Part I

General Part

CHAPTER 1

THE NATURE OF CONSTITUTIONAL AND ADMINISTRATIVE LAW

The constitutional law of a state is the law relating to the constitution of that state. It is therefore desirable at the outset to discuss briefly the terms "Law," "State" and "Constitution." **1–001**

Law

Many attempts have been made to define this apparently simple term, and for these the reader is referred to books on legal theory which English writers commonly call jurisprudence. We are concerned with state law (municipal law), and it will be sufficient for our present purpose to define the law of a state as consisting of those rules of conduct which are enforced by the duly constituted courts of that state. This would not be an adequate definition for the student of jurisprudence, or the science of law in general; for it does not explain whence the courts derive their authority to lay down the law, nor why the courts in administering justice look to certain sources and not to others, and look to those sources in a certain order and in a certain way. To say that the law is the law because the courts declare it to be so would be like defining an acid as that which turns litmus paper red. Litmus paper provides a convenient working test whereby the chemist determines whether a given liquid is acid or alkali, but it does not explain what acids and alkalis are in themselves. Similarly, enforcement by the courts is a sort of litmus test which may be used to distinguish between legal and non-legal rules of conduct. Enforcement by the courts does not necessarily mean specific enforcement, but usually takes the form of punishment or some other treatment (in criminal law), or an order to pay damages or to deliver up property (in civil law). **1–002**

This criterion is admittedly imperfect when applied to constitutional and administrative law. In the first place, many decisions in English administrative law are made by tribunals other than the ordinary courts. These tribunals, however, are created by Acts of Parliament; their jurisdiction, composition and powers are defined by statute, and their decisions—whether subject to appeal to the courts or not—are recognised and enforced by the courts. Again, law cannot be enforced against the government, though it can be enforced against members of the government individually. Nor can law be enforced against Parliament or either House of Parliament, although the courts may make a declaration as to the law in relation to either of the Houses, and law may be enforced against members of either House personally. Actions in tort or contract may be brought against a government department representing the Crown, but the judgment cannot be enforced by execution.[1] The law is not enforceable against the Queen in her personal capacity, but this is not of practical importance. Statutory "duties" may be declared by Parliament to be unenforceable in the courts, such as was the duty of the Post Office to provide a postal service under section 59 of the British Telecommunications Act 1981[1a]; and the performance of certain functions by the

[1] Crown Proceedings Act 1947.

[1a] For the current position under the Postal Services Act 2000 see *post* para. 28–012.

Speaker under the Parliament Acts may not be questioned in the courts. Moreover "the law and custom of Parliament," although it is recognised by the ordinary courts, is enforced by the Houses of Parliament through their officers, and is both historically and analytically a distinct branch of British constitutional law.[2]

1–003 Some writers, however, find the essential element of legal rules to be their recognition as obligatory, by legislative and executive as well as by judicial officers.[3] But the question remains, what would happen (or what ought to happen) if a given rule were broken? We still need the formal distinction between rules which the courts enforce and rules which they do not enforce. If constitutional conventions were called laws, then we should have to distinguish between judicially-enforced laws and non-judicially-enforced laws.[4]

Legal rules, with these modifications, are thus distinguished from rules of public morality which are not enforced by the courts, although they may in some cases, *e.g.* constitutional conventions (such as the responsibility of members to Parliament), be recognised as existing by the courts. Although constitutional conventions are not laws as here defined, a study of them is essential to the understanding of a constitution—especially the British Constitution—and a description of the more important conventions is always included in books on British constitutional law.[5]

Legal rules are also distinguished from rules of private morality or ethics which are not enforced by the courts, *e.g.* the moral obligation to carry out a freely made bargain which is not unlawful but which for some reason (such as absence of consideration) lacks legal sanction. The contents of ethics and law overlap to a great extent, *e.g.* murder, theft and slander; but there are many rules of ethics which the law does not seek to enforce, such as the commandment to honour our parents; and many legal rules which are not intrinsically moral, such as the husband's general liability to pay tax on his wife's income.

Law includes not only the sum total of particular laws, whether statutory or otherwise, but also the complex interrelations between those laws, as well as the technique—judicial precedent, statutory interpretation and so on—by which the law is administered.

The state

1–004 This is another very difficult term to define, and a full discussion of this question also falls within the province of jurisprudence or political theory. It is a concept that plays little part in the constitutional law of the United Kingdom, its place being taken by that of the Crown.[6] For present purposes, however, we may define a state as an independent political society occupying a defined territory, the members of which are united together for the purpose of resisting external force and the preservation of internal order. No independent political society can be termed a state unless it professes to exercise both these functions; but no modern state of any importance contents itself with this narrow range of activity. As civilisation becomes more complex, population increases and social conscience

[2] See Chap. 13; and for Standing Orders, Chap. 11.
[3] See *e.g.* A. L. Goodhart, *English Law and the Moral Law* (1955), pp. 46–65.
[4] See further, O. Hood Phillips, "Constitutional Conventions: A Conventional Reply" (1964) 8 J.S.P.T.L. 60; and *post*, Chap. 7.
[5] See Chap. 7; also Chaps 8, 17 and 36.
[6] See M. Loughlin, "The State, the Crown and the Law" in *The Nature of the Crown*, eds M. Sunkin and S. Payne (1999, Oxford).

arises, the needs of the governed call for increased attention; taxes have to be levied to meet these needs; justice must be administered, commerce regulated, educational facilities and many other social services provided.

A fully developed modern state is expected to deal with a vast mass of social problems, either by direct activity or by supervision or regulation. In order to carry out these functions, the state must have agents or organs through which to operate. The appointment or establishment of these agents or organs, the general nature of their functions and powers, their relations *inter se* and between them and the private citizen, form a large part of the constitution of a state.

The constitution of a state[7]

The word "constitution" is used in two different senses, the abstract and the concrete. The constitution of a state in the abstract sense is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen. A "constitution" in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained. A country, such as our own, which has no "written" constitution as explained below, has no constitution in the concrete sense of the word.[8] It should be clear from the context which meaning is being employed. **1–005**

Written and unwritten constitutions[9]

A constitution is said to be "written" when the most important constitutional laws are specifically *enacted*. Probably all states, except the United Kingdom and Israel[10] now have mainly written or enacted constitutions. New Zealand, until recently, had a largely unwritten constitution. The New Zealand Parliament, however, enacted a Constitution Act in 1996.[11] Those who attain power in a state, whether as a result of revolution (*e.g.* France), war of independence (*e.g.* United States), federation or confederation of existing units (*e.g.* Switzerland), or emergence of a new independent nation (*e.g.* former British colonies and protectorates), put into the form of legislative enactment the manner in which the state is to be organised, government carried on and justice administered, and this arrangement is commonly approved by a referendum of the electorate. The most important laws constituting the basis of the state are specified in one formal document or a series of formal documents which are binding on the courts and all persons concerned. **1–006**

It is not practicable for a written constitution to contain more than a selection of constitutional laws. It is invariably supplemented, within the limits prescribed in the constitution, by amendments passed in the prescribed manner; by organic laws, and other legislation passed in the ordinary way from time to time to fill in gaps; usually also by judicial decisions interpreting the written documents; and

[7] See Colin Munro, "What is a Constitution?" [1983] P.L. 563.

[8] Or indeed, in any sense according to F.F. Ridley, "There is No British Constitution," (1988) 41 Parl. Affairs, 340.

[9] The distinction is criticised as misleading and inexact by C. Munro, *Studies in Constitutional Law* (2nd ed., 1999, Butterworths).

[10] H. E. Baker, *The Legal System of Israel* (2nd ed., 1968); E. Likhovski, *Israel's Parliament* (1972): there are "basic laws," but no constitution has been drawn up yet.

[11] *post*, para. 36–012.

by customs and conventions regulating the working of the machinery of government.[12] Organic laws are a special class of laws for the passing of which a constitution prescribes some special procedure, but which do not amount to constitutional amendments.

Flexible and rigid constitutions

1–007 A more significant classification of the types of constitution is that into "flexible" and "rigid," metaphors given currency by Bryce.[13] A *flexible* constitution was defined by Dicey as "one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body." Dicey defined a *rigid* constitution as "one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."[14] The distinction is of great importance in relation to constitutional amendment.

Where the constitution is rigid, certain provisions are distinguished from others in that some *special procedure* is necessary for their alteration, if they are legally alterable at all. Most European and American constitutions are rigid. The method of amending "fundamental" or "constitutional" laws varies in different constitutions: it may be the legislature sitting in a special way (as in France) or with a prescribed majority or a prescribed quorum (as in Belgium), the convention of a special constituent body (as in the United States), the consultation of the component members of a composite state (as in the United States and Swiss Federations), or a referendum of the electorate (as in Switzerland and Australia). Amendment of the United States Constitution, for example, requires either initiation by two-thirds of both Houses of Congress and ratification by the legislatures of three-fourths of the states (the usual method), or initiation by two-thirds of the states and ratification by conventions in three-fourths of the states (*e.g.* repealing 18th Amendment on prohibition).

1–008 A subdivision of rigid constitutions can be drawn according to whether the special amending procedure is within the sole power of the legislature, or whether some outside agency has to be brought in. In the latter case the constitution may be said to be supreme over the legislature.

Sometimes a constitution or part of it may not be legally alterable at all, as certain articles of the Constitution of the German Federal Republic (1949), the "basic articles" of the Constitution of the Republic of Cyprus (1960) and the representation of a state in the United States Senate (unless that state consents); or it may be unalterable before a certain time, *e.g.* certain provisions of the United States Constitution before 1808. In such cases any alteration would legally amount to revolution.

It is unnecessary and it may be confusing to draw a distinction, as Dicey does in the first definition quoted, between the relative ease and difficulty of amending a law; this is not a distinction of which lawyers can take account, for it depends on political and psychological factors. It may be more difficult to pass a British

[12] Wheare, *Modern Constitutions*, Chaps 3, 7 and 8. See *e.g.* Munro, *The Constitution and Government of the United States* (4th ed.), pp. 76–88; Dawson, *The Government of Canada*, pp. 69–72; H. W. Horwill, *Usages of the American Constitution* (1925).

[13] *Studies in History and Jurisprudence*, Vol. 1, Essay 3. Other descriptive names considered by Bryce were moving and stationary, or fluid and solid (crystallised); *op. cit.* pp. 131–132. Lord Birkenhead L.C. preferred "controlled" and "uncontrolled": *McCawley v. The King* [1920] A.C. 691, PC. *cf.* Wheare, *op. cit.* Chap. 6.

[14] Dicey, *Law of the Constitution* (10th ed.), pp. 126 *et seq.*, and 146–150.

statute amending the law relating to the sale of intoxicating liquors or the opening of shops on Sunday than to pass a French statute reducing the period of office of the President of the Republic from seven to five years.

Unwritten constitutions are in practice flexible, but written constitutions are not necessarily rigid. The constitutions of the Australian states for example are written and largely flexible.

Fundamental laws and judicial review of legislation

1–009 Those who frame a rigid constitution seem to be placed in a dilemma. They may give the power to interpret the constitution and to declare legislation invalid *ex post facto* as being repugnant thereto, to the ordinary courts, or to a special constitutional court. Here the final and supreme power would appear to be vested in the courts, which would usually be contrary to the intention of the framers of the constitution. Why should judges, whose function is primarily judicial, set up their own views in opposition to the will of a popularly elected legislative assembly? Two answers may be suggested: first, the judges may be appointed by the executive which initiates legislation and presumably keeps in touch with public opinion; or, alternatively, the "will of the people" is supposed to be embodied in the constitution in a more permanent way than it is represented in the legislative assembly of the day.

On the other hand, if the legislature itself is given authority to interpret the constitution, what guarantee is there that it will ever hold itself to be wrong? In other words, how can the constitution in this case be rigid at all? Dicey saw this difficulty and stated the paradox that the "fundamental laws" in the continental type of "rigid" constitution placing restrictions on the authority of the ordinary legislature, without giving power of judicial review, so far from being laws of a particularly sacrosanct character are found on analysis not to be laws at all. When the courts are not given and have not assumed authority to declare legislation unconstitutional, the constitutional restrictions on legislative activity—though in fact they may be carefully observed—appear on Dicey's view to be merely constitutional conventions resting on the force of public opinion.[15]

1–010 It is comparatively rare for the courts to have jurisdiction to review legislation ("constitutional adjudication") except in federal states, such as Switzerland[16] and the federal members of the Commonwealth, where some check is necessary to preserve the respective rights of the federation and its component members.[17] The United States is the classic example of a federation in which each state as well as the federation has a completely rigid constitution. Here the state courts have jurisdiction to declare state legislation repugnant to the state constitution; and the federal courts have jurisdiction to declare provisions of state constitutions, state legislation and federal legislation repugnant to the Federal Constitution. It is not strictly accurate to say that the courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist or that an alleged wrong has been committed because a certain statute relied on is unconstitutional. Under the influence of Chief Justice

[15] *cf.* Bryce, *op. cit.* pp. 193–198.

[16] C. Hughes, *The Federal Constitution of Switzerland*; Geoffrey Sawer, *Modern Federalism* (1969), Chap. 10.

[17] Judicial review obtains in dependent territories of the Commonwealth, however, because their legislatures are regarded as subordinate to the British Parliament; *post*, Chap. 35.

Marshall the American Supreme Court first assumed the power of declaring Federal legislation unconstitutional in *Marbury v. Madison* (1803),[18] and the power of declaring state legislation repugnant to the Federal Constitution in *Fletcher v. Peck* (1810).[19] It may be added by way of further justification that, not only is the United States a federation, but the executive is not responsible to the legislature and so there is not the same reason for the will of the legislature to prevail. The Republic of Ireland, on the other hand, is a unitary state, with an executive legally as well as conventionally responsible to the legislature, whose Constitution gives the Supreme Court and High Court some power of review.[20]

The modern alternative to review of legislation by the ordinary courts is not necessarily the complete absence of any review of constitutionality. A special constitutional court may be set up for such cases, as in the Constitutions of the Republic of Cyprus (1960), West Germany, and Italy.

1–011 Another device is to establish a constitutional council to which Bills may be referred *before* being submitted to the Head of State for his assent. Thus the Constitution of the Fifth French Republic (1958) provides for a *Conseil Constitutionnel* composed of former Presidents of the Republic and nine other members, three being appointed by each of the President of the Republic, the President of the National Assembly and the President of the Senate. Before organic laws are promulgated, the Council must examine them to ensure that they do not conflict with the constitution. The President of the Republic, the Prime Minister or the President of either House may also submit ordinary laws to the Council before they are promulgated. If a provision is declared unconstitutional it cannot be promulgated or come into force. There is no appeal against decisions of the Constitutional Council, which are binding on all public, administrative and judicial authorities. This device differs from judicial review in that the *Conseil* is not a court, and judicial review operates *ex post facto*.

The Constitutions of the Irish Republic and India expressly recognise the distinction between fundamental rights safeguarded by the courts against amendment otherwise than by the appropriate procedure, and "directive principles of social (or state) policy" for the general guidance of the legislature but which are not cognisable by any court. Such directive principles of state policy are morally binding on the legislature, but can scarcely be called laws.

The scope of constitutional law

1–012 The constitutional law of a state is the law relating to its constitution. Where the constitution is written, even though it may have to be supplemented by other materials, it is fairly easy to distinguish the constitutional law of a state from the rest of its legal system; but where, as in Britain, the constitution is unwritten, it is largely a matter of convenience what topics one includes in constitutional law, and there is no strict scientific distinction between that and the rest of the law. Thus the United Kingdom constitution can well be said to be marked by three

[18] 1 Cranch 137.

[19] 6 Cranch 87.

[20] By Article 26 the Supreme Court may rule on the constitutional validity of legislation before it receives the President's assent.

By Article 34.3.2, both the High Court and Supreme Court have jurisdiction to declare unconstitutional legislation after it has been enacted.

striking features: it is indeterminate, indistinct, and unentrenched.[21] It follows from what has been said that constitutional law deals, in general, with the distribution and exercise of the functions of government, and the relations of the government authorities to each other and to the individual citizen. It includes the rules—though the nature of these is difficult to define—which identify the law-making authorities themselves, *e.g.* the legislature and the courts.[22]

More specifically, constitutional law embraces that part of a country's laws which relates to the following topics, among others: the method of choosing the Head of State, whether king or president; his powers and prerogatives; the constitution of the legislature; its powers and the privileges of its members; if there are two Chambers, the relations between them; the status of Ministers and the position of the civil servants who act under them; the armed forces and the power to control them; the relations between the central government and local authorities; treaty-making power; citizenship; the raising and spending of public money; the general system of courts, and the tenure and immunities of judges; civil liberties and their limitations; the parliamentary franchise and electoral boundaries; and the procedure (if any) for amending the constitution.

