's interference with judicial authority. Today as in 17th century, now as then, the boundary between interpretation and application of statutes is rather blurred. McIlwain's point made a century ago about the need to rid ourselves of the idea that law-making and interpretation of the law are mutually exclusive tasks could not be more accurate today.[67] For better or worse, that could also rid us of the likelihood theory endorsed in *Waddington* and place judicial handling of statutes on more transparent and predictable ground.

A combination of judicial review and interpretation approaches was also witnessed in an earlier case of *R v Cain*. As Lord Scarman clarified, an appeal against criminal bankruptcy orders can subsist in relation to *ultra vires* sentences even if legislatively ruled out in general terms; this was meant to protect fundamental principles of constitution. Thus, Lord Scarman

> would construe section 40(1) of the Act of 1973 [stipulating that no appeal lies from the making of a criminal bankruptcy order] as subject to an implied limitation to the effect that no appeal lies save where the issue is that the court in making the order has exceeded the power conferred on it by Parliament.[68]

It is thus for courts to say when such excess takes place and when it does not, in doing which they will bear in mind the constitutional rights under common law. It is based on such approach to statutory interpretation in relation to judicial review that led Lord Steyn to observe in *Pierson* that 'Ultimately, common law and statute law coalesce in one legal system.'[69]

In July 2020, UK Government has designated a committee to conduct the Independent Review of Administrative Law. The Committee did not recommend legislating to offset the effect of the above jurisprudence that deals with ouster clauses.[70] It would anyway be difficult to see why or how courts' power to deal with such offsetting clauses be any less than their power to deal with expressly drafter ouster clauses, or that with any such envisaged legislation Parliament's authority would increase accordingly at the expense of the authority of courts. In his response to the Government's position, Lord Carnwath has addressed the Government's point that 'ouster clauses are a reassertion of Parliamentary Sovereignty',[71] and considered that this point is not substantiated.[72] Government had

67 McIlwain (n 10) 291.
68 *R v Cain* [1985] AC 46 [56] (*per* Lord Scarman).
69 *Pierson* [1998] AC 539 [589].
70 Report of the Committee, March 2021, para 3.30.
71 Government Response document, March 2021, para 86.
72 Response to Consultation by Lord Carnwath CVO, 27 April 2021, para 22.

'failed to identify a problem requiring legislative intervention.'[73] And the Government's position is that 'depending on the wording of ouster clauses, the powers at issue may still be reviewable on some grounds.'[74]

The above is also reinforced by the principle that courts' independent constitutional status has to be respected by Parliament. Laws LJ in *Cart* dealt with the extent to which decisions of the tribunals established under acts of parliament, and denoted as superior courts of record, are open to challenge in judicial review proceedings before the High Court. Laws LJ observed that the High Court 'is independent of the legislature, the executive, and any other decision-makers acting under the law; and is the principal constitutional guardian of the rule of law'.[75] The High Court's jurisdiction was described as original, general, unlimited, very high, and transcendent,[76] that is neither derived from nor dependent on any other constitutional authority.

Laws LJ similarly emphasises the dependence of the viability of legislative power on the concordant judicial action:

> If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament.[77]

Unlike other above cases dealing with the relationship between courts and the Executive, *Cart* deals with relations between the High Court and statutory tribunals. But its importance for preserving the constitutional status of common law courts is not any less. UK Government's position is that legislating to offset the effect of *Cart* would save public resources because success rate of *Cart* applications is only 0.22 percent.[78] This does overlook the risk that in the absence of the *Cart*

73 Ibid, paras 15, 26.

74 Government Response document, para 39.

75 *R (on the application of Cart) v Upper Tribunal* [2009] EWCH (Admin)39, 2 WLR 1012 [1029]; this approach was further endorsed by Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [144]–[145] (*per* Lord Carnwath).

76 *Cart* (n 75) 44–51.

77 *Cart* (n 75) 39, 1028–1029 (emphasis added).

