

THE UNITED KINGDOM PARLIAMENT ACTS: PARLIAMENTARY SOVEREIGNTY ON TRIAL

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I. INTRODUCTION

According to the classic statement of Dicey,

[t]he principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[1]

In other words, Parliament has unlimited legal power to enact legislation; and the courts must recognise and enforce any legislation enacted by Parliament. That uncompromising statement of the legal powers of Parliament and the constitutional relationship between Parliament and the courts in the United Kingdom has long been debated among commentators.[2] One aspect of that debate has centred on the *Parliament Act 1911* (UK) (which provides that in certain circumstances Parliamentary legislation can be enacted without the consent of the House of Lords) and on the status of legislation enacted under the 1911 Act, particularly following its amendment by the *Parliament Act 1949* (UK).

Prior to the enactment of the *Parliament Act 1911* ('the 1911 Act'), all Bills before Parliament required the consent of both the House of Commons and the House of Lords; and, so long as either House withheld its consent, a Bill could not receive the Royal Assent and become an Act of Parliament. The 1911 Act was enacted with the consent of both Houses; but the Act altered that constitutional requirement for the future. Section 2(1), as originally enacted, provided:

If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take

effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.[3]

In summary, the 1911 Act provided for the enactment of legislation without the consent of the Lords, although the procedure did permit the Lords to delay that enactment for two years. The 1911 Act was very much an enabling statute enacted in response to the constitutional crisis created by the Lords' obstruction of the Liberal Government's budget.[4] It was not intended to displace, and it did not displace, the usual method of enacting legislation.[5]

The 1911 Act was amended by the *Parliament Act 1949* ('the 1949 Act'), which reduced the period of delay to one year.[6] However, it was the fact that the 1949 Act was enacted under the 1911 Act procedure[7] that raised the issue of the validity of the 1949 Act and subsequent legislation enacted under the amended 1911 Act procedure.[8] That issue, described as 'an interesting academic question for many years',[9] has now been examined by the courts in *R (on the application of Jackson and others) v Attorney General*.^[10] The applicants^[11] challenged the validity of the *Hunting Act 2004* (UK) ('the 2004 Act'), which made it a criminal offence to hunt wild animals with dogs for recreational purposes. The policy of the legislation (its principal target was fox-hunting with hounds) had formed part of the Labour Party manifesto for the 2001 General Election; and, following the re-election of a Labour Government, the Hunting Bill commanded strong support in the Commons. However, on each occasion that the Bill was introduced into the Lords, it was defeated or amended to such an extent that it was unacceptable to the Commons. The Government invoked the 1911 Act procedure to resolve the impasse and so, notwithstanding the absence of approval from the Lords, the Bill received the Royal Assent. The substantive content of the legislation had aroused strong feelings on both sides of the debate but the rights and wrongs of hunting formed no part of the argument before the courts. Although the Appellate Committee of the House of Lords ultimately ruled on the validity of the 2004 Act, that ruling depended exclusively on the validity of the 1949 Act, which in turn depended on the true effect of the 1911 Act. These issues required consideration of aspects of the constitutional relationship between Parliament and the courts and, in particular, the location of final competence to determine the validity of an Act of Parliament and the current status of the doctrine of Parliamentary sovereignty;^[12] and, as a reflection of the significance of the issues, the appeal to the Court of Appeal was heard by a panel that included the then Lord Chief Justice and the then Master of the Rolls; and the appeal to the House of Lords was heard by an Appellate Committee of nine Law Lords.

The essence of the applicants' argument was that the 1911 Act could not be amended by the 1911 Act procedure, but only with the consent of the Lords; that the 1949 Act was therefore invalid and ineffective to amend the 1911 Act; that the 1911 Act therefore remained unamended; and that the enactment of the 2004 Act failed to comply with the unamended 1911 Act procedure^[13] and was therefore invalid.

The submissions of the applicants were refined as the case progressed and were encapsulated in a series of key propositions before the House of Lords:

- (1) Legislation made under the 1911 Act is delegated or subordinate, not primary. (2) The legislative power conferred by s 2(1) of the 1911 Act is not unlimited in scope and must be read according to established principles of statutory interpretation. (3) Among

these is the principle that powers conferred on a body by an enabling Act may not be enlarged or modified by that body unless there are express words authorising such enlargement or modification. (4) Accordingly, s 2(1) of the 1911 Act does not authorise the Commons to remove, attenuate or modify in any respect any of the conditions on which its law-making power is granted. (5) Even if, contrary to the applicants' case, the Court of Appeal was right to regard s 2(1) of the 1911 Act as wide enough to authorise 'modest' amendments of the Commons' law-making powers, the amendments made by the 1949 Act were not 'modest', but substantial and significant.[15]

As will be apparent, there was some overlap and interrelationship among these propositions; and that is reflected in the varying structures of the judgments at first instance and in the appellate courts. The discussion in this article largely follows the above structure, which was also reflected in the judgment of Lord Bingham of Cornhill.

However, important as these substantive issues were, the application raised an equally important preliminary issue, namely whether the validity of an Act of Parliament was open to legal challenge in the courts. As the Court

of Appeal observed, 'it is unusual, and in modern times probably unprecedented, for the courts to have to rule on the validity of legislation that has received the Royal Assent'.[16] The determination of that preliminary issue depended in part on the consideration of the first of the applicants' substantive propositions, the question of the legislative status of the 1949 Act. Moreover, in their discussion of many of these issues, the Court of Appeal and the House of Lords made extensive reference to the circumstances in which the 1911 Act was passed. It is useful therefore to provide a brief outline of the history of the Act.[17]

II. THE ENACTMENT OF THE PARLIAMENT ACT 1911

Towards the end of the nineteenth century, members of Liberal governments had become increasingly frustrated by the ability (and willingness) of the Lords, with its predominantly Conservative-minded hereditary peers, to block aspects of the government's legislative programme with which it disagreed. Threats to create sufficient new peers to secure a government majority in the Lords sometimes proved enough to secure the Lords' acquiescence; but there was a growing demand for a more permanent solution. Although some cabinet ministers favoured the total abolition of the Lords, others preferred the less radical options of reforming the composition of the Lords or restricting the power of the Lords to reject or alter Bills passed by the Commons. The issue came to a head during the 1906-1910 government, when the Lords rejected or 'amended out of recognition' ten Bills passed by the Commons, including the 1909 Finance Bill. The rejection of the Finance Bill constituted a major issue in the January 1910 general election; and, having been returned to office, the Liberal government (supported by Labour and Irish Nationalist MPs) secured a large majority in the Commons for three resolutions that reflected the central elements of what became the *Parliament Act 1911* (that the Lords be disabled from rejecting Money Bills; that the power of the Lords to reject other Bills passed by the Commons be time-restricted; and that the maximum duration of Parliament be limited to five years). A conference of leading Liberal and Conservative

parliamentarians sought to reach a working solution; but the conference broke down because the Conservatives were vehemently opposed to Irish Home Rule and refused to agree to a restriction of the Lords' power to block legislation on that issue. When the Lords refused to pass a Bill embodying the three resolutions, the Liberal government called and won another general election, which was fought in part on the issue of the proposed restrictions on the Lords. The Commons immediately passed the Parliament Bill; and, although the Lords initially responded by heavily amending the Bill, the realisation that the Liberal government (and the King) could and would resort to the creation of supportive peers led the Lords to capitulate and pass the Bill.[18] The *Parliament Act 1911* duly received the Royal Assent,[19] on 18 August 1911.

III. THE LEGISLATIVE STATUS OF THE PARLIAMENT ACT 1949

The applicants argued that the 1911 Act provided for a species of delegated legislation, in that the Commons, the Lords and the Sovereign delegated to the Commons and the Sovereign alone power to enact legislation subject to the substantive and procedural requirements set out in that Act. Such legislation therefore depends for its validity on a prior enactment and indeed it is required to state on its face that it is made by the authority of the 1911 Act.