Administrative law

A distinction is commonly drawn in continental countries between constitutional law and administrative law, but because English law is not codified or officially systematised English jurists have found difficulty in determining the distinction. Sir Ivor Jennings contended that administrative law, like other branches of law, ought to be defined according to its subject-matter, namely, public administration. Administrative law then determines the organisation, powers and duties of administrative authorities.[23] **1–013**

What specially distinguishes administrative authorities from private individuals is the extent of their powers. An important aspect of administrative law is the control exercised by courts or tribunals over those powers, especially in relation to the rights of citizens. The remedy of the citizen may be left to the jurisdiction of the ordinary courts, or the matter may be regulated by special rules and adjudicated by special courts or by administrative tribunals. A system of administrative courts or tribunals is not essential for the existence of administrative law, as is shown by the experience of Belgium, which did not set up a *Conseil d'Etat* until 1946; but the fact that France has long possessed special administrative tribunals—notably the *Conseil d'Etat*—which in appropriate cases oust the jurisdiction of the ordinary civil courts, has no doubt helped towards the systematisation of administrative law in that country.[24]

Where there is a written constitution, as in France and the United States, it is easier to demarcate administrative law from constitutional law, although neither the French *droit administratif* nor American administrative law is codified. Where the constitution is unwritten, as in this country, it is largely a matter of convenience where the line is drawn.[25]

[21] S. E. Finer, Vernon Bogdanor, Bernard Rudden, *Comparing Constitutions* (1995, Oxford) p. 40.
[22] See H. L. A. Hart, *The Concept of Law* (2nd ed., 1994) Chap. VI.
[23] Jennings, *The Law and the Constitution* (5th ed.), p. 217.
[24] L. N. Brown and J. Bell, *French Administrative Law* (5th ed., 1998).
[25] *Post*, Chap. 2; and Pt VI. For a statutory recognition of the term "administrative law" see the State Immunity Act 1978, s.3(2).

Public law

1–014 A convenient descriptive term for both constitutional law and administrative law is public law. Many legal systems, influenced by Roman Law,[26] draw a clear distinction between public law and private law. Public law matters may be dealt with in separate courts. The rights and remedies of parties may depend on whether a claim raises a question of public law or private law. As Lord Wilberforce has explained,

> "The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution . . . The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals."[27]

The reasons for this development and its significance will be discussed later.[28]

The functions of government

1–015 Montesquieu in *L'Esprit des Lois* (1748),[29] following attempts by Aristotle[30] and Locke,[31] divided the powers of government into: (i) the legislative power; (ii) the executive power in matters pertaining to the law of nations, and (iii) the power of judging; and so we get the first statement of the modern classification to which we are now accustomed, *viz*: (i) legislative, (ii) executive, and (iii) judicial.

We may attempt a general description of the various governmental functions in the modern state on the following lines:

(i) *The legislative function* is the making of new law, and the alteration or repeal of existing law. Legislation is the formulation of law by the appropriate organ of the state, in such a manner that the actual words used are themselves part of the law: the words not only contain the law, but in a sense they constitute the law. Legislation may take the form of the decree of a personal ruler, whether king or dictator; or it may be issued by an autocratic body or by a democratic assembly wholly or partly elected by the people. Without a legislative body of some sort a state could not provide law readily enough to meet modern conditions.

Two methods of direct lawmaking are found in some states: the *referendum* by which certain measures have to be submitted for approval to the electorate before being enacted by the legislature; and the *initiative* by which certain kinds of

[26] Public law was that part of the law which concerned the State; private law that which concerned individuals; D.1.1.1.2; *Institutions* 1.1.4. (In this sense criminal law must be regarded as part of public law.) A similar distinction has been drawn by Aristotle, *Rhet* i.13.3. Scots law distinguishes public right and private right (Stair, *Institutions* 1.1.23). See, Article XVIII of the Union with Scotland Act; *Gibson v. Lord Advocate* 1975 S.L.T. 134; *post*, para. 4–007.

[27] *Davy v. Spelthorne B.C.* [1984] A.C. 262. The difficulties of transposing the concepts to the English legal system are discussed in J.W.F. Allison, *A Continental Distinction in the Common Law* (2000).

[28] *post*, Part VI, Introduction.

[29] Bk XI, Chap. 6.

[30] Aristotle, Vol. IV (transl. Jowett).

[31] John Locke, *Second Treatise of Civil Government* (1690) Chap. 12.

measures may be proposed by a specified number of the electors for enactment.[32] The referendum is usually a method for amending federal constitutions.[33]

(ii) *The executive or administrative function* is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible. In recent times, especially since the industrialisation of most civilised countries, the scope of this function has become extremely wide. It now involves the provision and administration or regulation of a vast system of social services—public health, housing, assistance for the sick and unemployed, welfare of individual workers, education, transport and so on—as well as the supervision of defence, order and justice, and the finance required therefore, which were the original tasks of organised government.

(iii) *The judicial function* consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the state sets up to exercise the judicial function are called courts of law or courts of justice.

1–016 Although the above classification of the functions and corresponding powers of government, based on a material or functional analysis, may be useful in helping to arrange the facts and to think about the problems of government, the categories are inclined to become blurred when it is attempted to apply them to the details of a particular constitution. Some hold that the true distinction lies not in the nature of the powers themselves, but rather in the procedure by which they are exercised. Thus legislation involves a formal and instantaneous act designed to establish general rules by which all disputes shall be settled; administration is a continuing and mainly informal process aimed at preventing disputes in classes of cases and does not create rights by establishing precedents; adjudication presupposes an existing dispute in a particular case, is governed by strict rules of procedure and evidence and tends to create rights by establishing precedents.

Others hold that the distinction is organic or formal. Thus administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all state officials who are neither legislators nor judges.[34] This last doctrine seems to be as difficult to apply as the functional or material conception of governmental functions. Thus in the Constitution of the Fifth French Republic not only has the Parliament other powers than the strictly legislative, but the law-making power is divided between the Parliament (*loi*) and the government (*règlement*), so that the Parliament may only make laws dealing with matters enumerated in article 34, while all others matters fall within the province of ministerial regulation.[35]

[32] Wheare, *op. cit.* Chap. 6; A. B. Keith, *British Cabinet System* (2nd ed., Gibbs), pp. 256–260; H. J. Laski, *Introduction to Politics*, pp. 66–68; Philip Goodhart, *Referendum* (1971).

[33] It has, however, become increasingly popular in the United Kingdom since 1972: Northern Ireland (Border Poll) Act 1972; Referendum Act 1975; Scotland Act 1978; Wales Act 1978; Referendums (Scotland and Wales) Act 1997; Greater London Authority Referendum Act 1998. Legislation relating to Northern Ireland has made standing provision for the use of referendums; Northern Ireland (Constitution) Act 1973; Northern Ireland (Entry to Negotiations) Act 1996; Northern Ireland Act 1998.

[34] Jennings, *op. cit.* pp. 24–25. For a contrast between the conceptual and the functional approach, see Griffith and Street, *Principles of Administrative Law.* (4th ed., 1967).

[35] B. Nicholas, "Loi, Règlement and Judicial Review in the Fifth Republic" [1970] P.L. 251.

Doctrine of the separation of powers[36]

1–017 The doctrine of "the separation of powers" as usually understood is derived from Montesquieu,[37] whose elaboration of it was based on a study of Locke's writings[38] and an imperfect understanding of the eighteenth-century English Constitution. Montesquieu was concerned with the preservation of political liberty. "Political liberty is to be found," he says, "only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the nature of things that one power should be a check on another. . . . When the legislative and executive powers are united in the same person or body . . . there can be no liberty. . . . Again, there is no liberty if the judicial power is not separated from the legislative and the executive. . . . There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers."

A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no overlapping or co-ordination, would (even if theoretically possible) bring government to a standstill. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another. There is an echo of this in Blackstone's *Commentaries* (1765): "In all tyrannical Governments . . . the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and wheresoever these two powers are united together there can be no liberty"; and this doctrine was taken over by the fathers of the American Constitution.

The question whether the separation of powers (*i.e.* the distribution of the various powers of government among different organs), in so far as is practicable, is desirable, and (if so) to what extent, is a problem of political theory and must be distinguished from the question which alone concerns the constitutional lawyer, namely, whether and to what extent such a separation actually exists in any given constitution. As a matter of fact the doctrine has not received much acceptance either in its country of origin or in other European countries. Governmental powers are co-ordinated by the effective part of the executive—the Council of Ministers or Cabinet—which is created by, but in fact controls, the legislature in which its members sit. The executive in some democratic countries is made responsible to the legislature; but in totalitarian states the executive has acquired complete domination over both the legislature and the judiciary. The doctrine may be said to have received its main application in democratic countries by securing the independence of the courts from the control of the executive.[39]

1–018 The United States Constitution goes further than any other in applying the doctrine. Thus the federal executive power is vested in the President, the federal legislative power is vested in Congress, and the federal judicial power is vested

[36] W. B. Glyn, *The Meaning of the Separation of Powers* (1965); M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967); G. Marshall, *Constitutional Theory* (1971), Chap. 5. Colin Munro, "The Separation of Powers" [1981] P.L.19; Munro, *Studies in Constitutional Law* pp. 295–307.

[37] *L'Esprit des Lois*, Chap. XI, pp. 3–6.

[38] Locke, *Second Treatise of Civil Government* Chaps. 12–13.

[39] The doctrine of the separation of powers in its earlier history had no true application to judicial matters, and had nothing to do with the independence of judges: C. M. McIlwain, *Constitutionalism: Ancient and Modern* (1940) (revised ed., 1947), pp. 141–142.

in the Supreme Court. The President and his Cabinet are not members of Congress (except that the Vice-President presides over the Senate), and they are not responsible to Congress. The President holds office for a fixed term and he is not necessarily of the same political party as the majority in either House of Congress. The President and Cabinet cannot initiate Bills or secure their passage through Congress, but he may recommend legislation in a message to Congress. But the separation of powers is by no means complete, the three branches of government being connected by a system of "checks and balances." Madison's theory was that one branch must not have the whole of another branch vested in it, nor obtain control over another branch. The chief danger in a republic with a representative legislature was, he thought, that the legislature (rather than the executive) would encroach on the other departments.[40] Thus the President may veto measures passed by Congress, though his veto may be overridden by a two-thirds vote of both Houses. The President has the power to negotiate treaties, but they must be ratified by a two-thirds vote of the Senate. The Supreme Court, asserting the continued significance of the separation of powers, has held that Congress has no power to veto executive acts of the President.[41] The Senate may refuse to confirm certain appointments made by the President, notably that of judges of the Supreme Court; and the judges of that court, although appointed for life, may be removed by impeachment. The power of judicial review of legislation was assumed by the Supreme Court, and was not expressly conferred—although it may perhaps be implied—by the constitution. The three branches of government are therefore interrelated; they act as checks on each other. The problem that may have to be faced before long is whether the draftsmen of the constitution, in their zeal to prevent too great a concentration of power, did not provide restraints that unduly hamper the working of government.[42]

Fundamental Rights

Rights which are regarded as possessed by human beings prior to their recognition by a legal system—or despite their denial by a legal system—can conveniently be described as human rights or natural rights. Formulations of natural rights date from the second half of the eighteenth century, the revolutionary period in America and France.[43] Both countries borrowed largely from English experience and thought, especially as embodied in the writings of Locke[44] and, in the case of America, Coke's commentary on Magna Carta and Blackstone's *Commentaries* (1765). For Blackstone the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. **1–019**

Such rights when recognised in a constitution and guaranteed protection against curtailment (except by legislation passed by special procedure) can be distinguished as "fundamental rights." In this sense the British Constitution does not recognise "fundamental rights." Nonetheless, the courts increasingly refer to rights as "fundamental" or "constitutional" which because of their importance

[40] *The Federalist*, Nos. 47 and 48 (1788).
[41] *Immigration and Naturalisation Service v. Chadha* (1983) 51 *U.S. Law Week* 4907; B. Schwartz, (1984) 100 L.Q.R.9.
[42] See, *e.g. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the "Steel Seizure Case"): B. Schwartz, *American Constitutional Law*, Chap. 7.
[43] See further D'Entreves, *Natural Law* (2nd ed., 1970) especially Chapter 4.
[44] *Two Treatises of Civil Government* (1690); see Bk. II, "Of Civil Government."

cannot be restricted except by clear words in an Act of Parliament.[45] The enactment of the Human Rights Act 1998 and the ensuing duty of public authorities to act in a way compatible with Convention rights will, almost inevitably, encourage further use of such terminology.[46]

Many modern constitutions incorporate certain "fundamental rights" such as personal freedom, equality before the law, freedom of property, free elections, freedom of speech, freedom of conscience and worship, freedom of contract, the right of assembly, the right of association and family rights. They are always restricted, expressly or impliedly, by some such concepts as "public order" or "due process of law"; and the courts may or may not have jurisdiction to review legislation that infringes such rights.

1–020 The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty and the pursuit of happiness. The American "Bill of Rights" consists of 10 amendments added in 1791 to the Federal Constitution of 1787.[47] These rights include free exercise of religion, freedom of speech and the press, peaceable assembly, petition for redress of grievances (1st Amendment); security of persons, houses, papers and effects from unreasonable searches and seizures (2nd Amendment); no deprivation of life, liberty or property without due process of law[48] (5th Amendment); and freedom from excessive bail or fines and from cruel or unusual punishments (8th Amendment). The American Constitution had already provided that the writ of habeas corpus should not be suspended, that no *ex post facto* law should be passed, and that the trial of all crimes, except in cases of impeachment, should be by jury.[49] Later amendments abolished slavery, and preserved the franchise from discrimination on grounds of race, colour or sex. The constitutions of individual American states also contain Bills of Rights.

A Declaration of the Rights of Man was prefaced to the French Constitution of 1791, and was confirmed by the preambles to the Constitutions of 1946 and 1958.

A Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations in 1948, and this was followed by the European Convention for the Protection of Human Rights and Fundamental Freedoms drawn up at Rome in 1950. The Convention came into force in 1953 but did not have legal effect inside the United Kingdom until the coming into effect of the Human Rights Act 1998.[50]

The United Nations has subsequently adopted Conventions on Refugees (1951), Slavery (1956), the Elimination of Racial Discrimination (1965); Civil and Political Rights (1966) and Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The impact of such international

[45] *Morris v. Beardmore* [1981] A.C. 446, HL (privacy of the home); *R. v. Secretary of State for the Home Department ex p. Ruddock* [1987] 2 All E.R. 518 (right of access to the courts); *R. v. Lord Chancellor ex p. Witham* [1998] Q.B. 575 (Div. Ct) (right of access to the courts). *Dist. R. v. Lord Chancellor ex p. Lightfoot* [2000] CA; *R. v. Home Secretary of State ex p. Leech (No 2)* [1994] Q.B. 198, CA; *R. v. Secretary of State for the Home Department ex p. Simms* [2000] 2 A.C., HL (rights of prisoners); *D.P.P. v. Jones* [1999] A.C. 240, HL (public right of peaceful assembly; Lord Irvine, at pp. 253–255.)

[46] See, *post* p. 115.

[47] A Bill of Rights was intentionally excluded from the original United States Constitution for the reasons given by Hamilton in *The Federalist*, No. 88.

[48] "Due process of law" may be traced back to (1354) 28 Edw. III, c.3.

[49] The Statute of Provisors 1351–52, c.4, required for a criminal charge indictment or presentment of good and lawful people of the neighbourhood.

[50] See *post*, Chap. 22.

CHAPTER 2

GENERAL CHARACTERISTICS OF THE BRITISH CONSTITUTION

Unitary constitution: the United Kingdom

2–001 The United Kingdom constitution was traditionally described as unitary as opposed to federal or confederal. Devolution and other constitutional reforms introduced since the election of 1997 have led, however, to the suggestion that the constitution should now be described as quasi-federal.[1] The United Kingdom is a union of England, Wales, Scotland and Northern Ireland.[2] The state for the purpose of international relations is the United Kingdom, although it is often popularly but inaccurately referred to as "Britain," "Great Britain" or "England." The words "United Kingdom," when used in a statute or public document, mean Great Britain and Northern Ireland, unless the contrary intention appears.[3]

Wales[4]

2–002 The *Statutum Walliae*, passed in 1284 after Edward I had defeated Llewelyn ap Griffith, declared that Wales was incorporated into the Kingdom of England. Henry VIII completed the introduction of the English legal and administrative system into Wales. This union was effected by annexation rather than treaty. The Laws in Wales Act 1536 united Wales with England, and gave to Welshmen all the laws, rights and privileges of Englishmen. Welsh constituencies received representation in the English Parliament. An Act of 1542 covered land tenure, courts and administration of justice. References to "England" in Acts of Parliament passed between 1746 and 1967 include Wales.[5] The judicial systems of England and Wales were amalgamated in 1830.

The Government of Wales Act 1998 devolved limited powers of government to the Welsh Assembly which it established.[6]

Scotland[7]

2–003 Scotland and England were separate kingdoms with their own rulers until 1603, when James VI of Scotland succeeded Elizabeth I as James I of England.

[1] R. Hazell, "Reinventing the Constitution" [1999] P.L. 84.

[2] The status of the Isle of Man and the Channel Islands is discussed in Chap. 35.