78 Government Response document, para 51; 2021 Judicial Review Bill proposes to insert section 11A in 2007 Tribunals, Courts and Enforcement Act Section 11A(2) would pronounce Upper Tribunal's decision to refuse leave to appeal as final and binding; subsection (3) would purport to bar even a pronouncement that Upper Tribunal exceeded its jurisdiction; but subsection (4) would allow review for breach of natural justice requirements.

remedy the proportion of wrongly decided cases might well have been higher. Moreover, resource dilemmas are not the same as constitutional dilemmas. If Parliament could, out of economic reasons, lawfully circumscribe High Court's authority, what could possibly stop it from undertaking the same enterprise with regard to the Court of Appeal, or even the Supreme Court, by establishing parallel structures of appellate jurisdiction?

4.2 Review and Interpretation under the 1998 Human Rights Act

The 1998 Human Rights Act has formed a big part of the debate as to the extent to which courts can interpret or disapply acts of parliament or secondary legislation. Key provisions are section 3 enabling courts to interpret acts of parliament 'as far as possible' compatibly with the European Convention on Human Rights, and section 4 which provides that if HRA-compatible interpretation could not be adopted, the Act in question should be declared incompatible with HRA. It has been suggested that 'Sections 3 and 4 HRA work together to balance protection for fundamental rights, an aspect of the rule of law, with the separation of powers and respect for Parliamentary sovereignty.'[79]

As Lord Neuberger explained in *Nicklison*, principles of review of primary and secondary legislation may be similar, and courts have the right to form a view on both. The standard applicable here is whether 'the provision enacted by Parliament is both rational and within the margin of appreciation accorded by the Strasbourg court' and therefore whether 'it infringes a Convention right.' Lord Neuberger concludes that, 'even under our constitutional settlement, which acknowledges parliamentary supremacy and has no written constitution, it is, in principle, open to a domestic court to consider whether section 2 [of the relevant statute] infringes Article 8 [ECHR].'[80] Courts can thus express their opinion on Parliament's legislative policies, and use human rights considerations to offset utilitarian imperative that drives those policies.

Standards of review could be applied rigorously. In *Roth*, dealing with the liability scheme involving new penalty regime created to deter those intentionally or negligently allowing clandestine entrants into the UK, Laws LJ has observed that,

79 The Government's Independent Review of the Human Rights Act, 23 June 2021, para 20.
80 *Nicklison* [2014] UKSC 38 [75]–[76] (*per* Lord Neuberger).

> [e]ven acknowledging, as I do, the great importance of the social goal which the scheme seeks to promote, there are nevertheless limits to how far the state is entitled to go in imposing obligations of vigilance on drivers (and vicarious liability on employers and hirers) to achieve it and in penalising any breach. Obviously, were the penalty heavier still and the discouragement of carelessness correspondingly greater, the scheme would be yet more effective and the policy objective fulfilled to an even higher degree. There comes a point, however, when what is achieved is achieved only at the cost of basic fairness. The price in Convention terms becomes just too high.[81]

If we prioritise the utilitarian and majoritarian imperatives, one may wonder why we should worry about proportionality of the measures in question when Parliament has legislated to protect the community's interest from relevant threats and subordinated the relevant individuals' interests to that priority. However, utilitarianism was not the guiding policy here.

The novelty of HRA has been to enable courts to review public authority decisions not just by reference to their *vires* and terms of their legislative conferral but also by reference to substance of a statute or decision, in terms of whether it complies with Convention rights and whether it is proportionate or otherwise within the State's margin of appreciation. In the absence of HRA courts could not that obviously question Parliament's decisions just because they are unfair or unjust. As Leigh has observed, HRA has created a new version of the illegality ground for judicial review and the proportionality analysis 'is intended to be more probing than the conventional *Wednesbury* approach'.[82] HRA has brought into UK law a new set of rights that were not, or at least not obviously or indisputably, justiciable under it.[83]

Courts have admitted that some deference is due to policy judgments of the democratic legislature. As Lord Hope stated in *Kebilene*, 'It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified.'[84] As pointed out, with rights unqualified by the margin of appreciation courts have to make their own decision on the substance of the matter, because proportionality would not be relevant in such cases.[85] So again, deference

81 *Roth GmbH* (n 53) 53 (*per* Simon Brown LJ).