In support of the classification of legislation enacted pursuant to the 1911 Act procedure as delegated legislation, the applicants cited a range of authority,[19] in particular the argument of Professor HWR Wade. In his classic Cambridge Law Journal article in 1955, Wade stated:

No difficulty arises over the Parliament Acts 1911 and 1949, if they are classed- as it is submitted they should be classed - as creating yet another species of delegated legislation. The sovereign legislature has always been regarded as having three component parts, and an Act to which the Lords do not assent is not an Act of the sovereign Parliament at all. It requires ulterior legal authority, which of course is provided by the Parliament Acts, and the Act of 1911 contains plenty of indications that Acts passed under it without the consent of the Lords are delegated legislation: the threefold sovereign has delegated its power, subject to restrictions, to a new and non-sovereign body made up of two of its parts only. Difficulty only arises if the expression 'Act of Parliament' is used for sovereign and non-sovereign Acts indiscriminately.[20]

While Wade has considerable support from some constitutional lawyers,[21] others reject Wade's characterisation and regard legislation enacted under the 1911 Act as primary legislation by the sovereign legislature redefined for particular purposes.[22] However, in response those same commentators, who nonetheless accept that an attempt to use the 1911 Act procedure to extend the maximum duration of Parliament beyond five years would be a nullity (being contrary to the exception in s 2(1)), Wade stated:

I cannot square [that acceptance] with the notion that legislation enacted under the Parliament Acts is primary. The acid test of primary legislation, surely, is that it is accepted by the courts at its own face value, without needing support from any superior authority. But an Act passed by Queen and Commons only has no face value of its own ... An Act of Queen and Commons alone is accepted by the courts only because it is authorised by the Parliament Acts - and indeed it is required to recite that it is passed 'in

accordance with the Parliament Acts 1911 and 1949 and by authority of the same'. This is the hallmark of subordinate legislation, and I do not understand how it is possible to disagree with Professor Hood Phillips when he says that this is the correct classification.[23]

In summary, the applicants argued that legislation enacted pursuant to the 1911 Act procedure owes its existence and authority to that Act; and that that is the defining characteristic of delegated legislation.[24]

The Administrative Court was not persuaded. In the view of Maurice Kay LJ, the 1911 Act redefined Parliament for certain legislative purposes and s 2(1) expressly provided that legislation enacted by that redefined Parliament 'shall become an Act of Parliament'. [25] Even though such legislation may be susceptible to judicial scrutiny to ensure compliance with the requirements set out in the 1911 Act, it remains 'more akin to primary legislation'. [26] According to Collins J, the 1911 Act provided for a new procedure whereby an Act of Parliament could be enacted. [27] Save that the 1911 Act did not permit the enactment of a Bill purporting to extend the life of Parliament, legislation enacted under the 1911 Act procedure was 'identical to an Act passed in the ordinary way'. [28] The Court of Appeal regarded the issue as less clear cut. It did not hold that legislation enacted pursuant to the 1911 Act procedure is delegated legislation (although it stated that it is perfectly possible to properly regard it as such); but nor did it accept that such legislation can be entirely equated with primary legislation enacted in the ordinary way, precisely because it is dependent on the 1911 Act for its existence and authority and because, in its view, such legislation would not be valid to the extent that it was outside the scope of the 1911 Act. [29]

The House of Lords held that the 1949 Act was properly characterised as primary rather than delegated legislation. According to Lord Bingham, the 1911 Act made it clear that legislation enacted in accordance with its provisions 'shall become an Act of Parliament' [30] and the expression 'Act of Parliament' is used only to denote primary legislation. The 1911 Act had not authorised a new form of sub-primary legislation but had created a new way of enacting primary legislation. [31] Moreover, the history of the 1911 Act demonstrated that the object of the Act was not to delegate power but to restrict the power of the Lords to frustrate measures supported by the Commons. [32] Lord Nicholls of Birkenhead accepted that as a matter of jurisprudential analysis the source of legal validity was not the same for legislation enacted under the 1911 Act procedure and for legislation enacted in the ordinary way; but he questioned the significance of that difference. According to s 2(1) of the 1911 Act, the 1911 Act procedure still results in an Act of Parliament. He concluded that it would be absurd and confusing to characterise such an enactment as delegated legislation; and that the appropriate approach was to recognise that in enacting s 2 the intention of Parliament 'was to create a second, parallel route by which, with the stated exceptions ... any public Bill introduced in the Commons could become law as an Act of Parliament.' [33]

Lord Steyn and Lord Hope of Craighead similarly regarded the 1911 Act procedure as an alternative mode of enacting an Act of Parliament. [34] Baroness Hale of Richmond expressly adopted the so-called 'manner and form' or 'redefinition' theory: on the basis that Parliament is omnipotent, in 1911 Parliament decided to redefine or, in Baroness Hale's terms, 'redesign' itself for the purpose of enacting Acts of Parliament in the circumstances set out in the 1911 Act; and in 1949 the redesigned Parliament decided further to modify the design. [35] Lord Carswell

and Lord Brown of Eaton-under-Heywood summarily rejected the analogy with delegated legislation as unsustainable.[36]

It is submitted that legislation enacted under the 1911 Act procedure manifests characteristics of both primary and delegated legislation. In determining that the 1949 Act was primary legislation, the courts attached greater weight to the characteristics of primary legislation and, in particular, to the self-serving statement in s 2(1) itself. However, having done so, the courts were faced with more difficult questions when they considered the issue of justiciability.

IV. JUSTICIABILITY

At first sight, there appeared to be two related obstacles to the justiciability of a challenge to the validity of an Act of Parliament. First, such a challenge would seem to be contrary to fundamental constitutional principle clearly recognised in the authorities. In *Edinburgh & Dalkeith Railway Co v Wauchope*[37] Lord Campbell stated:

[A]ll that a court of justice can do is look to the Parliamentary 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, nor into what was done previous to its introduction, or what passed in Parliament, during its progress in its various stages through both Houses.[38]

And in *Pickin v British Railways Board*[39] Lord Simon stated that 'the courts in this country have no power to declare enacted law to be invalid'.[40] Secondly, the 1911 Act itself expressly provides, in s 2(2), that, where the procedure of the Act is invoked, the Speaker of the House of Commons is required to certify that there has been compliance with the provisions of s 2; and s 3 provides that such a certificate 'shall be conclusive for all purposes, and shall not be questioned in any court of law'. In fact, the Attorney General did not seek to argue that the courts could not properly adjudicate on the challenge; and, at first instance, Maurice Kay LJ commented that the Attorney General 'wisely takes no point on justiciability'.[41]

However, the Court of Appeal insisted on taking the point. The Court was not entirely convinced by the initial response of the Attorney General -that the issue was justiciable because 'it was recognised that it was desirable that the courts should decide the issue'; and, further questioning prompted the Attorney General to assert that 'there was no absolute rule that the courts could not consider the validity of a statute' and that 'the courts had jurisdiction because the issue was one of statutory interpretation and because [the applicants] were contending that the 1949 Act was not a statute at all'.[42] Although the Court of Appeal did not appear to respond directly to these assertions, it was ultimately satisfied that the issue was justiciable. The Court stated:

The reality is that the 1911 Act was a most unusual statute. By that statute, the House of Lords, the House of Commons and the King used the machinery of legislation to make a fundamental constitutional change. Nearly 100 years after the event, the court has been invited to rule on the precise nature and extent of that change. We have decided that it was right for the Administrative Court to accept that invitation. The authority of the

1949 Act purported to be derived from the 1911 Act. The latter Act, by s 3, expressly envisaged the possibility that the validity of subsequent Acts enacted pursuant to its provisions might be subjected to judicial scrutiny. The effect of the 1911 Act was undoubtedly susceptible to judicial analysis. However, in considering that effect, the Administrative Court was acting as a constitutional court. There was no precise precedent for the jurisdiction that it was exercising. ... The circumstances in which it will be appropriate for the courts to become involved in issues of this nature are limited, but in this case it is perfectly appropriate for the courts to be involved. If the courts did not adjudicate on the issue, there would be great uncertainty as to the legal situation. ... In exercising this role, the Administrative Court and this court on appeal are seeking to assist Parliament and the public by clarifying the legal position when such clarification is obviously necessary.[43]

Such reasoning, which, it is submitted, is as much practical (or political) as it is legal, also found favour in the House of Lords. Lord Bingham stated:

The appellants have raised a question of law which cannot, as such, be resolved by Parliament. But it would not be satisfactory, or consistent with the rule of law, if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.[44]