[3] Interpretation Act 1978, s.5 and Sched. 1. For an express intention to the contrary see the Crown Proceedings Act 1947 where references to the United Kingdom (*e.g.* in s.40(2)(c)) have to be read in the light of s.52.

[4] See William Rees, *The Union of England and Wales* (University of Wales Press, 1938); J. F. Rees, *Studies in Welsh History* (Cardiff, 1947); *Welsh Studies in Public Law* (J. A. Andrews ed. 1970).

[5] Wales and Berwick Act 1746; Welsh Language Act 1967. It may be objected that this statute—like many others—has a singularly inapt short title: H. W. R. Wade, *Constitutional Fundamentals* (1980), p. 19. For the further promotion of the Welsh language, see the Welsh Language Act 1993.

[6] See *post*, Chap. 5.

[7] See T. B. Smith, *Scotland: The Development of its Laws and Constitution* (1962); J. D. B. Mitchell, *Constitutional Law* (2nd ed., 1968); *The British Commonwealth: Development of its Laws and Constitution: 1 The United Kingdom*, pp. 603 *et seq.*; T. B. Smith, "The Union of 1707 as Fundamental Law" (1957) P.L. 99; G. M. Trevelyan, *Ramillies and the Union with Scotland*, Chaps 12–14; D. Daiches, *Scotland and the Union* (1977); D. N. MacCormick, "Does the United Kingdom have a Constitution?" (1978) 29 N.I.L.Q.I.

The name "Great Britain" was suggested by Francis Bacon: "Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland."

This was merely a personal union, and was followed in 1707 by a union of the two Kingdoms into a United Kingdom of Great Britain.[8] The Treaty was ratified by both the English and Scottish Parliaments, which ceased to exist on the transference of their powers to the Parliament of Great Britain. The Union with Scotland Act 1706 provided for the succession of the Crown of Great Britain in accordance with the English Act of Settlement. There was to be a Parliament of Great Britain. Any law in force in either Kingdom inconsistant with the terms of the Union was to be void. Conventions of constitutional government were coming into being in England, but there was no constitutional tradition in Scotland and so the development of conventions after the Union continued on the English lines.[9] Scots law was to continue in force unless altered by the Parliament of Great Britain. Public law might be assimilated, but Scots private law was not be changed "except for evident utility of the subjects within Scotland." The preservation of the established Presbyterian Church in Scotland ("Church of Scotland") is an essential term of the Union.[10] Scotland has its own system of courts, with final appeal in civil, but not criminal, cases to the House of Lords.[11] The Scotland Act 1998 created a Scottish Parliament with somewhat wider powers than those of the Welsh Assembly.[12]

Northern Ireland[13]

2–004 For centuries before 1800 Ireland had been a subordinate Kingdom of the English (British) Crown. It had a Parliament of its own on the English model, though how far it was subordinate to the English (British) Parliament was a matter of controversy. Ireland also had a system of courts on the English model, but again doubts were expressed from time to time whether final appeal lay to the English or the Irish House of Lords. The executive in Ireland was definitely under the control of the English Government through the Lord-Lieutenant. The Union with Ireland Act 1800 united the two Kingdoms of Great Britain and Ireland into the United Kingdom of Great Britain and Ireland, under provisions similar to the Union of 1707. Again a personal union was turned into a legislative union. However, the union with Ireland, unlike that with Scotland, was not based on a treaty negotiated by commissioners representing each country, but was brought about by Acts of the British and Irish Parliaments following parallel resolutions passed by each Parliament in response to messages from the Crown.

[8] There was also a personal union of Great Britain and Hanover from 1714 to 1837, and the Act of Settlement 1700 provided that England should not be obliged to engage in any war for the defence of Hanover without the consent of Parliament. As to allegiance, see *Isaacson v. Durant (Stepney Election Petition)* (1886) 17 Q.B.D. 54.

[9] *cf. MacCormick v. Lord Advocate* 1953 S.C. 396; *post*, para. 4–008.

[10] See R. King Murray, "The Constitutional Position of the Church of Scotland" [1958] P.L. 155. And see further, *post*, para. 4–007.

[11] *Greenshields v. Magistrates of Edinburgh*, Robertson, App. 12. See Dicey and Rait, *Thoughts on the Union between England and Scotland*, pp. 194–195; Turberville, *The House of Lords in the Eighteenth Century*, pp. 94–95, 139–141. *cf.* Scottish Episcopalians Act 1711.

[12] See, *post* Chap. 5.

[13] See H. Calvert, *Constitutional Law in Northern Ireland* (1968); *The British Commonwealth: Development of its Laws and Constitutions: I The United Kingdom* (1955), pp. 411 *et seq.* (by L. A. Sheridan); A. S. Queckett, *The Constitution of Northern Ireland* (1928–46); V. T. H. Delaney, *The Administration of Justice in Ireland* (2nd ed., 1965); Claire Palley, "The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution (1972)," 1 *Anglo-American Law Review* 368.

The greater part of Ireland ceased to form part of the United Kingdom in 1922[14] and after a period of "Dominion status" similar to that of Canada at the time, it became in 1949 an independent republic outside the Commonwealth.[15] Northern Ireland, consisting of six[16] of the nine counties of Ulster, remained within the United Kingdom, and for half a century from 1920 considerable legislative and executive powers were devolved on it, so that it had its own subordinate Parliament and government departments.[17] The Province also had (and still has) its own system of courts, with final appeal in both civil and criminal cases to the House of Lords.

2–005 In 1972 the existing constitutional arrangements were suspended by the Northern Ireland (Temporary Provisions) Act 1972. A Secretary of State for Northern Ireland became responsible for governing the Province. Subsequent constitutional developments are discussed in Chapter 5 (Devolution).

Unwritten constitution

2–006 The British Constitution is described as "unwritten"[18] because it is not embodied, wholly or mainly, in any enactment or formally related series of enactments.[19] At the time of the Norman conquest, constitutions were of a customary nature. After the civil war of the seventeenth century, Cromwell drew up an Instrument of Government (1653)[20]—the only written constitution the English[21] have had; but this came to an end in 1660 with the restoration of the monarchy. Suggestions for a written constitution for the United Kingdom put forward on wide grounds[22] have attracted little general support hitherto, as distinct from support for the proposal of a Bill of Rights. The constitutional reforms effected since 1997 have not involved the adoption of a written constitution but have on the contrary, relied for their efficacy on the unwritten rule of the supremacy of Parliament.

The laws of the British constitution comprise three kinds of rules: statute law, common law, and custom (especially parliamentary custom). To these we must add constitutional conventions if we are to understand modern developments and the manner in which the constitution works. The sources of the legal rules are the same as for private law, namely, statutes, judicial precedents, customs and books of authority, except that under the third head we must include parliamentary custom. Treaties are not in themselves sources of municipal (*i.e.* national) law, as they are in some countries.

[14] Irish Free State (Agreement) Act 1922.
[15] Ireland Act 1949.
[16] Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone.
[17] Government of Ireland Act 1920, as amended from time to time.
[18] Or "not written," "part-written," "uncodified" or "evolutionary": L. Wolf-Phillips, *Comparative Constitutions* (1972), pp. 46–47; E. Barendt, *An Introduction to Constitutional Law* (1998), pp. 32–34.
[19] *ante*, para. 1–005.
[20] S. R. Gardiner, *Constitutional Documents of the Puritan Revolution*, 1625–1660 (3rd ed., 1906), p. 405.
[21] Cromwell also incorporated Scotland and Ireland into the Protectorate.
[22] e.g. Lord Hailsham, *The Dilemma of Democracy* (1978); O. Hood Phillips, *Reform of the Constitution* (1970); *British Government in an Era of Reform* (ed. W. V. Stankiewicz, 1976), pp. 78–93; Lord Scarman, "Constitutional Reform, A Legal Possibility?" (Holdsworth Club Address 1979); D. C. M. Yardley, "Constitutional Reform in the United Kingdom" [1980] Cur.Leg.Prob. 147.

Statutes

These consist of Acts of Parliament and subordinate legislation. **2–007**

Some of the principles and detailed rules of the British Constitution are contained in formally unrelated Acts of Parliament, such as the Act of Settlement 1700; the Parliament Acts 1911 and 1949; the Crown Proceedings Act 1947; the Supreme Court Act 1981 and the British Nationality Act 1981. Laws intended to bind both Houses of Parliament are put into the form of Acts, *e.g.* Provisional Collection of Taxes Acts, the Laying of Documents before Parliament (Interpretation) Act 1948 and the Royal Assent Act 1967. There are also a few important documents of a quasi legislative nature, such as Magna Carta 1215 (and subsequent reissues and confirmations by King and Parliament[23]), and the Bill of Rights 1688 (passed by a "convention" Parliament, but deemed to have the force of statute)[24] and at least two Acts of Parliament which have a peculiar status—the Union with Scotland Act 1706,[25] based on a treaty negotiated by the English and Scottish Parliaments, and the Statute of Westminster 1931, based on conventions agreed between the United Kingdom and the British Dominions at that time.

Subordinate legislation consists mainly of legislation made by persons or bodies to whom the power has been delegated by Parliament. Parliament confers on the Queen in Council the power to legislate by Orders in Council, a method which is useful for filling in the more important details giving effect to the principles of the enabling Act, and also valuable in times of emergency when Parliament may not be in session. Legislative powers are also frequently delegated by Parliament to individual Ministers, local government authorities and public corporations. Delegated legislation issued by Ministers usually takes the form of orders, rules or regulations, and these in appropriate cases are mostly published as Statutory Instruments. Delegated legislation made by local authorities is known as byelaws, and is published by the local authority concerned.

Judicial precedents

Many of the principles of British constitutional law are to be inferred from decisions of the courts in particular cases, such as the extent of the liberties of the citizen, determined in disputes between individuals and the executive. Such cases arise incidentally, as it were, in the ordinary course of litigation. They will most commonly be found in the decisions of the Queen's Bench Division (previously the Court of King's Bench), which not only grants damages for breach of legal rights but also has a special jurisdiction in proceedings for habeas corpus, certiorari, prohibition and mandamus; in the decisions of the Court of Appeal and **2–008**

[23] The version of Magna Carta that became law for subsequent times was that of Henry III (1225); and the authoritative text was that of (1297) 25 Edward I, later understood as expounded by Coke in his Second Institute. Obsolete provisions—not including Cap. 14 (forbidding excessive fines) and Cap. 29 (Caps. 39 and 40 of 1215)—were repealed in the nineteenth century by Statute Law Revision Acts. See *The Great Charter* (Griswold ed., 1965, New York) Alec Samuels, "Magna Carta as living law" (1969) 20 N.I.L.Q. 49. Confirmations by Edward I (1297) and Edward III (1324) were largely repealed by the Statute Law (Repeals) Act 1969.

[24] Crown and Parliament Recognition Act 1689. The statute now known as the Bill of Rights was passed in 1688 in a session of the new reign beginning on February 13. The Calendar (New Style) Act 1750 adopted belatedly the Gregorian calendar and laid down that for the future each year should begin on January 1, not March 25 as formerly. Hence, retrospectively, February 13, 1688 can be regarded as February 13, 1689. Famously also, 11 days were suppressed, September 3, 1752 becoming September 14.

[25] The argument that some of the terms of the Union with Scotland constitute fundamental rules of the British Constitution is discussed later; para. 4–006.

the House of Lords on appeal therefrom, and the Judicial Committee of the Privy Council in appeals from British overseas territories.[26]

Examples of judicial precedents laying down important principles of constitutional law, chosen from hundreds of cases that might be cited, are: *Ashby v. White* (1703)[27] (*ubi jus ibi remedium*); *Att.-Gen. v. Wilts United Dairies* (1922)[28] (no power to levy money without authority of Parliament); *Campbell v. Hall*[29] (no prerogative power to legislate for colony with representative assembly); *Entick v. Carrington*[30] (general warrant illegal); *Johnstone v. Pedler*[31] ("act of state" no defence in tort as regards act committed in relation to a friendly alien in this country); *Case of Proclamations*[32] (the King cannot create offences by proclamation); *Stockdale v. Hansard*[33] (Commons cannot change law by claiming new privileges); *Wason v. Walter*[34] (defence of qualified privilege extends to unauthorised reports of parliamentary debates); *Ridge v. Baldwin*[35] (*audi alteram partem*); *In re Mc.C (A Minor)*[36] (immunity of judges; privileged position of superior courts).

Custom

2–009 A custom in private law is a rule of conduct which has not been adjudicated upon by the courts, but which would be recognised and enforced by the courts if the matter came before them. It is based on usage, but in order that it may be recognised by the courts as law, a custom must be: (i) regarded by those subject to it as obligatory; (ii) certain; (iii) reasonable; (iv) of immemorial antiquity; and (v) it must have been in existence continuously. These are the main tests which English courts apply to an alleged local custom, and they would presumably apply the same tests to an alleged general custom not hitherto adjudicated upon. The traditional doctrine was that the common law of England consisted of the general "customs of the realm." It is true to a certain extent that the early common law consisted of general immemorial customs; but it is almost certain that general customs are no longer a creative source of English private law, as they have all become embodied by judicial recognition and enforcement in the system of case law or else have been displaced by legislation.

Custom (largely feudal in origin) has been a source of important parts of our constitutional law, for example, the royal prerogative and parliamentary privilege.[37] As Plucknett said: "Feudal custom includes the relationship of Crown and nobles until the moment when this body of custom separates and becomes, first, the law of the prerogative, and then later still combines with the custom of the King's High Court of Parliament to form modern constitutional law."[38] The royal

[26] The influence of equity on constitutional law has been comparatively slight, although the remedies of injunction and declaration were equitable in origin: see Hanbury, "Equity in Public Law" in *Essays in Equity*, p. 80.
[27] Ld.Raym. 938.
[28] 91 L.J.K.B. 897; *post* para. 3–010 and para. 29–012.
[29] (1774) 1 Cowp. 204; Lofft 655.
[30] (1765) 19 St.Tr. 1029, 1066.
[31] [1921] 2 A.C. 262.
[32] (1610) 12 Co.Rep. 74.
[33] (1839) 9 Ad. & E. 1.
[34] (1868) L.R. 4 Q.B. 73.
[35] [1964] A.C. 40, HL.
[36] [1985] A.C. 528, HL.
[37] But much of parliamentary privilege is not of "immemorial antiquity": Parliament itself may be said to have originated with Edward I.
[38] T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed.), p. 309.

prerogative is now regarded as part of the common law. The law and custom of Parliament, including parliamentary privilege, is a special kind of customary law—recognised, but not developed, by the ordinary courts—which is not of immemorial antiquity. There may still be some customary constitutional laws which have not had occasion to be recognised by the courts but which would be so recognised if the question came before them, for example, such rules (not being statutory or merely conventional) as prescribe the forms according to which acts of the Crown are to be performed. If so, customs of this kind would hardly require immemorial antiquity, but would rest rather on the necessity of there being some form (such as sealing and counter-signature) by which the Crown's acts can be authenticated.

Books of authority

2–010 The general rule applied by English courts is that textbooks, however eminent their authors, and whether or not they were judges, are not authoritative.[39] Between later authors and some of the earlier writers, however, there is a difference of authority so great as virtually to amount to a difference in kind. Some of the earlier textbooks are treated by the courts as authoritative statements of the law of their time, and therefore of present law if it is not shown to have been changed, which may be quoted and relied on in court on the authority of their authors. The statements of such writers are presumed to be evidence of judicial decisions that have been lost, and they are therefore accepted if not contrary to reason. This is chiefly to be explained by the difficulty of ascertaining the law of early times, and of course it only applies in the absence of statutes and reported decisions on the point. Whether a textbook will be treated as authoritative in this special sense is determined by the tradition of the legal profession and the practice of the courts, and depends on such factors as the reputation of the author and the date when the book was written.

Among the books of authority that are most important as sources of English constitutional law are Fitzherbert's *Abridgment* (1516), Brooke's *Abridgment* (1568), Glanvill's *Tractatus de Legibus et Consuetudinibus Angliae* (*c.* 1189), Bracton's treatise of the same name (*c.* 1250),[40] Littleton's *Tenures* (*c.* 1470), Fitzherbert's *Natura Brevium* (1543), Coke's *Institutes of the Laws of England* (1628–1644), Hale's *History of the Pleas of the Crown* (published in 1736, 60 years after the author's death),[41] Hawkins' *Pleas of the Crown* (1716), Foster's *Crown Cases* (1762),[42] and Blackstone's *Commentaries on the Laws of England* (1765–1769).[43] Of these Blackstone's *Commentaries*, being the most general and elementary as well as the most recent, have not such a high authority on points of detail as Hale, Hawkins and Foster.