82 Ian Leigh, 'The standard of judicial review after the Human Rights Act', in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 174, 188, 201.

83 Even though constitutional rights under common law were, by the time HRA was adopted and entered into force, already recognised by courts.

84 *Kebilene* [2000] 2 AC 326 [381] (*per* Lord Hope).

85 Sir David Keene, 'Principles of deference under the Human Rights Act', in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 206, 208.

takes backseat, and is relevant only to the extent applicable law allows it to be sustained. In its essence, the above 'deference' is one of the species of the broad genus of 'deference' manifested in various ways from 1832 onwards, discussed above, and it is always courts who determine when and to whatever extent judicial deference is owed to political branches of the government. Deference is only a first step in judicial reasoning, not its guaranteed outcome. It may be right, as Lord Kerr has put it in *Nicklison*, that section 4 HRA leaves the final word to Parliament.[86] Nevertheless, it sounds far less plausible to suggest that 'The remission of the issue to Parliament does not involve the court's making a moral choice which is properly within the province of then democratically elected legislature.'[87] What this process does involve is the questioning of the parliament's policies by courts, and the judgment that those policies, which presumably should otherwise stand unchallenged, are incompatible with the law.

Cases decided under section 3 HRA do emphasise the difference between interpretation and amendment, which may raise an issue whether the courts' interpretative power under HRA is more far-reaching than one that operates under common law. Section 3 has not created any new or distinct method of statutory interpretation that courts could not use before under common law. The bottom-line under section 3 instead is that the outcome should be 'possible' to be achieved through interpretation. A court minded in a utilitarian way may construe the relevant Convention right narrowly and avoid making a DoI, or otherwise courts may interpret another statute as compliant with HRA requirements. In *R v A*,[88] an implied provision was read in Section 41 of the Youth Justice and Criminal Evidence Act 1999, to enable the use of previous sexual history as evidence in rape prosecution cases, even if the 1999 Act did not admit such evidence. The House of Lords described the Act's approach as 'legislative overkill', thereby questioning the utilitarian public interest calculus that had driven legislative policies behind that Act. In its essence, that is not very different from what the Supreme Court did in *Evans*, in a non-HRA context. Overall, courts are deterred not by whether they could amend the text of legislation, but whether a particular re-interpretation and read-in exercise would involve a task feasible for adjudication: for instance, reading in an implied condition is not the same as creating a new statutory scheme.

The House of Lords has also ruled, in *Ghaidan v Godin-Mendoza*, that 'treating the survivors of long-term homosexual partnerships less favourably than the survivors of long-term heterosexual partnerships for purposes of the Rent Act 1977

86 *Nicklison* (n 80) 343 (*per* Lord Kerr).
87 Ibid, 344.
88 [2002] AC 45.

violates their right under article 14 in relation to article 8(1) of the Convention.'[89] It was explained that

> the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.[90]

Therefore, the court envisages the judicial reconstructing of legislative intention behind the statute, defying the ordinary meaning of the statute and legislative intention that such ordinary meaning conveys.

Overall, if courts will use the section 3 interpretation power in a far-reaching manner, and construe primary legislation in line with ECHR, they may generate accusation that they distort Parliament's will and deny it the right to confirm or maintain in force any relevant ECHR-contravening legislation by not complying with DoI that courts would otherwise have made. Whether Parliament has consented to that may well be questionable. This is what places the parliamentary sovereignty doctrine on a rather slippery ground: Parliament may have endorsed the overall structure of the adjudicative process under sections 3 and 4 HRA but it has not determined, nor could it determine, the exact amount of power courts possess under common law and how they go about exercising it. Provisions of HRA themselves operate in terms of the ordinary approach to statutory interpretation, in the sense that parliament legislates by adopting a text and courts determine its meaning.[91] Not that HRA has preserved or reduced parliamentary sovereignty, instead the latter was not absolute even before it.