Lord Brown referred to various arguments against justiciability - including the arguable finality of the Speaker's certificate of compliance with the provisions of s 2 of the 1911 Act, the lapse of time between the enactment of the 1949 Act and the current challenge to its validity, and the subsequent use of the amended 1911 Act procedure by both main political parties -but he seems to have concluded that these objections were outweighed by the Attorney General's concession as to justiciability.[45] However, some of their Lordships also sought to justify the assumption of jurisdiction on more strictly legal grounds. Lord Bingham expressed the view that *Edinburgh & Dalkeith Railway Co v Wauchope and Pickin v British Railways Board* did not conclude the question of justiciability in the present case. Despite the generality of the judicial self-denials articulated in those cases, both cases involved challenges based on internal procedural irregularities.[46] By contrast, the challenge to the validity of the 1949 Act in the present case centred on whether that Act - which the Parliamentary roll demonstrated had not been passed by both Houses of Parliament - was, in the language of Lord Simon, 'enacted law'.[47] Parliament - was, in the language of Lord Simon, 'enacted law'.[47] Lord Nicholls concluded that the challenge of the applicants (and the assumption of jurisdiction by the courts) was not incompatible with the supposed obstacles. He accepted the fundamental constitutional principle that Parliament has exclusive jurisdiction over its own procedures; but, in his view, the issue in the present case was the proper interpretation of s 2(1) of the 1911 Act; and it is an equally fundamental constitutional principle that statutory interpretation is a matter for the courts.[48] Lord Hope accepted that the issue as to the validity of the 1949 Act was one of statutory interpretation. He also expressed the view that the inclusion of s 3 of the 1911 Act was an indication that Parliament itself appreciated that the question whether legislation passed without the consent of the House of Lords was effective as an Act of Parliament was a question for the courts; and that the words 'in accordance with the provisions of the *Parliament Act 1911* and by authority of the same', which appeared in the preamble to the 1949 Act, provided the courts with a justiciable issue.[49] Moreover, although Lord Hope rejected the applicants' argument to the effect that the 1949 Act, having been enacted pursuant to the 1911 Act

procedure, is delegated legislation, in his view that did not mean that the 1949 Act was immune from judicial scrutiny: such scrutiny was available because the legislative power invoked to enact the 1949 Act was derived not from the common law but from another statute. In such circumstances, the fact that the 1949 Act asserted that it had been enacted pursuant to the 1911 Act procedure was not conclusive as to its validity as an Act of Parliament.[50] The 1949 Act is valid if, but only if, its enactment was within the power conferred by the 1911 Act: that is the only possible basis of its validity as an Act of Parliament.[51] That issue is not determined by the Speaker's certificate (which determines only that there has been compliance with the procedures laid down in the Act): it depends on the proper interpretation of s 2(1) of the 1911 Act, which is a matter for the courts.[52]

Lord Steyn appears to have taken a further step by asserting that the courts may properly investigate whether legislation has been enacted in accordance with 'manner and form' requirements imposed by earlier legislation:

Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. ... This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.[53]

And, to similar effect, Baroness Hale asserted:

[I]f Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters, nor is it permitted to remove or relax those requirements by passing legislation in the ordinary way.[54]

The reasoning of the courts on the issue of justiciability has been criticised as 'surprisingly brief and superficial'.[55] Once the courts had refused to accept the Attorney General's concession at face value and had insisted on satisfying themselves that the challenge to the validity of the 1949 Act was indeed justiciable, they might have been expected to provide a more sustained analysis of the issues.

It is submitted that the courts were correct in their conclusion as to the significance of the Speaker's certificate. That was conclusive on the question whether there had been compliance with the provisions of s 2. However, as the applicants argued, they were not questioning the s 2 certificate: they did not dispute that there had been full compliance with the procedure spelt out in s 2. Rather they were arguing that that procedure could not be used at all to amend the 1911 Act; and the Speaker's certificate was not conclusive on that issue.[56]

The majority of their Lordships who expressly confronted the justiciability question treated the issue before the Court as one of statutory interpretation, which is clearly a matter for the courts. However, in so doing, it is submitted that they failed to address the constitutional principle in *Edinburgh & Dalkeith Railway Co v Wauchope* and *Pickin v British Railways Board*. The applicants' response to that principle was that, while accepting that the question of the validity of an Act of Parliament that has been enacted by both Houses and has received the Royal Assent is not justiciable, they stressed that the 1949 Act was not such an Act. Rather, as has been seen, they argued that legislation enacted under the 1911 Act, *ex hypothesi* without the consent of the Lords, is delegated or subordinate legislation; and that such legislation is not covered by the constitutional principle and is not immune from legal challenge. Only Lord Bingham addressed

that obstacle; but it is submitted that his reasoning is persuasive. Once the courts rejected the applicants' argument that the 1949 Act was delegated or subordinate legislation, the consequence was to raise the stakes. Assuming jurisdiction to determine the validity of delegated legislation would have been uncontroversial and the substantive grounds of challenge are well established. By contrast, assuming jurisdiction to determine the validity of primary legislation raised issues of fundamental constitutional importance. The remainder of this article examines the courts' discussion of those issues.

V. THE VALIDITY OF THE PARLIAMENT ACT 1949

THE 1949 ACT AS DELEGATED LEGISLATION

The argument that the 1949 Act was properly to be characterised as delegated legislation - and its rejection by the courts - has been considered above. If that argument had been accepted, then it is clearly strongly arguable that the 1949 Act would have been held to be ineffective in so far as it purported to amend the 1911 Act; and that the 2004 Act would in turn necessarily have been held to be invalid. Indeed, it was this argument that prompted Lord Donaldson to introduce the Parliament Acts (Amendment) Bill in the Lords in December 2000 in order to affirm retrospectively the 1949 Act and legislation passed under its amendments to the 1911 Act.[57] He stated:

[I]t is a fundamental tenet of constitutional law that, prima facie, where the sovereign Parliament - that is to say, the Monarch acting on the advice and with the consent of both Houses of Parliament - delegates power to legislate, whether to one House unilaterally, to the King or Queen in Council, to a Minister or to whomsoever, the delegate cannot use that power to enlarge or vary the powers delegated to him. The only exception is where the primary legislation, in this case the 1911 Act, expressly authorises the delegate to do so. In other words there has to be a Henry VIII clause. The 1949 Act purported to vary the powers delegated to the Commons by curtailing the timetable. This could have been authorised by a Henry VIII clause in the 1911 Act, but there was no such clause. It follows that [the Commons], in enacting the 1949 Act, exceeded its authority.[58]

ENLARGEMENT OF POWERS UNDER SECTION 2 OF THE 1911 ACT

The applicants sought to reinforce their conclusion on the delegated legislation issue by arguing that, for the purposes of the 1911 Act, the Commons and the Sovereign constitute a subordinate legislature, which, in the absence of an express power, cannot amend the conditions under which its power to legislate was granted. Yet that was what the 1949 Act purported to do. The argument was based on the authorities dealing with the relationship between the Westminster Parliament and the devolved legislatures of former British colonies.[59] In the Administrative Court, Maurice Kay LJ regarded those authorities as not strictly analogous to the context of the

Parliament Acts; but, even assuming that the Commons and the Sovereign do constitute a subordinate legislature, he was of the view that the authorities relied on do not establish any principle that such legislatures may not amend their powers in the absence of an express power.[60]

The Court of Appeal examined the case law in some considerable detail;[61] and derived the following synthesis:

A sovereign legislature, uncontrolled by antecedent written constitutional instrument, may alter its own legislative powers and procedures by legislation duly enacted in accordance with its embedded procedures. The resulting amended constitution is controlled to the extent provided by the legislation. Thereafter, further constitutional alterations may be validly enacted under and by means of the altered powers and procedures. Such alterations may include alterations to the powers and procedures prescribed by the first legislation. This is, however, all subject to the proviso that the making of these subsequent alterations is within the power afforded by the first legislation properly understood, and provided that they are duly enacted in accordance with its procedures.[62]

The Court concluded that the powers granted to the devolved legislatures of former British colonies were not strictly analogous to the power of the Commons and the Sovereign under the 1911 Act, except to the extent that they uphold the validity of constitutional change by virtue of the very instrument from which the legislature enacting the change derives its own powers. However, the Court held that there was no constitutional principle or principle of statutory interpretation that prevents a legislature from altering its own constitution by enacting alterations to the very instrument from which its powers derive by virtue of powers in that same instrument, if the powers, properly understood, extend that far.[63] The discussion of this issue in the House of Lords was rather more limited. Lord Bingham rejected the applicants' submission on three grounds: first, for reasons already given, he did not accept that the 1911 Act involved the delegation of legislative power to a subordinate legislature; secondly, analogies drawn from the devolution of legislative power were of little if any value in the unique historical context of the 1911 Act;[64] and, thirdly, the Court of Appeal was correct in concluding that the question was one of construction of the relevant instrument.[65]

Having thus determined that the scope of the legislative authority under the 1911 Act depended on the construction of the relevant instrument, the courts examined the scope of s 2(1) of the Act.