Flexible constitution

2–011 The British Constitution is described as "flexible" because any principle or rule of the constitution can be altered by the same body and in the same manner as any other law. In other words, there is no formal distinction between laws that

[39] *Cordell v. Second Clanfield Properties Ltd* [1969] 2 Ch. 9, 16 *per* Megarry J.
[40] See *Case of Prohibitions (Prohibitions del Roy)* (1607) 12 Co.Rep. 63.
[41] See *R. v. Casement* [1917] 1 K.B. 98, 141–142.
[42] See *Joyce v. Director of Public Prosecutions* [1946] A.C. 347.
[43] "It is too late, in 1935, to attempt to show that Blackstone was wrong": *R. v. Sandbach* [1935] 2 K.B. 192, 197 *per* Humphreys J. See also *Thomas v. Sawkins* [1935] 2 K.B. 249; *R. v. St. Edmundsbury and Ipswich Diocese (Chancellor)* [1948] 1 K.B. 195.

are specifically "constitutional" or "fundamental" and that are not. The body which has the power to alter the constitution, or any other rules of law, is the Queen in Parliament, and the procedure is the same as for any other legislation. The legislature is supreme over the Constitution. There are no laws that cannot be repealed or altered in this way, that is to say, none that are "entrenched."[44] The flexibility of the British Constitution is a corollary of the fact that there is no written constitution or "higher law" binding on Parliament, and the consequent legislative supremacy of Parliament. The courts therefore have no power to "review" parliamentary legislation and to declare it unconstitutional.[45]

It follows also that the distinction drawn between British constitutional law and administrative law or other branches of English law, and the selection of the contents of each, are matters of convenience, guidance being sought from tradition and comparison with other constitutions.

Legislative supremacy of Parliament[46]

2–012 The most important characteristic of British constitutional law is the legislative supremacy (sometimes called "sovereignty") of the United Kingdom Parliament. Positively this means that Parliament can legally pass any kind of law whatsoever: negatively it means that there is no person or body whose legislative power competes with it or overrides it. We may call it the one fundamental law of the British Constitution,[47] which may itself be unalterable by Parliament.[48]

Constitutional or limited Monarchy

2–013 The British political system is in form monarchical. But it is a limited or "constitutional" monarchy, as opposed to an absolute or strong monarchy.[49] That is to say, the governmental powers which as a matter of legal form are vested in the Queen are in practice exercised according to the laws, customs and conventions of the constitution; and they are exercised either by the Queen on the advice of her Ministers or by the Ministers in her name.[50] This principle applies both to the Queen's common law ("prerogative") powers[51] and to her statutory powers. It is a product of English political history from the seventeenth century, when the monarch ceased to govern either himself directly or through delegates limited only by the law. The modern principle is secured by means of constitutional conventions.[52] "Constitutionalism" involves both legal limits to arbitrary power and also political responsibility of the government to the governed.[53]

[44] *cf. McWhirter v. Att.-Gen.* [1972] C.M.L.R. 882, CA (summons for declaration that accession to EEC would be contrary to the Bill of Rights, struck out as an abuse of the process of the court); *R. v. Jordan* [1967] Crim.L.R. 483 (Race Relations Act restricts "freedom of speech").

[45] A written and entrenched constitution for this country is advocated in Lord Hailsham, *The Dilemma of Democracy* (1978) and O. Hood Phillips, *Reform of the Constitution* (1970).

[46] See further, Chaps 3 and 4.

[47] Taken with the Parliament Acts 1911 and 1949 and the convention that the Queen will not refuse the Royal Assent to Bills, this virtually means the supremacy of a majority of the House of Commons. "That is really all the British Constitution that there is": Kenneth Pickhorn, M.P. (1956) 550 H.C.Deb., col. 1821.

[48] *post*, Chap. 4.

[49] O. Hood Phillips, "A Hundred Years of Constitutional Monarchy," (1978) 75 L.S. Gaz. 64.

[50] *post*, para. 36–021 for the position with regard to the Queen as Head of the Commonwealth.

[51] *post*, Chap. 15.

[52] *post*, para. 2–017 and Chap. 7.

[53] McIlwain, *op.cit.* p. 146.

Responsible parliamentary government

Parliamentary government

Parliament itself does not govern, nor is it capable of doing so. The expression "parliamentary government" is somewhat misleading, and means government by the executive in and through Parliament. Parliament exercises supreme control over all branches of government. Besides its supreme law making power, Parliament supervises the general conduct of the executive. It makes and unmakes state offices and government departments, controls their finances, asks questions concerning the carrying out of their duties, and debates motions of confidence. Parliament also reorganises the system of courts, though it does not in practice interfere with the conduct of litigation. All this is a matter partly of law, partly of custom and partly of convention. **2–014**

Responsible government

Ministers are responsible to Parliament—more particularly to the House of Commons. They defend their conduct there, and continuance in office depends on retaining the confidence of the Commons. This is mainly a matter of constitutional convention.[54] The key to responsible parliamentary government lies in the Cabinet system, which ensures that Ministers are members of the legislature, that they must retain the confidence of the Commons, and that they can appeal to the electorate to return an assembly that will support their policy. **2–015**

Responsible parliamentary government of this kind may be found in a republican régime, as in India. It is in marked contrast to the presidential system that exists, for example, in the United States, where the executive power is vested in the President, who is not a member of Congress and whose continuance in office does not depend on the support of the House of Representatives.[55]

Representative government

It is implied in what has been said of the British Constitution that the legislature "represents" the people in a general way. Responsible government involves representative government, though the converse is not necessarily true. A general election nowadays is in effect the election of a prime minister, the leader of a political party with a certain programme. Political parties are a development since 1688. They rest almost entirely on convention or merely political fact, though their existence was assumed by the Ministers of the Crown Act 1937, which defined the Leader of the Opposition and granted him a salary.[56] **2–016**

Representative government presupposes that the electors are free to organise themselves in political parties, and (within the limits imposed by the requirements of public order and peaceful change) to express their views and to criticise the government. The party system is inevitable in a democratic country, since men disagree about political ends and means. It is "a convenient device to enable

[54] See *post*, Chaps. 7 and 17.

[55] In addition to the "executive" type of President (*e.g.* USA) and the "parliamentary" type of President (*e.g.* India), there are other varieties of the presidential system, *e.g.* in South America and Africa.

[56] See now, Ministerial and other Salaries Act 1975. For a further reference see House of Commons (Administration) Act 1978, s.1(4).

the majority to have their way and the minority to have their say."[57] Party organisation exists both in the constituencies and in Parliament. Parties are voluntary associations, subject to the general law.[58] Increasingly, however, they are becoming subject to specific legal regulation.[59] Although, as George Tierney said, it is the duty of the Opposition[60] to oppose, the responsible aspect of the party system is brought out in the expression "His Majesty's Opposition," which was coined—originally as a joke—by J. C. Hobhouse early in the last century.

Following the Report of the Houghton Committee[61] public funds have been made available to opposition political parties, according to a formula which takes account of the number of seats held by each party and the number of votes cast.[62]

Representative government is now assisted also by secret ballot, universal adult suffrage,[63] independent Boundary Commissions, and a strict limitation of the powers of the House of Lords as against the House of Commons.[64]

In contrast to other forms of political system the British system is described as a liberal democracy. It is a qualified democracy for the activity of government is limited; society is recognised as being pluralistic, that is to say, government is not in the interest of any one group or groups but in the common interest; the majority opinion prevails but minorities are given a chance to become the majority.[65]

Importance of constitutional conventions[66]

2–017 The word "conventions," as used by constitutional lawyers, refers to rules of political practice which are regarded as binding by those whom they concern—especially the Sovereign and statesmen—but which would not be *enforced* by the courts if the matter came before them. The lack of judicial enforcement distinguishes conventions from laws in the strict sense. This is an important formal distinction for the lawyer, though the politician may not be so interested in the distinction. Privileges enforced by each House are also excluded from the definition of conventions.

[57] S. D. Bailey, *The British Party System* (Hansard Society, 1952), p. xii. For the political parties, see also Sir Ivor Jennings, *Party Politics*, Vol. II: *The Growth of Parties* (1961); I. Bulmer-Thomas, *The Growth of the British Party System* (1965); Robert McKenzie, *British Political Parties* (2nd ed., 1963); C. S. Emden, *The People and the Constitution* (2nd ed.); S. E. Finer, *The Changing British Party System, 1945–1979* (1980); *V. Bogdanor, People and the Party System and Multi Party Politics and the Constitution* (1983).

[58] See *Conservative and Unionist Office v. Burrell* [1982] 1 W.L.R. 522, CA; *Re Grant's Will Trusts* [1980] 1 W.L.R. 360.

[59] Registration of Political Parties Act 1998 which provide for a register of party names and emblems and amends the Representation of the People Act 1983 which allowed a reference to candidates' party affiliations on the ballot paper. See now, Political Parties Elections and Referendums Act 2000.

[60] *post*, para. 7–018.

[61] *Report of Committee on Financial Aid to Political Parties* (1976) Cmnd. 6601.

[62] The legal authority for such payments is to be found in the annual Appropriation Act (*infra* p. 220), *e.g.* Appropriation Act 1985, Sched. (B) Pt 15, Class XIII, Vote 2.

[63] *post*, Chap. 10. Direct "participation" of the people at the national level is not practicable, even if it were thought desirable; see Bernard Crick, "'Them and Us': Public Impotence and Government Power" [1968] P.L. 8; and see Crick, *In Defence of Politics* (1962; Pelican, 1964), Chap. 3 ("A Defence of Politics Against Democracy").

[64] *post*, Chap. 28.

[65] S. E. Finer, *Comparative Government* (1970).

[66] See further, *post*, Chap. 7.

Conventions are found to a greater or less extent in most countries that have written constitutions. This is so not only in the Commonwealth countries[67] but also, for example, in the United States. There the method of electing the President and the manner of choosing the President's Cabinet are governed largely by convention.[68] What is characteristic of the British Constitution is the extremely important part played by conventions. Not only do the British have no written constitution, but they have been reluctant to stereotype their rules of government in the form of statutes. Many important political developments have been effected since 1688 without recourse to legal forms at all. It is constitutional conventions that describe and explain how the constitution works, how it lives and grows. Their general purpose is to adapt structure to function. In this way the strong monarchy of 1688 has become a limited monarchy with responsible parliamentary government.

Independence of the judiciary from the executive[69]

2–018 The justices of the Royal courts, which grew up in Norman and Plantagenet times, were the King's servants: down to the time of the Stuarts they usually held office during the King's pleasure and, like other Crown servants, could be dismissed by the King at will.[70] This fact doubtless affected some of the judicial decisions given in the reigns of James I and Charles I. After the revolution of 1688, judges of superior courts were appointed "during good behaviour," but there was doubt whether at common law this referred merely to good behaviour in relation to the King. Eventually the Act of Settlement 1700 provided that "Judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them." The first and third of those provisions have been substantially re-enacted by the Judicature Acts and are now to be found in the Supreme Court Act 1981, s.11. The security of tenure of Lords of Appeal is protected by section 6 of the Appellate Jurisdiction Act 1876. Their effect is that judges of the *superior* British courts may not be removed except for misbehaviour in their office or (probably) conviction of some serious offence. Removal is by the Crown. Removal may be on an Address by both Houses of Parliament, but it is not certain whether such an Address is necessary.[71]

There are now statutory retiring ages for all judges (except the Lord Chancellor) and magistrates. Circuit judges and magistrates are removable at the instance of the Lord Chancellor on the grounds of incapacity or misbehaviour under various statutes.[72]

2–019 The provision as regards the ascertainment and establishment of salaries is secured by the practice of passing permanent Acts[73] defining judicial salaries and charging them on the Consolidated Fund. The executive, therefore, cannot bring pressure to bear on the judges by threatening to reduce their salaries, nor do their

[67] On Conventions in Australia, see George Winterton, *Parliament, The Executive and the Governor General* (1983).

[68] W. B. Munro, *The Government of the United States* (4th ed., 1936) pp. 80–83.

[69] See further, *post*, Chap. 20.

[70] Blackstone discusses the independence of the judiciary in a chapter on the King's Prerogative: Bl. Com. I. 269.

[71] See S. Shetreet, *Judges on Trial* (1976) and *post*, Chap. 20.

[72] *post*, Chap. 20.

[73] Strictly, there are no *permanent* Acts, *i.e.* Acts which Parliament cannot repeal or amend. The expression here refers to Acts passed for an indefinite period, as contrasted with Acts passed for some definite period, *e.g.* Annual Acts.

salaries come up for annual review (with opportunity for discussion of their conduct) by the House of Commons as do most estimates of public expenditure.

As the body of Ministers or "the Government" has in practice come to play the part in public affairs formerly played by the Sovereign, the modern significance of the independence of the judges is that they are free from control or influence by the Government in the administration of justice. Even the Houses of Parliament do not seek to interfere in the conduct of current litigation; not only are the judges' salaries charged on the Consolidated Fund, but it is a parliamentary custom that questions should not be asked in the House about the decisions of the courts in particular cases.

A different, though relevant, principle is the immunity of judges from legal proceedings taken against them in respect of the discharge of their judicial functions, in order that the law may be administered freely and without fear or favour.[74]

No strict separation of powers

2–020 There is not, and never has been, a strict separation of powers in the English constitution in the sense that legislative, executive and judicial powers are assigned respectively to different organs, nor have checks and balances between them been devised as a result of theoretical analysis.[75] Development of our public institutions has been mainly empirical.

The Crown has always been an element in the exercise of all three kinds of powers—executive (the Queen's government, Her Majesty's ministers), legislative (the Queen in Parliament, throne in the House of Lords, royal assent to Bills), and judicial (Royal Courts of Justice, Her Majesty's judges, indictment in the name of the Queen). The Cabinet and other ministers are members of the legislature. Most notably, the Lord Chancellor presides over the Second Chamber, is the head of the judiciary and is a Cabinet Minister. (Recent developments have cast the spotlight on the compatibility of his judicial role with his other functions.[76]) The Home Secretary exercises the prerogative of mercy, and the Attorney-General may enter a *nolle prosequi* to a prosecution on indictment. Ministers and government departments have powers of delegated legislation, while ministers and administrative tribunals have power to make decisions affecting private rights, and local government authorities may make byelaws for the good rule and government of their area.

The Houses of Parliament do not act exclusively as parts of a legislature but also set up select committees of inquiry and committees to scrutinise the administration. The House of Lords, besides being the Second Chamber, acts in another capacity as the final court of appeal. Early Parliaments, indeed, were concerned as much with judicial matters and the receiving of petitions and remedying of grievances as with actual law making.[77]

Courts must have some executive powers to prevent interference with their proceedings and to secure enforcement of their decisions. Final appeal from certain overseas courts, as well as in certain kinds of cases in this country, lies to

[74] *Sirros v. Moore* [1975] Q.B. 118, CA; *Re McC (A Minor)* [1985] A.C. 528, HL.

[75] For the eighteenth century, Holdsworth finds Montesquieu's analysis inadequate and misleading: *History of English Law*, Vol. X, pp. 713–724.

[76] There has been concern expressed about the Lord Chancellor sitting particularly in cases involving devolution issues: *post* paras 18–009, 22–036 and 22–051.

[77] *post*, pp. 123–124.

the Judicial Committee of the Privy Council, technically an advisory executive organ of the Crown.

2–021 The absence of judicial review of Acts of Parliament may look like a separation of powers, though it is not based on a theory of that kind but expresses the doctrine of the sovereignty of Parliament.

From that doctrine it follows that while the power of making law belongs to Parliament, the duty of the judges is to apply it—interpreting it where necessary—whatever their views about the wisdom, justness or morality of the legislation at issue. Nor are the courts concerned, in interpreting the law, with the wishes and views of the Government[78] or the likelihood of the Government finding the courts' interpretation unwelcome.[79] It is doubtful whether it is helpful or necessary to attribute that clear distinction of roles to a theory of the separation of powers, as Lord Diplock did in *Duport Steels Ltd v. Sirs*.[80] There has been concern expressed about the Lord Chancellor sitting in cases involving devolution issues. The Human Rights Act 1998 is particularly relevant in the light of the decision of the European Court of Human Rights in *McGonnell v. U.K.*[81] (Position of Deputy Bailiff of Guernsey as judge and member of the legislature: breach of Art. 6 E.C.H.R.)