5 Parliament's Attempt to Entrench Its Sovereign Authority

5.1 American Colonies and Revolution

By the 18th century, Parliament's legislative authority over American colonists was rationalised by the fact that they had emigrated from England and taken common

89 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [128] (*per* Lord Rodger).

90 *Ghaidan v Godin-Mendoza* (n 89) 30 (*per* Lord Nicholls), 54 (*per* Lord Millett).

91 'Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.' *Black-Clawson International Ltd v Black-Clawson Waldhof-Aschaffenburg, AC* [1975], 591 [638] (*per* Lord Wilberforce); interpretation 'is for the court and for no one else', ibid, 614 (*per* Lord Reid).

law with them. In addition, 'the presumption [was] that a statute applies only to the United Kingdom, it does not extend to the colonies unless they are mentioned or it is plain that the statute was meant for them.'[92] The King could grant colonists their own legislative assemblies and 'when such a grant has been made he cannot revoke it.'[93] On this view, colonies in North America had legislative authority that derived from the authority of British Empire, yet was independent of the authority of Parliament. Thus, the royal authority could be used to reduce the net extent of legislative supremacy.

In 1760s and 1770s colonists became increasingly unhappy with British parliament regulating taxation and trade in their colonies, especially with the Stamp Act that taxed commercial documents, newspapers and playing cards. Their view was that Parliament was not meant to pass laws on territories governed by colonial assemblies. In response Parliament abrogated the Act in question but declared it had authority to pass any act that it thought appropriate for any part of the empire; as Maitland puts it, 'to make laws and statutes to bind the colonies and people of America in all cases whatsoever.' But the crisis in America was essentially already about the authority of Parliament. Officially, British Parliament did not abandon its position till Britain recognised that American colonies were independent States.[94] And the net value of Parliament's reassertion of its legislative authority was never clear.

Maitland has explained that 'Students of Austin's Jurisprudence may find some interest in noticing this case: the sovereign body habitually refrains from making laws of a certain class and must suspect that if it made such laws they would not be obeyed.'[95] On this view, Parliament's legislative authority or 'sovereignty' was not the same as usual as far as those colonies are concerned.

5.2 Domestic Implications of UK's Membership in the EU: Common Law and the 1972 European Communities Act

In 2016, UK's population has voted for UK's exit from the European Union, and withdrawal of the UK from the EU has been completed by 31 December 2020. The 1972 European Communities Act (ECA) ceased to operate. The Supreme Court has said in *Miller* that UK's withdrawal from the EU entails 'a major change to UK

92 Frederic Maitland, *Constitutional History of England* (Cambridge University Press 1908) 337, 339.

93 Maitland (n 92) 337.

94 Thomas Benjamin, *The Atlantic World* (CUP 2009) 504 f; Maitland (n 92) 338.

95 Maitland (n 92) 339.

constitutional arrangements'.[96] However, the Supreme Court 'would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal'.[97] On this view, neither UK's withdrawal from EU nor repeal of ECA does anything that alters the basic principles of division of authority as between various branches of UK government such as legislative power of parliament or interpretation or review power of courts.

It is interesting to see how UK courts have initially embraced the fact that UK had joined the European Community. Section 2(1) ECA had provided that

> [a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

Section 2(4) ECA had provided that acts of parliament 'shall be construed and have effect subject to the foregoing provisions of this section'.