THE SCOPE OF SECTION 2(1) OF THE 1911 ACT

The applicants argued that, on its proper construction, the 1911 Act, and, in particular, s 2(1), did not confer power on the Commons and the Sovereign to amend the provisions of that Act. The applicants placed significant weight on the Preamble to the Act, which states:

Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament: And whereas it is intended to substitute for the

House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis, but such substitution cannot be immediately brought into operation: And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords.

They argued that the aim of the 1911 Act was to regulate the relationship between the Lords and the Commons and to do so with the consent of both Houses; and that the 1911 Act must be regarded as a 'concordat' or 'new constitutional settlement' (terms coined by the Court of Appeal) which, in the absence of express authorisation, cannot be amended without the consent of the Lords (which thus precludes the use of the 1911 Act procedure).

Administrative Court

The Administrative Court rejected this argument as inconsistent with the clear language of s 2(1), which applies to 'any Public Bill' other than those expressly excluded. The Court accepted the submission of the Attorney General that there was no scope for interpreting s 2(1) as containing an exclusion in relation to a Bill to amend the provisions of the 1911 Act; and, in particular, the Court rejected the applicants' argument that the Preamble required s 2(1) to be interpreted as precluding future legislation that amended that provision.[66]

Court of Appeal

The Court of Appeal emphasised that s 2(1) in its terms excluded from the 1911 Act procedure a Money Bill and a Bill containing a provision to extend the maximum duration of Parliament beyond five years. Given those express exclusions, the Court held that there was no obvious justification for implying other exclusions: a Bill amending the 1911 Act could have been expressly excluded by the terms of the Act but it was not.[67] The Court therefore concluded that nothing in the language of s 2(1) seemed to prevent the Commons and the Sovereign from using the 1911 Act procedure to make the amendments that the 1949 Act purported to make.[68]

However, unlike the Administrative Court, the Court of Appeal was of the view that the question of the validity of the 1949 Act did not turn simply on established principles of statutory interpretation:

This appeal is concerned with much more than the scope of a statutory power. It is concerned with the extent of the restriction on the role of the House of Lords as one of the constituents of sovereign power affected by what was in reality a concordat and what was in form a statute.[69]

For that reason the Court of Appeal took the view that it was not subject to the recent constraints on the decision in *Pepper v Hart*[70] to the effect that the Court could not have regard to ministerial statements in order to elucidate the scope of a statutory power.[71] On the contrary, it was 'most material' to review the circumstances in which the 1911 Act was enacted and Parliament's view of the effect of the Act from the time of its enactment up to the present day.[72] The Court reached a number of conclusions in the light of that review.

First, the Court accepted that there was no express restriction on the subject matter of legislation that could be enacted under the 1911 Act (other than the exclusions specified in s 2(1)).[73] Secondly, the Court was persuaded that it was at least strongly arguable that it was implicit that the powers conferred by the 1911 Act could not be used to override the express restrictions.[74] In particular, the Court expressed the view that the use of the 1911 Act procedure to extend the maximum duration of Parliament beyond five years (or to abolish the Lords) would be contrary to the intention of Parliament when enacting the 1911 Act; and, further, that it would be ineffective and subject to review by the courts.[75] The Court stated:

The purpose of the 1911 Act was to establish a new constitutional settlement that limited the period during which the Lords could delay the enactment of legislation first introduced to the Commons but which preserved the role of the House of Lords in the legislative processes. In our view it would be in conflict with the 1911 Act for it to be used as an instrument for abolishing the House of Lords. ... We would view such an endeavour in the same way as an attempt to delete the prohibition on extending the life of Parliament. The preamble of the 1911 Act is inconsistent with the Attorney General's contention. The preamble indicates that the 1911 Act was to be a transitional provision pending further reform. It provides no support for an intention that the 1911 Act should be used, directly or indirectly, to enable more fundamental constitutional changes to be achieved than had been achieved already.[76]

Thirdly, the Court noted that during the Parliamentary debates many express exclusions to s 2(1) were proposed but, save for those that appear in the Act, all were rejected. In particular, proposals in both Houses to exclude Bills amending the 1911 Act were rejected expressly because it was envisaged that amendment might prove to be expedient in the light of experience and such amendment should not be frustrated by the Lords. In the view of the Court it followed that it was impossible to suggest that the 1949 amendments to the 1911 Act could not be properly enacted under the 1911 Act procedure.[77]

The Court of Appeal was equally clear that subsequent views as to the effect of the 1911 Act were relevant to the determination of its scope:

What is in issue is a consensual constitutional change in the manner in which sovereign power is exercised. The nature of that change depends not simply on the words used in the legislation by which that change was brought about. It depends on general recognition of the nature of the change, as demonstrated particularly by those who brought about the change, but additionally by all affected by it. This is what Hart described as the 'rule of recognition' in Chapter 6 of his work on *The Concept of Law*. In short, it is vain to argue that, on its true construction, the 1911 Act provided for entrenched restrictions on the manner in which the powers granted by that Act should be exercised, if no one who was involved appreciated those restrictions at the time, and if all concerned have acted in disregard of such limitations in the lengthy period which has since elapsed.[78]

The original 1911 Act procedure was used to enact two major Acts of Parliament - the *Government of Ireland Act 1914* (UK) and the *Welsh Church Act 1914* (UK), both effecting important constitutional reforms. It was next used to enact the 1949 Act; and the House of

Commons seemed to accept that, whatever the views of the merits of the amendments to the 1911 Act, the 1911 Act procedure could be used to enact those amendments. Prior to the 2004 Act, three statutes were enacted under the 1911 Act as amended by the 1949 Act - the *War Crimes Act 1991* (UK), the *European Parliamentary Elections Act 1999* (UK) and the *Sexual Offences (Amendment) Act 2000* (UK). Although there was an unsuccessful challenge to the validity of the War Crimes Act 1991,[79] the validity of all three Acts (and thus the validity of the 1949 Act) seems subsequently to have been implicitly recognised both by the courts and by Parliament.[80]

The Court of Appeal thus concluded that its view of the scope of s 2(1) of the 1911 Act based on the language of that provision was confirmed by its review of the history of the 1911 Act and the relevant Parliamentary materials. The power conferred on the Commons by s 2(1) included the power to make the amendments contained in the 1949 Act. It followed that the 1949 Act was effective to amend the 1911 Act and that the 2004 Act, enacted in accordance with that amended procedure, was itself valid. However, the Court was concerned to point out that the amendments effected by the 1949 Act were 'relatively modest and straightforward'.[81] The Court was not prepared to go further in its formal decision:

[A]ccepting a power of amendment of this nature exists is quite different to allowing the power of amendment to extend to making changes of a fundamentally different nature to the relationship between the House of Lords and the Commons from those which the 1911 Act had made. The 1949 Act left the relationship between the House of Lords and the House of Commons substantially the same as it was before the 1949 Act. It reduced the length of the period for which the House of Lords could delay legislation proposed by the Commons.

What, if any, further power of amending the 1911 Act that Act authorises should not be determined in advance of an attempt to make a more significant amendment than that contained in the 1949 Act. It is, however, obvious that on our approach, the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act. Our decision is limited to indicating that if what is involved is properly described as a modification of the 1911 Act it is legally effective.[82]

House of Lords

The House of Lords upheld the decision of the Court of Appeal that the 2004 Act was valid.

In order to make clearer the views of the Law Lords, this section of the article considers in turn each of the conclusions of the Court of Appeal. Before examining the substantive conclusions on the scope of s 2(1), it is convenient to consider first the different views on the use of the legislative history and Parliamentary materials in reaching those conclusions.

Reference to the legislative history and Parliamentary materials

Prior to the decision of the House of Lords in *Pepper v Hart*,[83] courts were as a matter of law not permitted to refer to Hansard in order to ascertain the meaning of a statutory provision. *Pepper v Hart* relaxed that position to the extent that, where the provision was ambiguous,

unclear or would lead to an absurdity, courts were permitted to refer to clear statements by a government minister (or other promoter of the legislation) or to other Parliamentary material required to understand such statements and their effect.[84] However, as noted above, the rule was subsequently qualified to the extent that it could not be relied upon to determine the scope of a statutory power.