The "basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom" was also relied on by Lord Diplock as a guide to the interpretation of the constitution of Jamaica in *Hinds v. The Queen*.[82] In that case the Privy Council held that vesting the power to vary sentences in certain cases in a Review Board, the majority of members of which were not judges, was an unconstitutional attempt to vest judicial powers in a body not entitled to exercise such powers. A written constitution may enshrine the doctrine of the separation of powers, explicitly or by implication. To borrow it from the United Kingdom seems, however, dangerous: a country where not merely the Home Secretary[83] but even the Commissioners of the Customs and Excise[84] can release prisoners from jail. By contrast in *Liyanage v. R*[85] the Privy Council, in striking down legislation as an improper interference with the judicial power rejected any analogy drawn from the British Constitution. "The British constitution is unwritten whereas in the case of Ceylon their lordships have to interpret a written document from which alone the legislature derives its legislative power."[86]

2–022 In *R. v. Home Secretary ex p. Fire Brigades Union*[87] Lord Mustill referred to "the peculiarly British conception of the separation of powers". Lord Steyn has said that the constitutional principle of the separation of powers becomes important when the government has a massive majority in the House of Commons and parliamentary scrutiny of the acts and intentions of the executive is not always as

[78] *Abse v. Smith* [1986] Q.B. 536, 554 *per* Sir John Donaldson M.R.
[79] *Sherdley v. Sherdley* [1986] 1 W.L.R. 732, 736 *per* Sir John Donaldson M.R.
[80] [1980] 1 W.L.R. 142, 157. Similarly, *Chokolongo v. Att.-Gen. of Trinidad and Tobago* [1981] 1 W.L.R. 106, 110 *per* Lord Diplock.
[81] *The Times*, February 22, 2000.
[82] [1977] A.C. 195, followed in *Browne v. The Queen* [1999] 3 W.L.R. 1158, P.C.
[83] See, for example, Imprisonment (Temporary Provisions) Act 1980; a statute which passed through all its stages in both Houses and received the Royal Assent within a mere two days.
[84] Customs and Excise Management Act 1979, s.152(d); note, [1984] P.L. 2.
[85] [1967] 1 A.C. 259, 288 *per* Lord Pearce. See G. Marshall, *Constitutional Theory*, p. 120, ("The strong and surprising adoption of the separation of powers doctrine").
[86] See further, O. Hood Phillips, "A constitutional myth: separation of powers" (1977) 93 L.Q.R. 11.
[87] [1995] 2 A.C. 513.

careful as it ought to be.[88] One writer has found something of a puzzle between judicial support for the view that the constitution is firmly based on the separation of powers and the weight of academic judgement to the opposite effect.[89]

Where the judges are interpreting ambiguous written constitutions there is, of course, nothing to prevent them using the principle of the separation of powers to aid them in their task. In the case of the United Kingdom, too, resort to the separation of powers provides a justification for interpreting legislation. It fits in with the current approach, illustrated in cases on prisoners' rights and the powers of the Home Secretary,[90] that statutes must be read in the context of basic principles of common law. But all that is rather different from a constitution where the rights of the courts are beyond the powers of the legislature and the executive, where the executive, by law, is subject to the control of the legislature.[91]

No distinct system of administrative law

2–023 Administrative law, as we have seen,[92] determines the organisation, powers and duties of administrative authorities. It is the law relating to public administration. English and Scots law contain both general principles and detailed rules relating to the structure of administrative authorities, their functions and powers, and the supervision of the relations between them and the private citizen. Administrative authorities include Ministers and central government departments, local government authorities, public corporations, and their officers and servants. There are numerous statutes establishing their structure, and conferring the powers (including powers of delegated legislation and administrative jurisdiction) necessary for the exercise of their functions relating to such matters as public health, education, transport, planning, housing, national insurance, electricity supply and so on. Administrative Tribunals deal with a wide range of matters ranging from social welfare and employment to mental health and immigration, from which appeal may lie to the courts on questions of law. But until recently it could not be said that there was a *system* of administrative law in this country—and there is still no *system* of administrative courts.

The topics covered by administrative law in the United Kingdom have to be picked out, as a matter of choice, from the general body of our constitutional law. They comprise, roughly, the topics covered by Part VI of this book. The rest of our constitutional law would then deal with the monarchy and the royal prerogative, the conduct of foreign affairs, and control of the armed forces and the civil service; Parliament; nationality, citizenship aliens and immigration; offences against the State and public order; the general principles relating to the rights of the individual; the administration of justice; and the Commonwealth.

This view has slowly gained ground among academic lawyers. At first, English writing on administrative law tended to deal mainly with the delegation to the

[88] "The Role of the Bar, The Judge and The Jury," [1999] P.L. 51, citing his earlier article, "The Weakest and Least Dangerous Department of Government," [1997] P.L. 84.

[89] Munro, *Studies in Constitutional Law* (2nd ed. 1999), p. 306.

[90] *R. v. Home Secretary ex p. Pierson* [1998] A.C. 539, HL; *R. v. Home Secretary ex p. Simms* [2000] 2 A.C. 115, HL.

[91] "The separation of powers, at least as formulated by Montesquieu, has never really been taken seriously in the United Kingdom": E. Barendt, *An Introduction to Constitutional Law* (1998) p. 34.

[92] *ante*, para. 1–013.

executive of legislative and judicial powers,[93] not because administrative law is confined to these topics but largely because the great influence of Dicey[94] made them controversial ground and they revealed tendencies that were resented by the more conservative and individualist members of the legal profession.[95] Dicey's attitude was due not only to his political predilections in favour of individual liberty as against government "interference," but also to a misunderstanding of the French *droit administratif* which led to the false conclusion that there could be no administrative law without a separate system of administrative courts.[96]

2–024 In *Ridge v. Baldwin*[97] Lord Reid said: "We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it." Developments since then[98] have been such that Lord Diplock has claimed that

> "The extension of judicial control of the administrative process has provided over the last 30 years the most striking feature of the development of the common law in those countries of whose legal systems it provides the source; and although it is a development that has although it is a development that has already gone a long way towards providing a system of administrative law as comprehensive in its content as the droit administratif of countries of the civil law, albeit differing in procedural approach, it is a development that is still continuing."[99]

Important elements in that development were the introduction in 1977[1] of a new, simplified procedure (application for judicial review) by which to challenge the legality of administrative acts and the decision of the House of Lords in 1983[2] that actions involving administrative bodies must now be categorised as raising questions of "public law" or "private law." In the former case the new procedure must be used. Only where questions of private law are involved can a plaintiff sue a public authority without having recourse to the application for judicial review. There may not yet be a separate *system* of Administrative Law but there are now separate procedures for enforcing public rights and private rights.

The rule of law

Introductory

2–025 The "rule of law" is an ambiguous expression, and may mean different things for different writers.[3] Only when it is clear in what sense the phrase is being used

[93] *e.g.* Carr, *Delegated Legislation; Concerning English Administrative Law; Robson, Justice and Administrative Law* (3rd ed.); Allen, *Law and Orders* (3rd ed.); *Administrative Jurisdiction.*

[94] Dicey, *Law of Constitution* (10th ed. 1959), Chap. 12.

[95] See Lord Hewart, *The New Despotism*; Cmnd. 4060 (1932), *Report of the Committee on Ministers' Powers.*

[96] See, however, Dicey's article, "*Droit Administratif* in Modern French Law" (1901) 17 L.Q.R. 302, on changes in French administrative law after 1872. Dicey did not deny the existence of any administrative law in England, but the existence of anything like the French *droit administratif* as he understood it.

[97] [1964] A.C. 40, HL.

[98] See *post*, Part VI, Introduction.

[99] *Mahon v. Air New Zealand* [1984] A.C. 808.

[1] The reform was initially effected by amendments to the Rules of the Supreme Court. Subsequently legislative effect was given to the new procedure (contained in R.S.C. Ord. 53) by the Supreme Court Act 1981, s.31.

[2] *O'Reilly v. Mackman* [1983] 2 A.C. 237.

[3] *The Rule of Law; Ideal or Ideology* (ed. Hutchinson and Monahan) (1987).

is there any value in asking whether the rule of law exists in a particular legal system.

Historically, the phrase was, perhaps, first used with reference to a belief in the existence of law possessing higher authority—whether divine or natural—than that of the law promulgated by human rulers which imposed limits on their powers. It was probably in this sense that Aristotle expressed the view that "the rule of the law is preferable to that of any individual."[4] Bracton, writing in the thirteenth century adopted the theory generally held in the Middle Ages that the world was governed by law, human or divine; and held that "the King himself ought not be subject to man but subject to God and to the law, because the law makes him king."[5] The same view is also expressed in the Year Books of the fourteenth and fifteenth centuries.[6] Such superior law governed kings as well as subjects and set limits to the prerogative. On that ground Fortescue, in the middle of the fifteenth century, based his argument that there could be no taxation without the consent of Parliament.[7] During the conflict between King and Parliament in the reigns of the early Stuarts, the doctrine propounded by Coke was the superiority of the traditional common law over King and executive; but the common lawyers (including Coke in his later life) were in alliance with Parliament, and this theory had to be combined with the new doctrine of the supremacy of Parliament. What was supreme, therefore, was the law for the time being; that is to say, the common law subject to such changes as King in Parliament might make from time to time.[8] This view eventually prevailed with the revolution of 1688, although the law now regarded as supreme was not the common law (subject to parliamentary change) in the narrow sense, but the whole of English law, both statute law and case law, in whatever courts it was administered.

2–026 Thus it could be said that the British Constitution does not know of any rule of law since no superior law puts limits to what Parliament may legislate.[9] Suggestions by writers and (extrajudicially) by certain judges that there are limits to what Parliament may enact and hence is subject to the rule of law are purely speculative.[10] In this sense it would be appropriate to describe those legal systems which recognise a judicial power to hold legislation unconstitutional as being subject to the rule of law.

Although the courts have no power to hold legislation unconstitutional they interpret it on the assumption that Parliament did not intend to breach fundamental principles of the common law; "I must . . . be faithful to Parliament's sovereign will. Nevertheless, I am entitled to presume that Parliament always intends to conform to the rule of law as a constitutional principle and accordingly

[4] *Politics*, Vol. III, P. 16. He goes on to define law as "reason unaffected by desire." Commentators point out that Aristotle is not necessarily expressing his own view in this chapter; he may be reporting views held by others.

[5] "Ipse autem rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem": *De Legibus et Consuetudinibus Angliae*, f. 5 b.

[6] See *Report of Committee on Ministers' Powers* Cmnd. 4060, (1932) pp. 71–72.

[7] *De Laudibus Legum Angliae*, Chap. 18; *The Governance of England*, Chap. 3.

[8] Holdsworth, *History of English Law*, Vol. II, pp. 441–442; Vol. X, pp. 647–649. See also F. W. Gough, *Fundamental Law in English Constitutional History* (1955); *cf.* Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (1957); McIlwain, *The High Court of Parliament*, Chap. 2.

[9] See *post* para. 4–006 *et seq.*, for possible limits arising from the Union with Scotland, membership of the European Union, and adherence to the European Convention on Human Rights.

[10] T. R. S. Allen, *Law, Liberty and Justice* (1993); Sir John Laws, "Law and Democracy", [1995] P.L. 72; Lord Woolf, "Droit Public-English Style" [1995] P.L. 57.

to respect the constitutional rights of the individual to enjoy equality under the law."[11] In *X Ltd v. Morgan-Grampian (Publishers) Ltd* Lord Bridge said that the rule of law rests on twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.[12]

A second sense in which the phrase may be used is that the Crown (or Executive) must be able to demonstrate a lawful authority for its actions, whether common law, statutory or prerogative. A search warrant is not lawful merely because issued by a Secretary of State: *Entick v. Carrington*.[13] Taxation can be levied only by, or under, an Act of Parliament; hence the Crown cannot lawfully demand taxes on the basis of a resolution of the House of Commons.[14] Thus the rule of law can be said to be a characteristic of the British Constitution which precludes arbitrary action on the part of the Crown or members of the Government.[15]

2–027 The importance of this limit on the activities of the Executive must not be over-estimated. It does not have to show express authority for every action; "England . . . is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden"; *Malone v. Metropolitan Police Commissioner*.[16] In the absence of statutory provisions or judicial precedent to the contrary, the Home Secretary was not precluded from authorising the tapping of private telephones.[17] The enactment of the Human Rights Act 1998 will, of course, restrict Executive powers in those areas falling within the scope of Convention rights. Where statutory authority is required, the Government can generally secure the passing by Parliament of such laws as it wants.[18]

In many instances governments, of whatever political hue, prefer to achieve their objectives by "extra-legal" means, rather than introduce legislation with the possible embarrassment of Parliamentary criticism and, subsequently, the risk of challenge in the Courts. Employers are "persuaded" to follow government guidelines on pay, under the threat of losing grants and government contracts.[19] A "voluntary" system of censorship relating to matters of defence and security insulates decisions taken by the responsible officials from any form of review.[20] In some instances particular sections of the community may be prepared to reach

[11] *Fitzpatrick v. Stirling Housing Association* [1998] Ch. 304, 337 *per* Ward L.J.
[12] [1991] 1 A.C. 1, 48.
[13] (1765) 19 St. Tr. 1029, 1066. See, too, discussion of the "right" of a condemned prisoner to insist on being executed: Maitland, *The Constitutional History of England*, p. 476; P. Brett "Conditional Pardons and the Commutation of Death Sentences," (1957) 20 M.L.R. 131; R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed. 1964) pp. 69–70.
[14] *Bowles v. Bank of England* [1913] 1 Ch. 57, *cf.* Provisional Collection of Taxes Act 1968.
[15] See *infra* Chap. 33 for the supervisory jurisdiction of the High Court under which decisions of Ministers may be invalidated if they have failed to exercise their discretionary powers properly.
[16] [1979] Ch. 344, 357 *per* Sir Robert Megarry V.-C. A more robust approach was taken by the House of Lords in *R. v. Horseferry Road Magistrates Court ex p Bennett* [1994] 1 A.C. 42. (Accused tricked into returning to United Kingdom. Criminal proceedings stayed: rule of law requires courts to refuse to countenance unworthy conduct.)
[17] But see now, Interception of Communications Act 1985; and the Regulation of Investigatory Powers Act 2000; *post*, para. 26–014.
[18] For example, *Burmah Oil Co v. Lord Advocate* was followed by the War Damage Act 1965; *R. (Hume) v. Londonderry Justices* [1972] N.I. 91 by the Northern Ireland Act 1972.
[19] G. Ganz, [1978] P.L. 333.
[20] E. Barendt, "Prior Restraints on Speech" [1985] P.L. 253, 273. See also E. Barendt, *Freedom of Speech* (1985), p. 1135. (Informal rules regulating publication of ministers' memoirs).

informal agreements with a government in order to avoid being subjected to what they fear will be still stricter control by legislation.[21]

The rule of law may, again, be used to refer to those formal characteristics which rules of a legal system must possess before citizens can take them into account in determining their future conduct.[22] The law must, for example, as far as possible, be clear; "Absence of clarity is destructive of the rule of law."[23] Retrospective legislation is, generally, to be avoided.[24]

2–028 A system of law which complied with the "rule of law" in the two senses just discussed might, nonetheless, be a system which most people would regard as grossly unjust. The Executive might wield only powers given to it by law; the individual laws of the system might be admirably clear and possess every other desirable formal quality but their aim might be, for example, to maintain one group in power in that state and to deny, on racial or religious grounds, all rights to members of other groups. It is for this reason that some writers and jurists have used the phrase "rule of law" to refer to a minimum material or substantive element in a legal system. Perhaps the most important example of this approach is to be found in the *Declaration of Delhi*, 1959[25] according to which the rule of law implies, *inter alia*:—a right to representative and responsible government; certain minimum standards or principles for the law, including those contained in the Universal Declaration and the European Convention, in particular, freedom of religious belief, assembly and association, and the absence of retroactive penal laws; that a citizen who is wronged should have a remedy against the state or government; the certainty of the criminal law, the presumption of innocence, reasonable rules relating to arrest, accusation and detention pending trial, the giving of notice and provision for legal advice, public trial, right of appeal, and absence of cruel or unusual punishments; the independence of the judiciary.

Admirable though the sentiments contained in the *Delhi Declaration* may be, it can be argued that to equate them with the rule of law is confusing and misleading; indeed, in the words of one writer is a "perversion of the doctrine."[26] The objection to attempting to equate the phrase with a particular set of political beliefs is that it involves the use of a term which seems to imply the objective existence of certain qualities in the structure of a legal system as a covert political slogan to give approval to a particular system which the speaker or writer considers satisfactory.

Yet another sense in which "rule of law" may be used is to refer to the general duty binding "all citizens in a Parliamentary democracy to obey the law, unless

[21] Richard Lewis, "Insurers' Agreements not to enforce strict legal rights: Bargaining with Government and the Shadow of the Law," (1985) 48 M.L.R. 275.

[22] J. Raz, "The Rule of Law and Its Virtue" (1977) 93 L.Q.R. 195.

[23] *Merkur Island Shipping Corpn v. Laughton* [1983] 2 A.C. 570, *per* Lord Diplock.

[24] *Infra*, p. 55. In *R. v. Kirk* [1985] 1 All E.R. 453 the European Court described non-retroactivity of criminal legislation as a general principle of law observed by the Court and common to all the legal orders of member states. See also Article 7 of the European Convention of Human Rights. (Retroactive legislation is not, however, entirely precluded in the European Community: *Staple Dairy Products v. Intervention Board for Agricultural Produce* [1984] 1 C.M.L.R. 238.)

[25] "Declaration of Delhi" (1959) 2 Jo.Int.Com. of Jurists; pp. 7–32 "The Rule of Law in a Free Society" in *Report of International Congress of Jurists* (New Delhi, 1959). See further, N. S. Marsh, "The Rule of Law as a Supra- National Concept" in *Oxford Essays in Jurisprudence* (ed. A. G. Guest 1961), Chap. 9; N. S. Marsh, "Civil Liberties in Europe" (1959) 75 L.Q.R. 530; A. H. Robertson, *Human Rights in the World* (1972).