Lord Denning has observed in *Macarthys* that the priority over UK law was given to the EC law 'by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority.'[98] The Supreme Court has reiterated decades later that the supremacy of EU law in the UK depended on 1972 Act.[99] The Court also has said that 'the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction – and without being susceptible to being abrogated by Parliament.' Parliamentary sovereignty is seen to be 'fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows.'[100]

It has been suggested that Lord Denning's judgment in *Macarthys* was based on 'the degree of strength of the principle of construction adopted: statutes will be presumed to be intended not to conflict (nor to be applied in case of conflict) with Community law unless Parliament states the contrary.'[101] But the combined effect

96 *Miller* (n 9) 82.
97 *Miller* (n 9) 60; the term 'rule or recognition' originates from H L A Hart, *Concept of Law* (Oxford University Press 1961) 110.
98 *Macarthys* [1981] QB 180 [200].
99 *HS2* (n 29) 79 (*per* Lord Reed).
100 *Miller* (n 9) 61, 67.
101 T R S Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 OJLS 22, 32.

of sections 2(1) and 2(4) may have required an approach bolder than merely undertaking statutory interpretation. As Lord Bridge explained in *Factortame*,

> [i]f the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.[102]

Lord Bridge observed at the earlier stage of the same case that the 1988 Merchant Shipping Act ought to be applied

> as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.[103]

Lord Bridge has thus endorsed reading in an extra condition or provision in 1988 Act. This was against the background that the 1988 Parliament had clearly and willingly done something that purported to displace the effect of ECA. Complying with EC law was clearly not the 1988 Parliament's intention. Legislative supremacy *prima facie* backed both 1972 and 1988 Acts. Therefore, courts had to prioritise between two statutes on grounds other than parliament's sovereignty and authority, acting on the premise that even if Parliament is 'sovereign', it is not in control of the effects of its own legislation.

Sir William Wade has suggested that 'Nothing in Lord Bridge's language suggests that he regarded the issue as one of statutory construction. … neither does Lord Bridge's reasoning fit well with any theory based upon statutory construction.'[104] This seems to be entirely correct, because in the above two passages Lord Bridge speaks of some more global or wholesale effect of ECA and instruments whose domestic legal force it validates, rather than simply of interpretation. It was also pointed out that 'The inconsistencies between the Merchant Shipping Act 1998 and EC law could not be construed or interpreted away in the normal sense. … This amounts, in effect, to a priority rule, rather than a rule of construction.'[105]

---

102 [1991] 1 AC 603 [659] (*per* Lord Bridge of Harwich); and see *Miller* (n 9) 64 on the relevance of the ECJ decisions in this process.

103 *Factortame* [1990] 2 AC 85 [140] (*per* Lord Bridge).

104 H W R Wade, 'Sovereignty – revolution or evolution?' (1996) LQR 573.

105 Paul Craig, Constitutional and Non-Constitutional Review (2001) 54 CLP 147, 163.

ECA section 2(4) did not include words 'so far as it is possible' as they appear in section 3 HRA. Political branches of the government do not have to take any further action (one comparable to the post-DoI stage under HRA) either. Though it is not impossible that in some or indeed most cases a possible discrepancy between EU and UK legal provisions could be eliminated via statutory construction that does not invariably have to be the case. Therefore, the maximum effect of section 2(4) ECA is about substantially more than simply interpretation. It is about adjusting normative conflict between two acts of parliament. As Parliament's authority when enacting one or another statute is exactly the same, endorsing priority of one statute over another turns, as was the case with the implied repeal rule above, on judicial authority. Parliament has purported to entrench ECA in English law, but it could not alone and without judicial support manage to bind subsequent parliaments. This position is not compatible with the absolute view of parliamentary supremacy, and the subsequent case of *Thoburn* has further rationalised the common law basis on which ECA has had relative priority in relation to competing acts of parliament. For, ECA was one of constitutional statutes that could not be abrogated through an implied repeal.[106]