Lord Bingham set out at considerable length the events that led to the enactment of the 1911 Act and the details of the Bill's passage through Parliament. However, although he referred to this 'historical record' in holding that there was no support for the limitations on s 2(1) suggested by the Court of Appeal,[85] later in his judgment he stated that he had reached his conclusion without reliance on the Parliamentary debates on the 1911 and 1949 Acts. Indeed, since he did not find the language of the 1911 Act to be ambiguous or obscure, the principle in *Pepper v Hart* did not permit reference to Hansard.[86]

Lord Steyn also found that the pre-conditions for the applicability of *Pepper v Hart* were not satisfied; and that, in any event, Hansard contained no important indications on the point in issue in the present case.[87] More generally, while accepting that Hansard may be used to identify the mischief at which legislation was directed, he regarded the use of Hansard to identify the intention of the Government or Parliament as 'constitutionally unacceptable'.[88]

Lord Carswell regarded the historical context of the enactment of the 1911 Act as important as showing the mischief that the Act was intended to address. The extent to which use may be made of subsequent events is less clear; but in the present case the subsequent apparent endorsement by both Houses of Parliament of the validity of the 1949 Act may be viewed as political fact or reality that could not readily be set aside.[89] On the other hand, like Lord Bingham and Lord Steyn, since he was not persuaded that the pre-conditions for consulting Hansard were satisfied in the present case, he did not rely on Hansard in reaching his conclusion on the scope of s 2(1). In particular, he expressed the view that it would be incorrect to draw conclusions from such elements of the Parliamentary history as the proposal and rejection of amendments.[90] Lord Nicholls was of the view that in the present case the principle in *Pepper v Hart* did not preclude the consideration of ministerial statements as a means of confirming the interpretation of s 2(1). The proposal and rejection of amendments during the enactment of the 1911 Act provided confirmation that the scope of s 2(1) was not limited in the manner submitted by the applicants.[91] Moreover, the subsequent history confirmed Parliamentary recognition of the validity and effectiveness of the 1949 Act amendments of the 1911 Act: not only had the 1911 Act as amended by the 1949 Act been invoked on four occasions, Lord Nicholls accepted the submission of the Attorney General that for more than fifty years legislative business had been conducted in both Houses of Parliament against a background awareness that the 1911 Act can be used if it is necessary and appropriate.[92] Lord Hope also expressed the view that it was also important to consider the political effects that resulted from the 1911 and 1949 Acts.[93]

Lord Rodger of Earlsferry and Baroness Hale both emphasised the importance of the historical context and constitutional and political significance of the 1911 Act. Lord Rodger stressed that the 1911 Act was clearly intended to address the constitutional problem created by a too powerful hereditary House of Lords frustrating the wishes of the elected House of Commons. That factor could not be ignored in determining the scope of the Act.[94] Baroness Hale regarded the historical context of the enactment of the 1911 Act as important not only as

showing the mischief that the Act was intended to cure^[95] but also as demonstrating that it was always contemplated that the 1911 Act procedure might be used to bring about major constitutional change. In particular, one of the motivations behind the Act was to facilitate the passing of the passage of the Irish Home Rule legislation and in turn secure the support of the Irish Nationalists for the budget.^[96]

Lord Brown simply stated that it was unnecessary to resort to Hansard to conclude that 'both Houses of Parliament must inevitably have recognised in 1911 the real possibility that the Act's procedure would thereafter be used to amend itself'.^[97]

It is difficult to draw any firm conclusions on the permitted use of the legislative history and Parliamentary materials, not least because some of the Law Lords failed to differentiate clearly between the Parliamentary record in Hansard and the historical circumstances that culminated in the enactment of the 1911 Act. It may be argued that the very special circumstances justified more flexible use of such materials, not only to identify the mischief at which the 1911 Act was directed but also to assist in determining the scope of s 2(1); but that the case provides no precedent for approaches to statutory interpretation in more orthodox contexts.

Express exceptions from the 1911 Act procedure

It appears, largely by implication from silence, that their Lordships were unanimous in concluding that, in its terms, the use of s 2(1) was limited only to the extent of the two express exceptions contained within that provision.^[98] Subject to those express exceptions, s 2(1) provides that 'any Public Bill' can be enacted in accordance with the 1911 Act procedure. Lord Bingham acknowledged that the literal meaning of a statutory provision may have to be rejected if it leads to an interpretation or consequence that Parliament could not have intended; but he pointed out that the historical background to the enactment of the 1911 Act supported the literal meaning: during the passage of the Bill through Parliament, there were repeated attempts to extend the classes of Bills to which the 1911 Act would not apply; but, save for the amendment relating to Bills to extend the maximum duration of Parliament, they were all rejected.

Power to remove the express exclusions

Lord Bingham held that the applicants' submission, that the conditions laid down in s 2(1) were intended to be incapable of amendment under the 1911 Act procedure, was contradicted both by the language of the section and by the historical record.^[99] More specifically, Lord Bingham alone accepted the submission of the Attorney General that the power of amendment could be even used to remove the express exclusions.^[100] However, it has been argued that his broad statement of principle is difficult to reconcile with his view on the justiciability issue.^[101] He stated:

There is nothing in the 1911 Act to provide that it cannot be amended, and even if there were such a provision it could not bind a successor Parliament. Once it is accepted, as I have accepted, that an Act passed pursuant to the procedures in s 2(1), as amended in 1949, is in every sense an Act of Parliament having effect and entitled to recognition as such, I see no basis in the language of s 2(1) or in principle for holding that the

parenthesis in that subsection ... [is] unamendable save with the consent of the Lords[102]

If legislation enacted under the 1911 Act procedure is indeed 'in every sense an Act of Parliament', it should not be open to challenge before the courts.

None of the other Law Lords agreed with Lord Bingham's unqualified stance on the issue. It was acknowledged that an attempt to use the 1911 Act procedure to enact legislation that in its terms purported to extend the maximum duration of Parliament would be contrary to the express exclusion in s 2(1). Further, it seems to have been assumed that the courts would declare such legislation to be invalid, although, as a matter of traditional constitutional theory, it is arguable that, pursuant to the doctrine of implied repeal, such legislation would have the effect both of repealing the exclusion in s 2(1) and of extending the duration of Parliament. However, it would appear that the express exclusion in s 2(1) could be circumvented by a two-stage process:

First, a Bill would be introduced deleting the reference in [s 2(1)] to a Bill containing any provision to extend the life of Parliament. A Bill which sought to do this would not be within the terms of the prohibition. Then, a second Bill would be introduced, to run in tandem with the first, which sought to do what the provision to be deleted would have prohibited. So long as the first Bill passed into law before the second Bill was presented for the Royal Assent, so the argument would run, it could not be said to be a Bill that s 2(1) of the 1911 Act did not authorise.[103]

Lord Nicholls held that the express exclusion from the 1911 Act procedure of a Bill extending the duration of Parliament not only precluded the direct use of the procedure to enact such a Bill without the consent of the Lords;[104] but he also held that the express exclusion carried with it, by necessary implication in order to render the express exclusion effectual, an exclusion of achieving the same result indirectly (by first amending s 2(1) to remove the exclusion). Otherwise the express legislative intention could be defeated.[105] Lord Carswell expressly agreed with the reasoning of Lord Nicholls.[106] And Lord Steyn, Lord Hope and Baroness Hale also held that the 1911 Act procedure could not be used directly or indirectly to legislate contrary to the express exceptions in the 1911 Act.[107] Lord Rodger acknowledged that the 1911 Act procedure could not be used directly to extend the maximum duration of Parliament,[108] although he expressly reserved his opinion on the question whether the procedure could be used to extend the maximum duration of Parliament indirectly by first deleting the exclusion from s 2(1). However, he acknowledged that extending the life of Parliament is a matter of fundamental constitutional importance: 'not only could it undermine the democratic basis of the British system of government, but it would also affect the dynamic which underlies s 2 of the 1911 Act'. In the absence of full argument, he would not conclude that such a matter should not be subject to the safeguard of the consent of the House of Lords.[109] Similarly, Lord Brown indicated that he was not prepared, without fuller argument, to give a ruling that would sanction the use of the 1911 Act procedure for the purpose of prolonging the life of Parliament.[110] The view of the majority of the House of Lords that the 1911 Act procedure could not be used directly or indirectly to extend the maximum duration of Parliament contrary to the express limitation in s 2(1) seems to constitute the recognition of a form of entrenchment. The 1911 Act established a procedure for the enactment of primary legislation that is less demanding than the traditional procedure; but, by excluding from that

procedure legislation to extend the duration of Parliament, it provided that such legislation must be enacted in accordance with the more demanding traditional procedure. By sanctioning this entrenchment to the extent that it not only overrides the traditional doctrine of implied repeal but also precludes achieving the same result by what would otherwise seem to be a legitimate, if formalistic, two-stage route, the House of Lords has recognised implied double entrenchment.[111]

Power to amend the 1911 Act generally

Although a majority of the House of Lords held that the express exclusions in s 2(1) could not be overridden, directly or indirectly, by legislation enacted in accordance with the 1911 Act procedure, a further question was whether there are any other limitations on the use of the procedure to amend the provisions of the Act.