[26] Raz. See note 17, at p. 196. See also T. D. Weldon, *The Vocabulary of Politics op. cit.* (1953), p. 61.

and until it can be changed by due process."[27] A similar duty binds the judge: unless he applies the law laid down by Parliament, whatever his own views, "public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law" will be endangered.[28]

The "untrammelled power" of the courts to regulate their own proceedings in cases where they are not regulated by ancient usage or statute has been claimed to be essential for "the maintenance of the rule of law": *Abse v. Smith*.[29]

For students of the British Constitution however the rule of law pre-eminently means Dicey's doctrine of the rule of law.

Dicey's doctrine of the rule of law

Dicey first published his *Law of the Constitution*, based on lectures he gave as Vinerian Professor of English Law at Oxford, in 1885. His purpose was to deal "only with two or three guiding principles which pervade the modern constitution of England."[30] The three distinguishing characteristics of the English Constitution that he chose to explain and illustrate were "the Sovereignty of Parliament, the Rule of Law, and the Conventions of the Constitution."[31] A large part of the book was devoted to an exposition of his doctrine of the "rule of law,"[32] and this has had a profound influence among those who think and write about the constitution, as well as those who work it. **2–029**

For Dicey the expression "the rule of law" included three distinct though kindred conceptions:

(i) The absence of arbitrary power. No man is above the law. No man is punishable except for a distinct breach of law, established in the ordinary legal manner before the ordinary courts.

(ii) Equality before the law. Every man, whatever his rank or condition, is subject to the ordinary law and the jurisdiction of the ordinary tribunals. This Dicey contrasted with the French *droit administratif*, under which the responsibility of public officers for their official acts is decided by a distinct system of administrative courts.

(iii) The general principles of the British Constitution—especially the liberties of the individual, such as personal liberty, freedom of speech and public meeting—are the result of judicial decisions in particular cases. The constitution is judge-made.

[27] *Francome v. Mirror Group Newspapers Ltd* [1984] 1 W.L.R. 892, 897 *per* Sir John Donaldson M.R. The Master of the Rolls recognised that in some cases the citizen might feel a moral obligation to disobey the law—on which see Geoffrey Marshall, *Constitutional Theory* Chap. IX.

[28] *Duport Steels v. Sirs* [1980] 1 W.L.R. 142, 157 *per* Lord Diplock.

[29] [1986] Q.B. 536, 555 *per* May L.J.

[30] Preface to first edition (1885). A recent biography and analysis of Dicey's work and thought is R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey* (1981).

[31] Dicey, *Law of the Constitution* (8th ed., 1914), p. xvii.

[32] Dicey, *Law of the Constitution* (10th ed. 1959). Part II. H. W. Arndt, "The Origins of Dicey's Concept of 'The Rule of Law'" (1957) 31 A.L.J. 117, points out that Dicey elaborated and expanded the ideas of W. E. Hearn in *The Government of England* (1867), to which Dicey made a general reference in the Preface to his first edition. Dicey first used the phrase in 1875: "Stubbs' Constitutional History of Great Britain," *Nation* 20 (March 4, 1875) 154; Cosgrove, *op. cit.* p. 67.

2–030 Dicey's doctrine has been chiefly criticised with regard to the notion of equality before the law and the topic of administrative law.[33]

The first principle ("No man is punishable," etc.) applies generally in criminal law. Criminal courts usually have a wide discretion with regard to punishment, but this favours the citizen as it is a discretion downwards from a statutory maximum. The principle excludes, as a general rule, preventive detention, compulsory acquisition of goods and direct enforcement of administrative decisions, although preventive detention by order of the Home Secretary was authorised by Parliament during the two World Wars.

Whether discretionary powers conferred on Ministers by Parliament should be described as "arbitrary" or not is, largely, a matter of judgment. To the extent that Dicey objected to any discretion being conferred on ministers he was, it has been pointed out, attempting to turn particular political and economic theories into a constitutional doctrine. Certainly, the granting of wide powers to ministers is now a settled feature of legislation.[34]

To the doctrine that all persons have equal rights and duties before the law, however, so many exceptions have now to be made that the statement is of doubtful value. Ministers and other public authorities have many powers that the ordinary person has not got. Thus local authorities have statutory power under certain conditions to buy land compulsorily, and the police have special powers of arrest and search by common law and statute, and ministers have wide powers of delegated legislation. Immunity from the general law of tort may attach to acts done "in contemplation or furtherance of a trade dispute."[35] Rights and obligations of the individual are now decided in many cases not by the ordinary courts but by special or administrative tribunals. Judges and ambassadors have immunity from being sued in the courts, although the immunity of judges actually favours "the rule of law" to the extent that it helps secure the independence of the Judiciary from control by the Executive. In one important respect we are paradoxically nearer to Dicey's "rule of law" than when he wrote, for the common law immunity in tort of the Crown (in effect, the government) was largely removed by the Crown Proceedings Act 1947.[36] Nonetheless the government retains legal immunities and privileges not possessed by the private citizen.[37]

2–031 With regard to administrative law,[38] its existence does not necessarily involve special administrative courts, as is shown by the fact that Belgium before 1946

[33] See, *e.g.* E. C. S. Wade in Dicey, *Law of the Constitution* (10th ed.), pp. xcvi–cli; Jennings, *op. cit.* Chap. 2, s.1 and Appendix II: "In Praise of Dicey" (1935) 13 *Public Administration* 123; B. Schwartz, *French Administrative Law and the Common-Law World*, Chap. 10. For a re-appraisal of Dicey's doctrine, see F. H. Lawson, "Dicey Revisited" (1959), *Political Studies*, Vol. VII, pp. 109, 207. See also P. P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, 1990).

[34] Quite exceptional powers may be delegated to ministers in times of emergency: see *post*, Chap. 19.

[35] The width of the immunity tends to vary with the political complexion of the government. For the present position see *Harvey on Industrial Relations and Employment Law*, Vol. 2, Pt. M.

[36] An anomalous exception was the exemption of the Post Office and its employees under s. 9 of that Act, which was substantially re-enacted in the Post Office Act 1969. See now the British Telecommunications Act 1981, s.23 (immunity of British Telecom) and s.29 (immunity of Post Office).

[37] G. Zellick, "Government beyond Law" [1985] P.L. 283.

[38] Dicey, *op. cit.* Chap. 12; *cf.* A. V. Dicey, "*Droit Administratif* in Modern French Law" (1901) 17 L.Q.R. 302; "The Development of Administrative Law in England" (1915) 31 L.Q.R. 148 (based on the case of *Local Government Board v. Arlidge* [1915] A.C. 120).

had a *droit administratif* without such separate courts. The essence of administrative law is that different principles should apply in relation to the official acts of public authorities and officers. These are not confined to liability to pay compensation for injury caused to private individuals. In any event, *droit administratif* is looked upon by the French as a protection for the individual, not as a privilege for public officials.[39] If French administrative law provides compensation for excess or abuse of power *ex post facto*, English administrative law might be said to seek to deter public officials from exceeding their powers in the first instance.

Whatever Dicey's initial distrust of a separate system of administrative law it should be remembered that the development of such a system has been claimed as one of the judicial achievements of the last thirty years.[40]

It is not easy to see how Dicey's treatment of the "rights of the subject" in British constitutional law is related to the other parts of his doctrine. It is true that the rights of the individual are mostly to be inferred from judicial decisions[41] and are therefore part of the common law, especially if such enactments as the Bill of Rights 1688 be regarded mainly as declaratory. That such rights are *part* of the ordinary law is a necessary consequence of the fact that the British Constitution is unwritten; but the fundamental principle both in the ordinary English law and in British constitutional law is the legislative supremacy of Parliament, so that it cannot be said with exactness that either the principles or the decisions are *derived* from the others.

2–032 In so far as Dicey's general statement of the rule of law may be taken to involve the existence in the English Constitution of certain principles almost amounting to fundamental laws, his doctrine is logically inconsistent with the legislative suspremacy of Parliament. Dicey attempted to reconcile the two notions by saying that parliamentary sovereignty favors the rule of law because the will of Parliament can be expressed only in the form of an Act, which must be interpreted by the courts; and that the rule of law favours parliamentary sovereignty, as any additional discretionary powers that the government needs can only be obtained from Parliament.[42] His doctrine is a political theory, in some of its aspects connected with the doctrine of the separation of powers. From another point of view it implies moral restrictions on the legislative activity of Parliament, its juridical nature resembling the "directive principles of state policy" found in the Constitutions of the Republic of Ireland and India.

Conclusion

2–033 Despite the supremacy of Parliament, theories of the rule of law may be significant in at least three ways. First they may influence legislators. The substantive law at any given time may approximate to the "rule of law," but this only at the will of Parliament. Secondly, their principles may provide canons of interpretation which give an indication of how the law will be applied and legislation interpreted. English courts lean in favour of the liberty of the citizen, especially of his person: they interpret strictly statutes which purport to diminish that liberty, and presume that Parliament does not intend to restrict private rights

[39] L. Neville Brown and J. Bell, *French Administrative Law*, (5th ed., 1998, Chap. 11).
[40] *ante*, para. 2–024.
[41] But statutes have curtailed some (*e.g.* Public Order Act 1986) and modified others (*e.g.* Habeas Corpus Acts). See further, *post*, Chaps 24–26.
[42] Dicey, *op. cit.* Chap. 13.

in the absence of clear words to the contrary.[43] But Parliament could pass an Act requiring the judges to interpret social legislation freely in favour of the administration. Thirdly, the rule of law may be a rule of evidence: everyone is prima facie equal before the law. A person, whether an executive officer or not, may have peculiar rights, powers, privileges or immunities; but, if so, he must prove them. In this sense, the government is subject to law.

The British Constitution and human rights[44]

2–034 The British Constitution contains no fundamental rights in the strict sense. Being unwritten and flexible, the constitution in any of its parts can be changed in the same way as any other part, namely, by ordinary Act of Parliament. The legislative supremacy of Parliament means that there is no legal limit to the extent to which Parliament can abridge or abolish rights that in other countries may be regarded as "fundamental."[45] The practical checks are the influence of public opinion, the vigilance of the Opposition, and the restrictive interpretation of the courts. Traditionally, the rights of the individual in English law are the *residue* of freedom that is left after legislative and executive powers have been defined, and their extent can only be determined by examining the restrictions placed on the activity of the individual and the enjoyment of his property.[46]

This attitude, however, will have to give way to the recognition by the Human Rights Act 1998 of Convention rights and the duty of public authorities not to act incompatibly with such rights.[47]

Local government[48]

2–035 The present structure of local government authorities in England and Wales is based on recent legislation although counties, boroughs and parishes as units for various purposes are ancient. In the shire, hundred and vill is found the key to the present organisation of rural areas for local government purposes—the county, the district and the civil parish. An antithesis between centralisation and decentralisation runs through the history of the organisation of English government. In the early Middle Ages, both before and after the Norman Conquest, the chief royal officer for the control of local government was the sheriff of the county or shire, subject to the supervision of the King's Council. The general administration was carried on in the county court, the assembly of the freeholders of the county over which the sheriff presided.

Over a period of centuries the sheriff gradually lost nearly all his functions, so that Maitland could say in 1885 that the whole history of English justice and police might be described as "the decline and fall of the sheriff."[49] After various experiments, the local administration of justice was given in the middle of the

[43] See, *e.g. Allen v. Thorn Electrical Industries Ltd* [1968] 1 Q.B. 487, CA. This aspect of the importance of the rule of law is developed by T. R. S. Allen "Legislative Supremacy and The Rule of Law" [1985] C.L.J. 111.

[44] See further, *post*, Chap. 22.

[45] But see dicta cited *ante*, para. 1–019.

[46] See *post*, Chaps 22–27.

[47] *post* Chap. 22.

[48] Redlich and Hirst, *History of Local Government in England* (ed. B. Keith-Lucas, 2nd ed., 1970); W. A. Robson, *The Development of Local Government* (3rd ed., 1954); S. Webb, *The Evolution of Local Government* (1951); Holdsworth, *History of English Law*, Vol. X, pp. 126–339; *A Century of Municipal Progress 1835–1935* (ed. Laski, Jennings and Robson, 1935); K. B. S. Smellie, *A Hundred Years of Local Government* (2nd ed., 1950).

[49] *Justice and Police* (1885), p. 69. For the modern sheriff, see *The High Sheriff* (*The Times*, 1961).

fourteenth century to justices of the peace. For nearly 500 years, that is, until the year 1834, the control of local government outside the boroughs was mainly in the hands of these justices of the peace, for besides the judicial functions in which they displaced the sheriffs and the county and hundred courts, a long series of statutes cast on them numerous administrative duties concerning such matters as highways, poor relief, wages and licensing.[50] The justices themselves were controlled by the King's Council until the Star Chamber was abolished in 1640. For the next 200 years local government was, subject to the legislative power of Parliament, almost autonomous: practically the only control was exercised by the courts in applying the doctrine of *ultra vires* and issuing prerogative writs.

The period from the Middle Ages down to the early nineteenth century also saw a great growth in the size and number of towns, and to the justices of the peace as local government authorities we must add the boroughs. Further, the statutory institution of ad hoc bodies for specific purposes, which began with the Statute of Sewers 1531, was increasingly adopted in the eighteenth century for such purposes as the poor law, turnpike roads and urban sanitation.

2–036 Modern local government, characterised by *locally elected councils*, was inaugurated by the Poor Law Amendment Act 1834 and the Municipal Corporations Act 1835. The former Act reorganised the administration of the poor law which, apart from police, had hitherto been the most important function of local government. The Municipal Corporations Act provided for an elected borough council in place of an oligarchy of co-opted burgesses. The process of creating elected councils was continued by the introduction, first, of county councils and county borough councils in 1888,[51] and then of urban district councils, rural district councils and parish councils in 1894.[52] Ad hoc authorities continued to be created during the nineteenth century for highways, schools and sanitation, but they gradually disappeared. The general principle in modern times was to have one local authority for all services in its area, and this was largely brought about by 1930.[53] The Local Government Act 1933 consolidated the legislation relating to the structure of local government outside London, and remained the basis of the law until the coming into effect of the Local Government Act 1972.

The government of London has always stood apart from the general system, owing to the maintenance of the ancient privileges of the City of London and the great size and population of Greater London.

The City of London Corporation is a body corporate by prescription, its full style according to a statute of 1690 being "The Mayor and Commonalty and Citizens of the City of London". The Corporation was not affected by the Municipal Corporations Acts 1835–1882, but it is governed—mostly in accordance with royal charters granted from time to time—by three courts. The City of London is a common law corporation with some financial resources that are not subject to statutory control.

2–037 Local government outside the City was from 1899 based on the London County Council and the metropolitan borough councils.[54] In 1963 the Greater London Council was created[55]—and abolished in 1985.[56] An authority for the

[50] Sir Carleton Allen, *The Queen's Peace*, Chap. 5.
[51] Local Government Act 1888.
[52] Local Government Act 1894.
[53] Local Government Act 1929; Poor Law Act 1930.
[54] Local Government Act 1999.
[55] London Government Act 1963.
[56] Local Government Act 1985.

whole of London was re-established by the Greater London Authority Act 1999 which also introduced the novelty of a directly elected mayor.

In the case of the country at large the present government's philosophy of raising the standards of local government finds expression in the Local Government Act 2000. Provisions are made generally for the election of mayors and elaborate arrangements have been enacted to ensure that members of local authorities comply with codes of conduct which describe the standards expected of members of local authorities.[57]

[57] For the powers of local authorities and their relationship with central government see S.H. Bailey, *Cross, Local Government Law* (9th ed., 1996); M. Loughlin, *Local Government in the Modern State* (1986); M. Loughlin, "Restructuring of Central-Local Government Relations", *The Changing Constitution* (ed. J. Jowell and D. Oliver, 4th ed., 2000, Oxford), Chap. 6.

CHAPTER 3

PARLIAMENTARY SUPREMACY I: HISTORY AND NATURE

I. HISTORICAL INTRODUCTION

3–001 In the nineteenth century the prevailing juristic theory in this country was Austin's doctrine of sovereignty, which supposed that in every mature legal system there was some person or body—the "Sovereign"[1]—vested with unlimited power to make law.[2] Austin himself did not apply his own doctrine consistently to the British Constitution. Dicey's treatment, in which he ascribed sovereignty to the United Kingdom Parliament, was more consistent.[3]

The doctrine of sovereignty in the theory of municipal law as opposed to international law, however, is now out of fashion, and the continued use of the term "sovereignty" in the present context tends to prejudice discussion of the lawmaking power of the United Kingdom Parliament, with which legislature we are here concerned. A body may have supreme (highest) power without necessarily being sovereign (unlimited) in Austin's sense, nor do we need to assert or imply here that there must be a sovereign authority in every legal system.