If ECA section 2(4) has merely created a presumption against implied repeal, then its words 'shall be construed and have effect' should not be taken to differentiate between implied or express repeal or conflict. *Thoburn* does admit the possibility of express repeal in such cases, but the relevance of this thesis is narrow, if not only hypothetical. As the Supreme Court has explained in *Miller*,

> EU law has primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law. However, legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force).[107]

Thus, the only freedom the Supreme Court's reasoning leaves to Parliament is that it could expressly abolish ECA when withdrawing from the EU, or otherwise subverting domestic status of EU law without withdrawing from the EU or without abolishing ECA,[108] if Parliament wanted to risk the consequences that would ensue. But the common law constitution would not have allowed Parliament to

106 *Thoburn v Sunderland City Council* [2003] QB 151 [183]–[185].

107 *Miller* (n 9) 67.

108 See for instance *Shindler* [2016] 3 WLR 1196, Elias L J suggesting at [58] that 'Parliament agreed to join the EU by exercising sovereign powers untrammelled by EU law and I think it would expect to be able to leave the EU in the exercise of the same untrammelled sovereign power, whether the later legislation expressly dis-applies section 2(1) or not.'

affect ECA's operation through any other way of legislating that would fall short of above drastic steps.

5.3 Implications of UK's Withdrawal from the EU: 2018 and 2020 Acts

European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 have determined that ECA was to be repealed on the day of UK's withdrawal from the EU. But these acts have recognised the supremacy, in UK law, of EU legal provisions and instruments adopted before the day on which the UK withdrew from the EU. Section 3(1) 2018 Act provides that 'Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.' Section 4 accordingly provides for saving in UK law ECA effects that arose before exit day.[109] Thus, EU law enacted before the completion day applies with the same effect as it applied when UK was an EU member and subject to EU organs' law-making authority.

Section 5(2) of the 2018 Act provides that 'the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.' This is an arrangement similar to one that was contained in section 2(4) ECA. Moreover, section 5(3) of the 2018 Act provides that the supremacy principle could apply 'to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification'.

Section 7(2) determines that UK authorities have the power to modify the effect of EU legal provisions in UK law. This can be done through acts of parliament, through other primary legislation if adopted within the scope of authority available to adopt it, and through secondary legislation if validly authorised to undertake such modification.

The 2020 Act has inserted new sections 5A to 5D into 2018 Act. Section 5A provides that

> [a] Minister of the Crown may by regulations provide for (a) a court or tribunal to be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section, (b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law, (c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law.

109 Section 25(3) 2020 Act extends that to the withdrawal implementation period (IP) completion day.

However, section 5D provides that 'No regulations may be made under subsection (5A) after IP completion day'.

Article 4(1) of the Withdrawal Agreement concluded between UK and UK provides that[110]

> [t]he provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

Article 2(4) provides that UK will disapply incompatible domestic legal provisions. Article 2(3) provides that 'The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.' Article 2(4) provides that 'The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.'

To implement the above provisions in UK law, section 5 of the 2020 Withdrawal Agreement Act provides that

> (1) Subsection (2) applies to— (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be —
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

Therefore, UK Parliament has given to retained EU law and to withdrawal agreement law the domestic status that is practically indistinguishable from that which EU law had under ECA before UK's withdrawal from the EU. The principal feature

110 12 November 2019, *OJ* C 384 I/1.

of this legislation is the recognition that the retained and incorporated EU law provisions enjoy supremacy within the UK's legal system, on terms that such supremacy is recognised within the EU law and the jurisprudence of CJEU. Section 7(2) of the 2018 Act does preserve the possibility to modify the domestic effect of EU provisions. Now as before when courts had to handle matters arising under ECA, it will be for courts, by using common law principles of judicial review and statutory interpretation, to say whether any such alleged or purported modification commands legal effect in UK law.