As already noted, Lord Bingham gave that question an unqualified negative answer. Lord Nicholls concluded that implied limitations were justified only where they were required to prevent circumvention of express limitations; and thus, in the absence of an express exclusion of a Bill amending the terms of s 2, Lord Nicholls saw no good reason for arguing that the implication of such an exception was necessary.[112] Lord Steyn also held that the existence of express exclusions precluded implied exclusions.[113] Moreover, the applicants' argument based on the Preamble to the 1911 Act - that 'Parliament' denoted Parliament as ordinarily constituted - could not prevail against the clear language of the substantive provisions of the 1911 Act.[114] Lord Rodger rejected the implication of an exclusion of Bills amending the 1911 Act both because such an exclusion would be difficult to reconcile with the constitutional background to the 1911 Act and also because, in the absence of any contrary indication, the existence of express exclusions precluded the implication of other exclusions.[115] Baroness Hale and Lord Hope were of the view that the applicants' argument that the 1911 Act procedure cannot be used to amend itself 'had rather more substance' and was 'not unattractive'. However, in the end they both rejected it. Baroness Hale was of the view that, in the absence of an express exclusion of a Bill to modify the 1911 Act, the Act must be taken to authorise the use of its procedure for that purpose.[116] Lord Hope expressed the view that the argument overlooked the political reality that the post-1949 history demonstrated a general acceptance by both Houses of the validity of the amendments introduced by the 1949 Act. In his view, it was not open to a court to ignore that reality.[117] Lord Cooke of Thorndon questioned (extra-judicially) why the majority of the House of Lords insisted on ensuring the effectiveness of the express exclusions in parenthesis in s 2(1) - by finding that there was an implied limitation on direct and indirect circumvention of those exclusions - but did not afford similar protection to the other limitations on the power conferred by the 1911 Act. He argued that the various requirements of the Parliamentary 'timetable' set out in s 2(1) as originally enacted could be regarded as no less express 'conditions of resort' to the 1911 Act procedure than the express exclusions relating to Money Bills and Bills extending the maximum duration of Parliament; and that to permit the 1911 Act procedure to be used to weaken any of those other conditions would also, adopting the words of Lord Nicholls, defeat the legislative intention underlying the Act.[118]

It may be noted that the 2000 Royal Commission on the Reform of the House of Lords assumed that the 1911 Act procedure could be used to amend the Act and that the 1949 Act amendments were valid. However, while the Commission supported the post-1949 balance between the Commons and the Lords, it referred to the possibility that the powers of the Lords might be further restricted as a 'potential weakness' of the Parliament Acts. It therefore recommended that that 'loophole' should be closed and that the 1911 Act should be amended by adding to the express exclusions in s 2(1) a reference to any Bill that purported to amend the 1911 Act.[119] Moreover, the Parliament Acts (Amendment) Bill[120] introduced in the Lords by Lord Donaldson in December 2000 included a clause to exclude from the scope of the 1911 Act procedure any Bill containing provisions to vary the constitution or powers of the Lords.

Power to legislate for constitutional change

Six of the Law Lords expressly rejected the distinction drawn by the Court of Appeal between a 'relatively modest and straightforward amendment' and 'changes of a fundamentally different nature to the relationship between the House of Lords and the Commons from those which the 1911 Act had made'. Lord Bingham noted that the dichotomy had not been argued before the Court of Appeal or the House of Lords; and he was of the view that it could not be supported in principle.[121] One of the known objectives of the 1911 Act was to enable the Liberal government to secure the grant of Home Rule to Ireland,[122] which was, by any standards, a fundamental constitutional change (as was the disestablishment of the Anglican Church in Wales). Moreover, contrary to the assertion of the Court of Appeal, Lord Bingham expressed the view that the 1949 Act amendments were not 'relatively modest' but were 'substantial and significant'.[123] Lord Steyn rejected the conclusion of Court of Appeal that a clear distinction could be drawn on the basis of statutory interpretation between modest and straightforward constitutional amendments (which the 1911 Act permitted) and fundamental constitutional change (which it did not).[124] But he was 'deeply troubled' by the potential implications of holding that there were no limits on the use of the 1911 Act procedure (other than the express exclusions): on that basis the 1911 Act could be used to abolish the House of Lords or to enact oppressive and wholly undemocratic legislation. He asserted that the supremacy of Parliament is still the general principle of the United Kingdom constitution; but he rejected as implausible the argument of the Attorney General that the constitution is uncontrolled. He noted that membership of the European Union, devolution with the United Kingdom and the Human Rights Act 1998 (UK), incorporating the European Convention on Human Rights into national law, have, as a matter of fact, compromised Dicey's account of Parliamentary sovereignty as pure and absolute. More generally, he intimated that an 'exorbitant assertion of government power' (such as the use of the 1911 Act procedure to abolish the House of Lords) 'may test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level':

[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. In 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.[125]

The position of Lord Hope on this issue is not entirely clear. He too was unable to accept the distinction drawn by the Court of Appeal between relatively modest and straightforward constitutional amendments and fundamental constitutional change. No such distinction was supported by the wording of s 2(1); and, in his view, the distinction raised questions of fact and degree about the effect of legislation which are quite unsuited for adjudication by a court.[126] On the other hand, he accepted that the United Kingdom constitution is not uncontrolled[127] and he asserted that

[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.[128]

Lord Rodger rejected the view expressed by the Court of Appeal that the basis for determining the scope of s 2(1) should be the scale of the constitutional change involved.[129] Indeed, the effecting of major constitutional change was one of the principal purposes behind the 1911 Act. First, it was clearly intended to address the constitutional problem created by the too powerful hereditary Lords frustrating the wishes of the elected Commons.[130] Secondly, it was anticipated that the new procedure would be used to enact what became the Government of Ireland Act 1914 and the Welsh Church Act 1914.[131]

Baroness Hale also noted that the historical context of the enactment of the 1911 Act demonstrated that it was always contemplated that the 1911 Act procedure might be used to bring about major constitutional change.[132] In particular, one of the motivations behind the Act was to facilitate the passage of the Irish Home Rule legislation and in turn secure the support of the Irish Nationalists for the budget. This rendered untenable the distinction that the Court of Appeal sought to draw between modest and fundamental constitutional changes.[133] Nonetheless, Baroness Hale did assert that, although the sovereignty of the United Kingdom Parliament remained fundamental to the constitution, the legislative competence of Parliament is not wholly unqualified. Moreover, although the constraints are generally political and diplomatic rather than constitutional,[134]

the courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the individual from all judicial scrutiny.[135]

Lord Brown agreed that the distinction drawn by the Court of Appeal was 'unwarranted in law and unworkable in practice'; but he stated that he was not prepared to give a ruling that would sanction the use of the 1911 Act procedure for all purposes, for example the abolition of the House of Lords or the prolonging of the life of Parliament. A conclusive ruling on such issues required fuller argument.[136]

Lord Carswell expressly declined to examine the distinction drawn by the Court of Appeal but he noted that it had not been argued before the courts and that it found favour with none of their Lordships. However, he inclined very tentatively to the view that its instinct may be right and that there may be limits on the powers conferred by s 2(1) of the 1911 Act. He questioned whether a government in the real political world would seek to use the 1911 Act procedure to bring about 'a fundamental disturbance of the building blocks of the constitution'; and indicated

that the issue whether a legal challenge to the use of the procedure for such a purpose could succeed required more profound consideration.[137] The indication that the United Kingdom courts may be prepared to question the validity of legislation on the ground that it is oppressive or undemocratic or undermines fundamental constitutional principles extends beyond the recently-conferred power of the courts to make a declaration that legislation is incompatible with the European Convention on Human Rights.[138] It echoes the view of Sir Robin Cooke (later Lord Cooke), articulated in a series of New Zealand cases going back to 1979, that the courts should seek to uphold fundamental rights recognised by the common law even in the face of Parliamentary legislation that purported to override them.[139] In fact, in each of those cases, the Court was able to affirm the supremacy of Parliament and uphold the legislation in question - so that the issue 'happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and judges has kept theoretical'.[140] Similar views have been expressed in the United Kingdom by judges (writing extra-judicially)[141] and by commentators.[142] However, now that the potential power to impose substantive limitations on Parliament's legislative competence has been judicially asserted by some members of the House of Lords, it remains to be seen whether, as in New Zealand, that power will remain theoretical only.