The establishment of parliamentary supremacy was a product of the revolution of 1688.[4] Before then the chief rivals were, first, the King or King in Council, and then the common law courts. Later the House of Commons acting by resolution occasionally threatened a breach in the authority of the Parliament as a whole.[5]

[1] The doctrine of sovereignty was derived by Austin from Bodin, Hobbes, Blackstone and Bentham. Coke's description of the "transcendant and absolute" power and jurisdiction of Parliament for making of laws in proceeding by bill (4 Inst. 36) was thought by Sir Ivor Jennings to refer to the jurisdiction of the High Court of Parliament (*The Law and the Constitution* (5th ed., 1959), App. III). Sir Thomas Smith's discussion in *De Republica Anglorum* (1589), Bk. 2, Chap. 1 (Alston ed.), of the "absolute" power of Parliament probably referred to Parliament as the highest court, "absolute" here meaning "not subject to appeal." In the Middle Ages the King ruled (subject to custom and advice) and was called the Sovereign, but "the Sovereign" as applied to the modern constitutional monarch is a courtesy title.

[2] John Austin, *The Province of Jurisprudence Determined* (1832). There are many editions and commentaries, notably H. L. A. Hart's edition (1954) and Jethro Brown's *The Austinian Theory of Law* (1906). Most English textbooks on jurisprudence contain criticisms of Austin's theory; and see H. L. A. Hart, *The Concept of Law* (2nd ed., 1994). Bentham's work, inadequately published until recently, would no doubt be known to Austin; see H. L. A. Hart, "Bentham on Sovereignty" (1967) 2 Ir. Jur. (N.S.) 327; J. H. Burns, "Bentham on Sovereignty: an Exploration" in *Bentham and Legal Theory* (M. H. ed. James, p. 133 (re-printed from (1973) 24 N.I.L.Q.).

[3] *Law of the Constitution*, (10th ed., 1959) Chaps 1–3, *cf.* E. C. S. Wade's Introduction, pp. xxxiv–xcvi. Dicey suggests indeed that Austin's general theory of sovereignty was a deduction from the position of the British Parliament.

[4] The historical development of the doctrine, drawing on numerous pre-1688 instances, is described in J. Goldsworthy, *The Sovereignty of Parliament* (1999) which refutes the suggestion that the concept of Parliamentary supremacy owes its origin to Dicey.

[5] *Stockdale v. Hansard* (1839) 9 Ad. & E. 1; *Case of the Sheriff of Middlesex* (1840) 11 Ad. & E. 273; *post*, Chap. 13.

The King as lawmaker

3–002 Parliament emerged as an effective body in the fourteenth century.[6] In the reign of Henry VI the Lords and Commons framed the statutes and the King assented in much the same fashion as at the present day. Nevertheless it would seem that the King continued to legislate on matters of lesser or temporary importance. Whether there was a significant distinction between the terms "statute" and "ordinance," the former applying to Parliament and the latter to royal legislation, has long been a matter of controversy, but Plucknett thought these terms were synonymous.[7]

Proclamations

3–003 The Statute of Proclamations 1539,[8] which gave the King power, with the advice of the Council, to make proclamations that would have the force of statutes, was of very limited scope and short-lived. Intended for emergencies, it provided that proclamations might not impose the death penalty (except for cases of heresy), take away a subject's property or conflict with existing statutes, customs or common law. This Act was repealed in the first year of Edward VI.[9] Notwithstanding its repeal, Mary and Elizabeth I continued to make and enforce proclamations concerning imports and also certain religious matters.

In the reign of James I the Commons complained of the abuse of proclamations. The opinion of Chief Justice Coke and four of his colleagues was sought and given in the *Case of Proclamations* (1610),[10] when James I wanted to prohibit by proclamation the building of new houses in London in order to check the over-growth of the capital, and the manufacture of starch from wheat so as to preserve wheat for human consumption. The opinion was to the effect that no new offence can be created by proclamation; the only prerogative possessed by the Crown is that which is conferred by the law of the land; but that to prevent offences the King can by proclamation warn his subjects against breaches of the existing law, in which case a breach would be the more serious.

The suspending and dispensing powers

3–004 By virtue of the *suspending* power the King claimed to postpone indefinitely the general operation of a given statute; by virtue of the *dispensing* power he relieved particular offenders or classes of offenders from the statutory penalties they had incurred. In the reign of Henry VII it was held that the King could at common law dispense with *mala prohibita* but not *mala in se*.[11] Subject to this restriction, both the suspending and dispensing powers were accepted as part of the prerogative in the sixteenth and seventeenth centuries. The Stuarts used these prerogatives to subvert established laws. James II issued a proclamation that a

[6] See E. B. Fryde and E. Miller (eds.) *Historical Studies of the English Parliament: Origins to 1399* (1970); Sir Goronwy Edwards *The Second Century of the English Parliament* (1979); R. G. Davies and J. H. Denton (eds), *The English Parliament in the Middle Ages* (1981).

[7] T. F. T. Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, p. 34. See also S. E. Thorne, *Introduction to a Discourse upon the Exposition and Understanding of Statutes* (Huntington Library, 1942); H. G. Richardson and G. O. Sayles, *Law and Legislation from Aethelberht to Magna Carta* (1966); "The Early Statutes" (1934) 50 L.Q.R. 201, 540.

[8] 31 Hen. VIII, c. 8. The Act was debated by Parliament for 15 days, the Commons rejecting the first Bill sent down by the Lords.

[9] (1547) 1 Edw. VI, c. 12.

[10] 12 Co.Rep. 74; 2 St.Tr. 723.

[11] Y.B.Mich. 11 Hen. VII, no. 35 (1495) *per* Fineux C.J.; see Holdsworth, *History of English Law*, Vol. VI, pp. 218–219.

Declaration of Indulgence, suspending the operation of all laws against Roman Catholics, should be read in all the churches; but in the *Seven Bishops' Case* (1688)[12] the Primate and six bishops were acquitted by a jury on a charge of seditious libel for signing a petition claiming that to read the declaration would be illegal and against their conscience. The right of the subject to petition the King was also confirmed.

3–005 In *Thomas v. Sorrell* (1674)[13] the plaintiff claimed a penalty for selling wine without a licence contrary to a statute of 12 Charles II. The jury returned a special verdict that they had found a patent of 9 James I incorporating the Vintners Company and granting them permission to sell wine without a licence, *non obstante* an Act of 7 Edward VI forbidding such sale. The judges decided that the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the King's benefit. In *Godden v. Hales* (1686)[14] a collusive action was brought to test the King's *dispensing* power. Sir Edward Hales accepted appointment as colonel of a regiment, and was sued for a penalty for neglecting to take the oaths of supremacy and allegiance and to receive the Sacrament according to the Test Act of 25 Charles II. Hales pleaded a dispensation of James II. The court held that the dispensation barred the right of action, as the King had a prerogative to dispense with penal statutes in particular cases for reasons of which the King was the sole judge.

The Bill of Rights 1688 declared: "That the pretended power of *suspending* of laws or the execution of laws by regal authority without consent of Parliament is illegal; that the pretended power of *dispensing* with laws or the execution of laws by regal authority *as it hath been assumed and exercised of late* is illegal."[15] Projected legislation, stating in what cases dispensation should be legal, was never passed.[16] It is by virtue of the words "as it hath been assumed and exercised of late" in relation to the dispensing power that the prerogative right to pardon was retained. These words were also relied on as legalising a dispensation granted by Elizabeth I in 1566 in the *Eton College* case (1815)[17] where, owing to their insertion, a fellow of Eton College was allowed to hold a living in conjunction with his fellowship.

3–006 The prohibition on the suspending and dispensing powers might be thought to give rise to doubts about the legality of the practice of the Inland Revenue of making extra-statutory concessions to tax payers. The practice is not new and certainly existed in the nineteenth century. By 1944 it was so well established that a list of agreed concessions was published.[18] Sir Stafford Cripps said in 1947 that such concessions had come into existence "without any particular legal authority under any Act of Parliament but by the Inland Revenue under my authority."[19] Judicial concern about the powers claimed by the Revenue was

[12] 12 St.Tr. 371.
[13] Vaughan 330.
[14] 11 St.Tr. 1166; 2 Shower 275.
[15] For attempts to suspend legislation in New Zealand, see W. A. McKean, "The Suspending Power Exhumed," [1978] P.L. 7. P. Joseph, "Doing Things the Stuart Way: 1688 and All That", [1991] P.L. 29. An example of a dispensing power conferred by statute is to be found in s.134 of the Army Act 1955 under which a superior officer may "condone" an offence committed by a soldier: see *R. v. Bisset* [1980] 1 W.L.R. 335 (Ct-M.A.C.); *post*, para. 19–022.
[16] Holdsworth, *op. cit.* Vol. VI, pp. 215–225, 240–241.
[17] *King's College, Cambridge v. Eton College, P.Wms.* 53; Broom, *Constitutional Law*, p. 503.
[18] The latest list was published in 1985: see N. L. J. May 31, 1985, p. 534.
[19] See D. W. Williams, "Extra Statutory Concessions" [1979] B.T.R. 137, 140.

voiced in *Vestey v. I.R.C. (No 2)*.[20] In that case a taxpayer claimed that the construction of the relevant statute urged by the Revenue could not be correct because, *inter alia*, of the absurdly wide liability it would impose on beneficiaries under a trust. The Revenue's response that there was no risk of any individual being harshly treated; in its discretion particular beneficiaries would be assessed for reasonable sums. Walton J. and the House of Lords held that the beneficiaries were not liable to tax under the statute. Walton J. went on to indicate very clearly his belief that the power of dispensing claimed by the Revenue was contrary to the Bill of Rights. In the House of Lords Lord Wilberforce similarly emphatically repudiated any such power, although the Commissioners must act with administrative common sense, so that they were under no duty to expend a large sum of taxpayers' money in attempting to collect a small amount of tax, and they could bring humanity to bear in hard cases.[21] The problem arose in another way in *Furniss v. Dawson*[22] where the House of Lords abandoned the principles laid down in earlier cases and, in wide and vague terms, indicated that elaborate schemes designed to minimise tax liability might in future be at risk of being set aside at the instance of the Revenue. To allay alarm the Inland Revenue issued a draft statement of practice indicating what schemes would continue to be acceptable. As the result of concern expressed that the Revenue was claiming a dispensing power, the statement was withdrawn—and a similar one, in the form of a written answer to a parliamentary question, was issued by the Chief Secretary to the Treasury.[23]

Monopolies

3–007 Formerly the granting of monopolies by the monarch was presumed to inflict a hardship on the public. In the *Case of Monopolies* (1602)[24] Darcy, a servant of Elizabeth I and grantee of the sole rights of importing and making playing-cards, sued Allein for interfering with his grant. The court held that the grant was a monopoly and void, and that the Queen could not exercise her dispensing power to confer private gain on an individual contrary to statutes of Edward III and Edward IV, which imposed a penalty on the importation of certain goods and were enacted for the public good. The grant of monopolies is now governed by Patent Acts.[25]

Taxation

3–008 It was supposed to have been settled by Magna Carta and by legislation in the reigns of Edward I and Edward III that taxation beyond the levying of customary feudal aids required the consent of Parliament. One of the central themes of English constitutional history was the gaining of control of taxation and national finance in general by Parliament, and in particular the Commons; for this control meant that the King was not able to govern for more than short periods without

[20] [1979] Ch. 177; [1980] A.C. 1148.

[21] Administrative commonsense is exemplified in *R. v. I.R.C. ex p. National Federation of Self Employed and Small Businesses Ltd* [1980] A.C. 952. ("Amnesty" to Fleet St. casuals).

[22] [1984] A.C. 474.

[23] Dawn Oliver, "Tax Planning and Administrative Discretion" [1984] P.L. 389. The case for the legality of the Revenue's practice of making concessions is argued by John Alder, "The Legality of Extra-Statutory Concessions," 180 N.L.J. 1980, 180.

[24] *Darcy v. Allein*, 11 Co.Rep. 84b. For the background of this case, see D. R. Seaborne Davies, "Further Light on the Case of Monopolies" (1932) 48 L.Q.R. 394.

[25] The Crown's right to make use of patents is preserved by the Crown Proceedings Act 1947, s.3 (see *Pfizer v. Ministry of Health* [1965] A.C. 512.) and the Patent Act 1977, ss 55–59.

summoning Parliament, and Parliament could insist on grievances being remedied before it granted the King supply. This applied at least to *direct* taxation. With regard to *indirect* taxation different considerations might apply. Down to the early seventeenth century import duties, for example, were regarded rather as licences or concessions than as taxes and, further, the royal prerogative relating to foreign affairs—and hence the regulation of foreign trade in the national interest—was relevant. Issue was joined in two famous cases in the reigns of James I (the "Case of Impositions") and Charles I (the "Case of Ship-Money").

In *Bate's Case (Case of Impositions)* (1606)[26] Bate, a Levant merchant, refused to pay a duty imposed by letters patent of James I on the import of currants, contending that the imposition was contrary to a statute of Edward III which declared that such taxation required the consent of Parliament. The Court of Exchequer gave judgment unanimously for the King. Their reasons were that foreign affairs, and therefore foreign commerce, were within the absolute power of the King; as the King could prohibit the importation of goods, still more could he tax imported goods; and the court must accept the King's statement that the purpose of the tax was to regulate foreign trade. Coke and Popham C.JJ. thought this decision was right.[27] The judgment has been condemned by some modern historians, but it may well have been warranted by the law of that time in so far as it rested on the prerogative power to regulate foreign trade. This power, however, was liable to be abused, and danger also lay in dicta treating the matter as a question of revenue within the "absolute" (*i.e.* inalienable) powers of the Crown. It was in the debate on impositions in 1610, says Holdsworth,[28] that the supremacy of the King in Parliament over the King out of Parliament was first asserted by James Whitelocke.

The Petition of Right 1628 was occasioned largely by *Darnel's Case (The Five Knights' Case)* (1627),[29] where the defendants were imprisoned for refusing to pay a forced loan. The Petition of Right was assented to by Charles I, and has always been regarded as having statutory force although largely superseded by the Bill of Rights. It forbad tallages, aids, forced loans, benevolences, taxes and suchlike charges "without common consent by Act of Parliament."[30]

3–009 While this document was still fresh in men's minds, Charles I (after consulting the judges) imposed under the Great Seal a direct tax known as ship-money, to be used to furnish ships for the navy. The tax was charged first on the seaport towns, which had the primary responsibility for finding ships and men for the national defence, and then on the inland counties. In *R. v. Hampden (Case of Ship-Money)* (1637)[31] proceedings were taken against John Hampden, a Buckinghamshire gentleman, for refusing to pay the amount of £1 assessed on him. The majority of the judges in the Court of Exchequer Chamber gave judgment for

[26] 2 St.Tr. 371. See further Holdsworth, *History of English Law*, Vol. VI, pp. 42–48; G. D. G. Hall, "Impositions and the Courts 1554–1606" (1953) 69 L.Q.R. 200.

[27] 12 Co.Rep. 33.

[28] *Some Lessons from our Legal History*, pp. 124–125.

[29] 3 St.Tr. 1.

[30] Tallages were imposts set by the King as landlord on his own demesne lands, aids were free-will offerings by tenants to their lord in time of need, and benevolences were extorted free-will offerings. These methods of raising money were not invented by the Stuarts, but were known in the fourteenth and fifteenth centuries.

[31] 3 St.Tr. 825. See further Holdsworth, *History of English Law*, Vol. VI, pp. 48–54; D. L. Keir, "The Case of Ship-Money" (1936) 52 L.Q.R. 546.

the King. The gist of their decision was that the King's prerogative to defend the realm in time of danger overrode the general principle that taxation required the consent of Parliament, and that the King was sole judge both of the existence of an emergency and also of the steps to be taken to meet the danger. It is difficult to criticise this decision in the light of the law at that time. The precedents were conflicting, and Hampden's counsel did not place much reliance on the Petition of Right. The verdict of most historians has been against the correctness of the decision, which they put down to the subservience of the judges to the King. Even if the decision was right in law, it had implications that were politically dangerous. The judgment itself was declared void by the Long Parliament in 1641.

The eventual solution was political rather than legal, for the revolution of 1688 meant that Parliament henceforth controlled the King. The Bill of Rights 1688 accordingly settled the matter for the future, as regards both direct and indirect taxation, by declaring that "levying money for or to the use of the Crown by pretence of prerogative without consent of Parliament for longer time or in other manner than the same is or shall be granted is illegal." It may be noted that the Tenures Abolition Act 1660 had confirmed the abolition of military tenures, and no revenue was derived from that source after 1645.[32]

3–010 An attempt by the government (which in modern times represents the Crown) to levy money without express statutory authority was *Att.-Gen. v. Wilts United Dairies*.[33] The Attorney-General sought to recover £15,000 from Wilts United Dairies, representing a fee of 2d. a gallon on milk purchased by them under licence from the Food Controller, which was granted under statutory orders made in virtue of Regulations issued under the Defence of the Realm (Consolidation) Act 1914. The House of Lords unanimously upheld the decision of the Court of Appeal that the charge was *ultra vires* as a levy of money for the use of the Crown without the authority of Parliament. Lord Buckmaster stated that neither the Act creating the Ministry of Food, nor the Regulations issued under the Defence of the Realm Act, directly or by inference enabled the Food Controller to levy payment. The charges to the extent of £18,000,000 were validated retrospectively by the War Charges (Validity) Act 1925.[34]

In 1954 it was discovered that the Post Office had for many years been inadvertently charging licences for wireless sets without the power to do so, since no regulations with the consent of the Treasury had been issued as required by the Wireless Telegraphy Act 1904. The Post Office repaid the plaintiff's licence and costs,[35] and the charge for wireless licences was validated retrospectively by the Wireless Telegraphy (Validation of Charges) Act 1954. In *Congreve v. Home Office*[36] the Home Secretary gave notice of his intention to increase the fees for television licences. Some licence holders, in order to forestall the increase, took out new licences at the existing rate before their licence had expired. The Home

[32] For the "sovereignty" of Parliament in the eighteenth century, see Holdsworth, *op. cit.* Vol. X, pp. 526–531.