Section 38(2)(a) of the 2020 Act professes to preserve parliamentary sovereignty with regard to retained EU law and withdrawal agreement law.[111] One might suspect that Parliament might have been worried that 2018 and 2020 Acts could otherwise have the opposite effect. More generally, it is not obvious how Parliament's own pronouncement about its own authority could be any crucial. It is possible that Parliament wishes to preserve the implied repeal doctrine with regard to these two Acts (because it is the most likely tool to subvert direct effect and supremacy of EU or withdrawal agreement law, by merely ascribing to subsequent legislation an intention to do so). However, the implied repeal doctrine is a common law doctrine anyway and it is now, owing to *Thoburn*, subjected to the doctrine of constitutional statutes, it being for courts to determine whether a particular statute falls within this category. Overall, just as the 1988 Parliament was not immune from the judicial handling of its legislation as took place in *Factortame*, 2020 Parliament could not be immune from a similar effect either. Courts' power to decide what an act of parliament means or what its effect is has not gone away and parliament cannot take it away either. These matters would continue to turn on the common law constitution and authority of courts. This is the genuine meaning of the point in *Miller* above that UK's entry into or exit from the EU does not affect the rule of recognition whereby the sources of English law are determined.

6 Conclusions

All issues examined in this contribution centre around the normative and constitutional value of Parliament's self-assertion of sovereignty on a unilateral basis. The absolute view of legislative supremacy was initially boosted by political and ideological sentiment of utilitarianism. But it has rested on an incomplete or distorted representation of legal and constitutional history in the UK. It has been premised on a false jurisprudential thesis that limits on legislative authority could

111 S 38(1) 'It is recognised that the Parliament of the United Kingdom is sovereign.' S 38(3) 'nothing in this act derogates from the sovereignty of the Parliament'.

be either natural law or nothing. Factors of democratic legitimacy and popular representation are not parts of legal reasoning, and they do not add to parliament's constitutional authority. It is both possible that Parliament legislates lawfully and constitutionally the way that does not entirely correspond to perceptions of the public, and also that Parliament's acts representing social and public interest will not under common law be given the effect sought by Parliament. As the above analysis has demonstrated, Parliament has attempted to auto-determine the external limits of its legislative authority, notably with regard to Human Rights Act, ouster clauses, or Brexit. But in none of those cases does constitution allocate final word to it or enable it to unilaterally increase net constitutional value of its legislative authority. Parliament's legislative authority is part of the broader constitutional arrangement of separation of powers, which is not under control of Parliament. This is a principal reason why Parliament's pronouncement as to the extent of its own powers or of courts' powers could not be conclusive. Were it otherwise, UK constitution would have no separation of power worthy of the name.

Overall, it is common law which validates legislative supremacy of parliament, its particular privileges and most importantly determines the scope to which the duty of judicial obedience to acts of parliament operates. In English legal history, there has been no such moment of constitutional transition that would fundamentally alter this position. The 1689 Bill of Rights did nothing to affect the role of common law courts, and UK's entry into and exit from the European Union has been given effect through the common law constitution, through courts using their ordinary powers of statutory interpretation and judicial review. The courts' power to handle acts of parliament is rather broad: they cannot take a statute off the statute book, but they can do pretty much anything else with it. Differences projected between interpretation and review, or between non-HRA and HRA areas are mostly artificial. The overall compromise between courts and Parliament – indeed a separation of power model broadly adopted under common law – has since long been that courts are less likely to offset Parliament's legislative policies and more likely to intervene where Parliament encroaches on fundamental rights or other constitutional requirements. There is not much net value in the abstract or wholesale parliamentary sovereignty thesis. Instead, re-framing the debate to discuss the net value of legislative authority based on its judicial handling and practical workings, encompassing both statutory interpretation and judicial review grounds, non-HRA as well as HRA areas, would be much more productive and rewarding. This would further increase the awareness that in 21st century legislative authority could not be sensibly portrayed as a tool to suppress constitutional rights of individuals, and that common law in England is now more distanced from enabling that outcome than it ever was.