VI. CONCLUSION

The actual decision in *R (Jackson) v Attorney General*, upholding the validity of the *Hunting Act 2004* (UK) and its ban on fox-hunting, will in practice affect only a small minority of the British public; and that reality was perhaps reflected in the public and media response to the decision. For constitutional lawyers, the case raised some fundamental constitutional questions that, at least in the United Kingdom, had previously been the subject of theoretical speculation only; and, on those questions, the decision of the House of Lords was groundbreaking. First, their Lordships held that the validity of the 1949 Act and the 2004 Act was open to challenge in the courts, notwithstanding that they insisted that those Acts were primary rather than delegated legislation. Secondly, although their Lordships took the view that, when enacting legislation under the 1911 Act procedure, the Commons and the Sovereign constituted 'Parliament', albeit redefined for the purposes of that Act, they nonetheless held that there were implied limitations on their legislative power. Thirdly, some of their Lordships made it clear that the courts might be unwilling to uphold legislation enacted under the 1911 Act procedure (and even legislation enacted in the ordinary way with the consent of the Lords) if that legislation was found to be oppressive or undemocratic or to undermine fundamental constitutional principles. Previous qualifications of Dicey's traditional view of Parliamentary sovereignty have been effected by Parliament itself through legislation (relating to membership of the European Union, the protection of human rights and devolution within the United Kingdom). It is submitted that the fact that these new qualifications have been asserted by the courts, on one view the guardians of Parliamentary sovereignty, represents a significant development in the continuing debate about the United Kingdom constitution.

1. A V Dicey, *Law of the Constitution* (10th ed, 1959) 39-40.
2. See, for example, AW Bradley and K D Ewing, *Constitutional and Administrative Law* (13th ed, 2003) ch 4; S A de Smith and R Brazier, *Constitutional and Administrative Law* (8th ed, 1998) ch 4; O Hood Phillips, P Jackson and P Leopold, *Constitutional and Administrative Law* (8th ed, 2001) chs 3, 4. For detailed discussion of the doctrine with special reference to the New Zealand context, see P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) chs 14-15.
3. Money Bills are dealt with separately in s 1 and are not considered further. The effect of the exclusion of a Bill containing any provision to extend the maximum duration of Parliament beyond five years is discussed below. Section 2 makes further provision as to the extent that amendments to the original version of a Bill are permitted without losing the opportunity to take advantage of the 1911 Act procedure.
4. See Part II below.
5. The unamended 1911 Act procedure was used on three occasions only, to enact the *Government of Ireland Act 1914* (UK), the *Welsh Church Act 1914* (UK) and the *Parliament Act 1949* (UK).
6. The 1949 Act substituted references to two Parliamentary sessions and one year for the references to three Parliamentary sessions and two years in the 1911 Act as originally enacted.
7. In order to expedite the enactment of the 1949 Act, the Government instituted a special short Parliamentary session from 14 September to 25 October 1948. This constituted the second of the three 'sessions' required under the unamended 1911 Act. The requirement that there should be a two-year time lapse between the date of the second reading of the Bill in the Commons in the first of those sessions and the date on which it passes the Commons in the third of those sessions was also satisfied.
8. Four statutes have been enacted under the 1911 Act as amended by the 1949 Act - the *War Crimes Act 1991* (UK), the *European Parliamentary Elections Act 1999* (UK), the *Sexual Offences (Amendment) Act 2000* (UK) and the *Hunting Act 2004* (UK). The Government has indicated its intention to invoke the procedure on other occasions; but the legislation in question has eventually been agreed by the Commons and the Lords.
9. The observation was made by the Attorney General, Lord Goldsmith: *Guardian*, 25 January 2005.
10. [2005] EWHC 94 (Admin); [2005] EWCA Civ 56, [2005] QB 579; [2005] UKHL 56, [2006] 1 AC 262.
11. The three applicants were members of the Countryside Alliance but they brought the proceedings in their respective personal capacities as landowner within a hunt area, hunt employee and hunt-related businesswoman.
12. For recent discussion of these issues in the New Zealand context, see Dame Sian Elias, 'Sovereignty in the 21st century: Another spin on the merry-go-round' (2003) 14 *Public Law Review* 148; M Cullen, 'Parliamentary Sovereignty and the Courts' [2004] *New Zealand Law Journal* 243; P A Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *Kings College Law Journal* 321; R Ekins, 'The Authority of Parliament: A Reply to Professor Joseph' (2005) 16 *Kings College Law Journal* 51.
13. The *Hunting Bill* was given its Second Reading in the Commons on 16 December 2002 and its Third Reading on 9 July 2003. It was introduced into the Lords on 10 July

2003 but, since it failed to complete all its stages in the Lords before the end of the 2002/2003 session, it was deemed to have been rejected. The Bill was reintroduced into the Commons in the following session and was given its Third Reading on 15 September 2004. It subsequently passed all its stages in the Lords but only in a significantly amended form. Pursuant to the 1911 Act procedure, the Bill as passed by the Commons was presented for the Royal Assent and became an Act of Parliament. The dates demonstrate that there was compliance with the procedural requirements in the amended s 2(1) (but not with the original requirements).

14. In separate proceedings, the Countryside Alliance has challenged the validity of the 2004 Act on the grounds that it contravenes various rights under the European Convention on Human Rights (right to respect for private and family life, home and correspondence (Article 8); freedom of assembly and association (Article 11); prohibition of discrimination (Article 14); protection of property (First Protocol, Article 1) and fundamental freedoms under the European Community Treaty (free movement of goods (Article 28); free movement of workers (Article 39); freedom to provide services (Article 49)). The challenge has been rejected by the Administrative Court ([2005] EWHC 1677 (Admin), 29 July 2005) and by the Court of Appeal ([2006] EWCA Civ 817, 23 June 2006); but permission to appeal to the House of Lords has been given.
15. [2005] UKHL 56, [7].
16. [2005] EWCA Civ 56, [11].
17. For more detailed accounts, see [2005] EWCA Civ 56, [77]-[87], [2005] UKHL 56, [9]-[20] (Lord Bingham), [142]-[154] (Baroness Hale).
18. The Commons did accept a Lords' amendment to the Bill as originally introduced, excluding from the 1911 Act procedure a Bill containing any provisions to extend the maximum duration of Parliament beyond five years.
19. See [2005] UKHL 56, [22] (Lord Bingham).
20. HWR Wade, 'The Basis of Legal Sovereignty' [1955] Cambridge Law Journal 172, 193-194.
21. See Hood Phillips and Jackson, above n 2, 79-80; Sir William Wade and C F Forsyth, *Administrative Law* (9th ed, 2004) 26-27.
22. de Smith, above n 2, 93-94; A W Bradley, 'The Sovereignty of Parliament - Form or Substance' in J L Jowell and D Oliver (eds), *The Changing Constitution* (5th ed, 2004); Bradley and Ewing, above n 2, 65; P Mirfield, 'Can the House of Lords be Abolished?' (1979) 95 Law Quarterly Review 36; G Winterton, 'Is the House of Lords Immortal?' (1979) 95 Law Quarterly Review 386.
23. Sir William Wade, *Constitutional Fundamentals* (1980) 27-28.
24. See W R Craies, *Craies on Legislation* (8th ed, 2004) para 1.21.
25. Parliament Act 1911, s 2(1).
26. [2005] EWHC 94 (Admin), [25].
27. *Ibid* [40].
28. *Ibid* [45].
29. [2005] EWCA Civ 56, [30]-[48].
30. Parliament Act 1911, s 2(1).
31. [2005] UKHL 56, [24].
32. *Ibid* [25]-[26].
33. *Ibid* [63]-[64].

34. Ibid [94] (Lord Steyn), [111] (Lord Hope).
35. Ibid [160]-[161].
36. Ibid [173] (Lord Carswell), [187] (Lord Brown).
37. (1842) 8 Cl & F 710.
38. Ibid 725.
39. [1974] UKHL 1; [1974] AC 765.
40. Ibid 798.
41. [2005] EWHC 94 (Admin), [12].
42. [2005] EWCA Civ 56, [11].
43. Ibid [12]-[13].
44. [2005] UKHL 56, [27].
45. Ibid [182].
46. In *Edinburgh & Dalkeith Railway Co v Wauchope* the challenge was based on the alleged non-compliance with Parliamentary standing orders; in *Pickin v British Railways Board* the challenge was based on allegations that the Board had fraudulently concealed certain matters and thus misled Parliament into passing the legislation.
47. [2005] UKHL 56, [27].
48. Ibid [51]. See also [169] (Lord Carswell).
49. Ibid [110]-[116].
50. Ibid [111]-[112].
51. Ibid [115].
52. Ibid [116].
53. Ibid [81].
54. Ibid [163].
55. A Twomey, 'Implied Limitations on Legislative Power in the United Kingdom' (2006) 80 *Australian Law Journal* 40, 43.
56. For an argument that the Speaker's certificate also related to the issue of whether the Bill in question is within the scope of s 2(1), so that a challenge on that issue does involve questioning the certificate, see *ibid* 42.
57. The Bill received a Second Reading in the Lords but made no further progress. *Hansard*, House of Lords, 19 January 2001, col 1309. Lord Donaldson concluded that in principle the courts had the power to set aside the 1949 Act and any existing legislation enacted on the basis of the amended timetable, although he doubted whether the courts would do so since an application would be required to be made very promptly after the enactment. However, 'a wholly different situation would arise if [the Commons] again legislated without the consent of [the Lords] and if that legislation - I have little doubt that this might happen - were challenged promptly by someone with a sufficient personal interest. ... I would forecast that the court would set aside the new Act on the basis that the 1949 Act was flawed and could not be relied upon to authorise a new Act using that timetable': cols 1309-1310.
58. The principal authorities relied on were *The Queen v Burah* (1878) 3 App Cas 889; *McCawley v The King* [1920] AC 691; *Harris v Minister of the Interior* 1952 (2) SA428; *Harris v Minister of the Interior* 1952 (4) SA 769; and *Bribery Commission v Ranasinghe* [1964] UKPC 1; [1965] AC 172.
59. [2005] EWHC 94 (Admin), [26]-[27].

60. [2005] EWCA Civ 56, [49]-[59]. In addition to the authorities listed in note 59 above, the Court referred to *Taylor v Attorney General of Queensland* (1917) 23 CLR457 and *Clayton vHeffron* [1960] HCA 92; (1960) 105 CLR 214.
61. *Ibid* [67].
62. *Ibid*.
63. *Ibid* [68].
64. For criticism of the discussion of the Australian authorities as misconceived, see Twomey, above n55, 45.
65. [2005] UKHL 56, [33]-[36]. See also [81]-[85] (Lord Steyn), [162] (Baroness Hale), [174] (Lord Carswell).
66. [2005] EWHC 94 (Admin), [17]-[19] (Maurice Kay LJ), [41]-[44] (Collins J).
67. [2005] EWCA Civ 56, [70].
68. *Ibid* [71].
69. *Ibid* [76].
70. [1992] UKHL 3; [1993] AC 593.
71. See *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2000] UKHL 61; [2001] 2 AC 349.
72. [2005] EWCA Civ 56, [72].
73. *Ibid* [76].
74. *Ibid*.
75. *Ibid* [40]-[48].
76. *Ibid* [42].
77. *Ibid* [87].
78. *Ibid* [90].
79. *R v Serafinowicz*. No report or record remains of counsel's arguments or of Potts J's ruling.
80. There have been successful prosecutions under the War Crimes Act 1991 and the Sexual Offences (Amendment) Act 2000, and unchallenged elections under the European Parliamentary Elections Act 1999. The War Crimes Act 1991 has been amended, and the European Parliamentary Elections Act 1999 consolidated, by legislation enacted by both Houses of Parliament.
81. [2005] EWCA Civ 56, [98].
82. *Ibid* [99]-[100].
83. [1992] UKHL 3; [1993] AC 593.
84. *Ibid* 640 (Lord Browne-Wilkinson).
85. [2005] UKHL 56, [31].
86. *Ibid* [40].
87. *Ibid* [98].
88. *Ibid* [97].
89. *Ibid* [171].
90. *Ibid* [172].
91. *Ibid* [65]-[66].
92. *Ibid* [67]-[69].
93. *Ibid* [119]-[120], [128]. Lord Hope referred to Wade's analysis of Parliamentary sovereignty as the 'ultimate political fact' in 'The Basis of Legal Sovereignty' above n 20, 196 (adopted by Mirfield, above n 22, 42-44, and Winterton, above n 22, 388) and

- Hart's discussion of the open texture of the foundations of the legal system in H L A Hart, *The Concept of Law* (1961) 107-114.
94. Ibid [132]-[136].
 95. Ibid [156].
 96. Ibid [157].
 97. Ibid [195].
 98. Section 5 also excluded from the 1911 Act procedure any Bill for confirming a provisional order, although such legislation has fallen into disuse: [2005] UKHL 56, [56] (Lord Nicholls), [78] (Lord Steyn).
 99. [2005] UKHL 56, [30].
 100. Ibid [32].
 101. Twomey, above n 55, 47.
 102. [2005] UKHL 56, [32].
 103. Ibid [122] (Lord Hope).
 104. Ibid [57].
 105. Ibid [58]-[59].
 106. Ibid [175].
 107. Ibid [79] (Lord Steyn), [122] (Lord Hope), [164] (Baroness Hale).
 108. Ibid [138].
 109. Ibid [139].
 110. Ibid [194].
 111. It has been questioned whether this approach might be applied in New Zealand to protect the entrenched provisions of the Electoral Act 1993 (NZ): see Joseph, above n 2, 534-535.
 112. [2005] UKHL 56, [60]-[62].
 113. Ibid [88].
 114. Ibid [89].
 115. Ibid [137]-[138].
 116. Ibid [164].
 117. Ibid [124], [128].
 118. Lord Cooke, 'A Constitutional Retreat' (2006) 122 *Law Quarterly Review* 224. It appears that the applicants may have sought to advance a not dissimilar argument: see [2005] UKHL 56, [87]-[88] (Lord Steyn).
 119. *A House for the Future*, Royal Commission on the Reform of the House of Lords, Cm 4534 (2000) paras 5.13-5.15. The recommendation would also secure the Lords' veto over any Bill to extend the maximum duration of Parliament: *ibid* para 5.16.
 120. See text to n 57 above.
 121. [2005] UKHL 56, [31].
 122. The undertaking to grant Home Rule to Ireland, which was strongly resisted by the Conservative party in the Commons and the Lords, was part of the price the Liberal government paid for the necessary support of the Irish Nationalists for the budget.
 123. [2005] UKHL 56, [38].
 124. Ibid [96].
 125. Ibid [100]-[102].
 126. Ibid [127].
 127. Ibid [104]-[109].
 128. Ibid [107] (*italics added*).

129. Ibid [131].
130. Ibid [136].
131. Ibid [131].
132. Ibid [157].
133. Ibid [158].
134. Ibid [159].
135. Ibid.
136. Ibid [194].
137. Ibid [178].
138. Human Rights Act 1998 (UK), s 4; and see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
139. For the most unambiguous statement of Sir Robin Cook's view, see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398. For a discussion of this and related 'crusades', see Joseph, above n 2, 492-495, 507-512.
140. *Cooper v Attorney General* [1996] 3 NZLR 480, 484 (Baragwanath J).
141. Lord Woolf, 'Droit Public - English Style' [1995] Public Law 57, 69, Sir John Laws, 'Law and Democracy' [1995] Public Law 72, 81-93.
142. T R S Allan, 'Parliamentary Sovereignty: Law Politics and Revolution' (1997) 113 Law Quarterly Review 443, 449.