[33] (1922) 37 T.L.R. 884; 91 L.J.K.B. 897. The same principle requires local authorities to be able to show explicit legislative authorisation for the imposition of charges for services: *McCarthy and Stone (Developments) Ltd v. Richmond on Thames L.B.C.* [1992] 2 A.C. 48, HL.

[34] Parliament can, of course, expressly delegate the power to levy such charges, and did so in the Second World War by the Emergency Powers (Defence) Act 1939, s.2.

[35] *Davey Paxman & Co Ltd v. Post Office* (action settled) *The Times*, November 16, 1954.

[36] [1976] Q.B. 629.

Secretary, who had a statutory discretion to revoke television licences, proposed to revoke such overlapping licences unless the increased fee was paid. The Court of Appeal held that the Minister's discretion must be exercised reasonably,[37] and that this was an attempt to levy money without authority of Parliament.[38]

Parliament's exclusive control over finance has also been recognised and applied to require explicit statutory authority to justify an order relating to the expenditure of public money.[39]

The Judges and a Higher Law[40]

Medieval judges, though appointed by the King, had inherent authority to declare and apply the law, which was mainly feudal and customary, even against the King[41]; and they could develop the law, within the limits set by a narrow range of sources, to meet new situations. But judges had no jurisdiction to change the direction of the law by introducing novel provisions or to abolish law already established: these functions fell within the province of legislation. A fundamentally new and written constitution like that of the United States would be required to give British courts coordinate authority with that of the legislature, involving jurisdiction to review primary legislation and to test its validity against the supreme law of the constitution. Judges cannot confer such authority on themselves. **3–011**

There are dicta in the common law courts, however, down to the seventeenth century to the effect that there is a law of nature or reason superior even to Acts of Parliament. The most celebrated example is *Dr Bonham's Case*,[42] in which Coke C.J. presided over the King's Bench. The question was whether Dr Bonham was liable to pay a fine, half to the Crown and half to the Royal College of Physicians, under the charter of the College which had been confirmed by Act of Parliament. The Court gave judgment for Bonham on the ground that the College had no jurisdiction over those practising outside London; but Coke's report of the judgment goes on to say that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." This statement was obiter, and is also inconsistent with what Coke says in his *Institutes*.[43]

In *Day v. Savadge*[44] the question was whether Day, as a freeman of the City of London, was exempt from wharfage duty on a bag of nutmegs. On behalf of the Corporation it was contended that by a statute of 7 Ric. II disputes as to the

[37] *Padfield v. Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997, HL. The Parliamentary Commissioner had strongly criticised the Home Secretary's action: *Seventh Report of Parliamentary Commissioner for Administration*, Sess. 1974–75, p. 680.

[38] Citing *Att.-Gen. v. Wilts. United Dairies, supra*. The Home Secretary later obtained statutory power to alter television licence fees without advance notice.

[39] *Steele Ford & Newton v. Crown Prosecution Service* (1993) 97 Cr.App.R. 376, HL.

[40] J. W. Gough, *Fundamental Law in English Constitutional History*; Roscoe Pound, *The Development of Guarantees of Liberty* (1957); E. S. Corwin, *The "Higher Law" Background of American Constitutional Law* (reprint 1955).

[41] Bracton, *De Legibus et consuetudinibus Angliae*, f. 5b.

[42] (1610) 8 Co.Rep. 114, 118; *cf.* T. F. T. Plucknett, "Bonham's Case and Judicial Review" (1926) 40 *Harvard Law Review* 30; S. E. Thorne, "Dr Bonham's Case" (1938) 54 L.Q.R. 543.

[43] 4 Inst. 36. Coke as a Law Officer supported the prerogative, as a judge the supremacy of the common law (which he equated with reason), and as a parliamentarian the sovereignty of Parliament.

[44] (1615) Hobart 85, 97.

More recently there has been a revival of interest in theories of limits to Parliamentary supremacy by reference to the Rule of Law or a framework of constitutional principles[50]—suggestions firmly rebutted by the Lord Chancellor, Lord Irvine.[51]

II. The Nature of Parliamentary Supremacy[52]

3–013 The "Legislative Supremacy of Parliament" means that Parliament (*i.e.* the Queen, Lords and Commons in Parliament assembled) can pass laws on any topic affecting any persons, and that there are no "fundamental" laws which Parliament cannot amend or repeal in the same way as ordinary legislation. Dicey[53] was following the tradition of Coke[54] and Blackstone[55] when he said that Parliament has "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 the right to override or set aside the legislation of Parliament." Once a document is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity; *Manuel v. Att.-Gen.*[56] *per* Sir Robert Megarry V.C. In that case, presented with the text of the Canada Act 1982, the learned Vice Chancellor held himself obliged to recognise its validity once satisfied that it had been passed by the House of Commons and the House of Lords; had received the Royal Assent and there was no suggestion that the copy was not a true copy of the Act.[57]

Legislative supremacy as thus defined is a legal concept. The supremacy of Parliament, being recognised and acted on by the courts, is a principle of the common law. It may indeed be called the one fundamental law of the British Constitution, for it is peculiar in that it could not be altered by ordinary statute, but only by some fundamental change of attitude on the part of the courts resulting from what would technically be a revolution. Parliament could not, of course, confer this authority on itself. Thus the first Acts passed by the Convention Parliaments of 1660[58] and 1689,[59] legalising their own authority, confirmed the result of revolutions; and the American Colonies Act 1766,[60] asserting the

[50] Lord Woolf, "Droit Public—English Style," [1995] P.L. 57; Sir John Laws, "Law and Democracy" [1995] P.L. 72.

[51] "Judges and Decision Makers" [1996] P.L. 59. For an extended refutation of modern, revisionist theories, see J. Goldsworthy, *The Sovereignty of Parliament* (1999).

[52] Dicey, *Law of the Constitution* (10th ed.), Chaps. 1–3; H. W. R. Wade, "The Basis of Legal Sovereignty" [1955] C.L.J. 172, and review in [1954] C.L.J. 265; O. Hood Phillips, *Reform of the Constitution* (1970), Chaps. 1 and 7.

[53] Dicey, *op. cit.* pp. 39–40; quoted by Wild C.J. in *Fitzgerald v. Muldoon* [1976] 1 N.Z.L.R. 615, 622.

[54] 4 Inst. 36.

[55] Bl.Comm., I. 160–162.

[56] [1983] Ch.77, 86. The reference to an English court is explicable by the fact that the learned Vice-Chancellor is an English judge and was clearly not meant to imply that a different rule applies in Scotland: but see *post*, para. 4–008.

[57] On the definition of Act of Parliament, see *post*, para. 4–025 *et seq.*

[58] Parliament Act 1660.

[59] Crown and Parliament Recognition Act 1689.

[60] Repealed by the Statute Law Revision Act 1964.

full power and authority of Parliament to make laws binding on the American colonies, was merely declaratory.

3–014 On the other hand a state may be a sovereign state and yet have a legislature which is not unlimited and courts with jurisdiction to review its legislation. Thus the 1947 Constitution of Ceylon (an independent sovereign state within the Commonwealth) required for its amendment the Speaker's certificate that not less than two-thirds of the members of the House of Representatives voted in favour. It was held by the Privy Council in *Bribery Commissioner v. Ranasinghe*[61] that the Bribery Tribunal by which the respondent had been convicted was not lawfully appointed, because the Act under which it was appointed was passed by the ordinary legislative procedure, whereas it required a constitutional amendment relating to the appointment of judicial officers. This is also the principle that emerges from the South African case *Harris v. Minister of the Interior* ("the Cape coloured voters case"),[62] in so far as that case is relevant to the present context. The question in issue was the validity of the Separate Representation of Voters Act 1951, which was passed by the two Houses sitting separately and thus infringed section 152 of the South Africa Act 1909, which Act formed the basis of the Constitution. This section provided that no repeal or alteration of section 35 (qualification of Cape coloured voters) should be valid unless the Bill was passed by both Houses sitting together and the third reading was agreed to by not less than two-thirds of the members of both Houses. It was held by the Appellate Division of the Supreme Court of South Africa that the Separate Representation of Voters Act was invalid as the South Africa Act was a superior law to the Union Parliament, which it created. Whether the Union Parliament was called a "sovereign" legislature was a matter of definition: the Parliament functioning bicamerally was restricted in certain respects, but anything it could not do in that way could be done by a two- thirds majority in the Parliament functioning unicamerally.[63]

The legislative supremacy of the British Parliament, as well as being a legal concept, is also the result of political history and is ultimately based on fact, that is, general recognition by the people and the courts. It is therefore at the same time a legal and a political principle.[64]

3–015 The doctrine of the legislative supremacy of Parliament has been so firmly established that it has scarcely been challenged in the courts. When Canon Selwyn made an application questioning the validity of the Royal Assent to the Irish Church Disestablishment Act 1869 as being inconsistent with the Coronation Oath and the Act of Settlement, Cockburn C.J. and Blackburn J. in refusing the application said: "There is no judicial body in the country by which the validity of an act of parliament can be questioned. An act of the legislature is superior in authority to any court of law . . . , and no court could pronounce a judgment as to the validity of an act of parliament" (*ex p. Selwyn*).[65] In *Vauxhall*

[61] [1965] A.C. 172. Ceylon is now called Sri Lanka and has a new constitution.

[62] [1952] (2) A.D. 428; *sub nom. Harris v. Dönges* [1952] 1 T.L.R. 1245. See D. V. Cowen, *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act* (1951).

[63] The desired legislation was eventually passed by changing the composition of the Senate; see *Collins v. Minister of the Interior* [1957] (1) A.D. 552.

[64] Professor H. L. A. Hart calls it "the ultimate rule of recognition," which may be regarded both as an external statement of fact and as an internal criterion of validity; *The Concept of Law*, pp. 107–108.

[65] (1872) 36 J.P. 54.

Estates Ltd v. Liverpool Corporation[66] and *Ellen Street Estates Ltd v. Minister of Health*[67] counsel unsuccessfully argued that a later Act could not repeal the provisions of an earlier Act, with which it was inconsistent, except by express words. That contention, said Scrutton L.J. in the latter case, "is absolutely contrary to the constitutional position." In *Hall v. Hall*[68] the plaintiff claimed that the Probate Act 1857, on which the defendant based the title to a house, had not really received the Royal Assent as he challenged the Royal Succession from the days of James II. The county court judge said he could not ignore a statute that had been acted on for more than eighty years, and that in any event Parliament could validate all titles by passing an Indemnity Act.

In *R. v. Jordan*[69] J, who had been sentenced to imprisonment for offences under the Race Relations Act 1965, applied for legal aid to enable him to apply for habeas corpus on the ground that the Race Relations Act was invalid as being in curtailment of free speech. The Divisional Court, dismissing the application, held that Parliament was supreme and there was no power in the courts to question the validity of an Act of Parliament, adding that the ground of the application was completely unarguable. In *Cheney v. Conn*[70] a taxpayer contended that the Finance Act 1964 conflicted with the Geneva Conventions incorporated in the Geneva Conventions Act 1957, and that it was contrary to international law that part of his tax should go to the construction of nuclear weapons. Ungoed-Thomas J. held that there was no conflict between the two Acts; the Finance Act prevailed over international convenions, which are an executive act of the Crown; and that what Parliament enacts cannot be unlawful.

In *Martin v. O'Sullivan*[71] Nourse J. and the Court of Appeal refused to consider a claim that proceedings in the House of Commons during the passage of the bill which became the Social Security Act 1975 were invalid because the members of the House were all disqualified from sitting. There was, according to the judges, a fundamental answer to this case, namely, that a court could only look at the parliamentary roll of statutes and if it appeared that an Act had passed both Houses of Parliament and had received the Royal Assent it could look no further. **3–016**

In an appeal to the House of Lords in *Edinburgh and Dalkeith Ry v. Wauchope*,[72] where it had been suggested in the Scottish court below that a private Act might not be applicable against a person whose rights were affected but who had not been given prior notice, Lord Campbell pronounced the following dictum: "All that a Court of Justice can do is to look to the Parliament roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can enquire 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." In another case concerning a private Act, *Lee v. Bude and Torrington*

[66] [1932] 1 K.B. 733 (D.C.) *post*, para. 4–004.
[67] [1934] 1 K.B. 590 (C.A.) *post*, para. 4–004.
[68] (1944) 88 S.J. 383 (Hereford C.C.). The judgment as reported appears to beg the question.
[69] [1967] Crim.L.R. 483; 9 J.P.Supp. 48.
[70] [1968] 1 W.L.R. 242.
[71] [1982] S.T.C. 416; [1984] S.T.C. 258, CA.
[72] (1842) 8 Cl. & F. 710; cited and followed, *Sillars v. Smith* 1982 S.L.T. 539; *post*, para. 4–009.

Ry.,[73] Willes J. said: "Acts of Parliament are the law of the land and we do not sit as a Court of Appeal from Parliament."[74]

3–017 The matter was fully reviewed again in relation to a private Act of Parliament by the House of Lords in *Pickin v. British Railways Board*,[75] where Pickin pleaded that the British Railways Act 1968 (c. xxxiv) contained a false recital, that the Board had misled Parliament by obtaining the Act *ex parte* as an unopposed Bill, and that it was therefore ineffective to deprive him of his land. Their Lordships held unanimously that the courts could not go behind private Acts to show that a provision should not be enforced, or examine proceedings in Parliament to show that the Board by fraudulently misleading Parliament, caused him loss. Lord Reid said that the law was correctly stated by Lord Campbell in *Edinburgh v. Dalkeith Ry v. Wauchope*[76]: although that was *obiter* [*semble*, as regards public Acts] no one since 1842 had doubted it. The court had no concern with the manner in which Parliament, or its officers in carrying out its standing orders, performed their functions.

Examples of subject-matter

3–018 Examples of the positive aspect of the legislative supremacy of Parliament as regards subject-matter are the Septennial Act 1715, extending the maximum duration of the existing and future Parliaments from three to seven years; the Parliament Acts 1911 and 1949, restricting the power of the House of Lords to withhold its assent to public Bills (especially money Bills), and reducing the maximum duration of a Parliament to five years; the prolongation of its own life

[73] (1871) L.R. & C.P. 576.

[74] Other judicial dicta that may be cited are: "The supremacy of Parliament. ... That sovereign power can make and unmake the law": *per* Lord Denman C.J. in *Stockdale v. Hansard* (1839) 9 Ad. & E. 1; "Whereas ... you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament": *per* Lord Herschell L.C. in *Institute of Patent Agents v. Lockwood* [1894] A.C. 347, 359; "For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme and we are bound to give effect to its terms." *per* Lord Dunedin (Lord Justice General) in *Mortensen v. Peters* (1906) 8 F.(J.C.) 93, 100; "Parliament is omnipotent": *per* Vaughan Williams L.J. in *R. v. Local Government Board, ex p. Arlidge* [1914] 1 K.B. 160, 175–176; "Nothing we do or say could in any degree affect the complete power of the legislature by Act of Parliament to carry out the present scheme, or any other scheme": *per* Atkin L.J. in *R. v. Electricity Commissioners* [1924] 1 K.B. 171; "Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament ... is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given": *per* Lord Wright in *Liversidge v. Anderson* [1942] A.C. 206; "Parliament has absolute sovereignty and can make new legal creatures if it likes": *per* Scott L.J. in *National Union of General and Municipal Workers v. Gillian* [1946] 1 K.B. 81; "Parliament could do anything ... being omnipotent": *per* Harman J. in *Hammersmith Borough Council v. Boundary Commission, The Times*, December 15, 1954. "The supremacy of Parliament ... it is not for the Court to say that a parliamentary enactment, the highest law in this country, is illegal": *per* Ungoed—Thomas J. in *Cheney v. Conn* [1968] 1 W.L.R. 242, 247; "That central feature of our constitution, the sovereignty of Parliament." *per* Lord Simon of Glaisdale in *Jones v. Secretary of State for Social Services* [1972] A.C. 944: "The supremacy of Parliament was finally demonstrated by the revolution of 1688"; *per* Lord Reid: "parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament." *per* Lord Simon of Glaisdale.: *Pickin v. British Railways Board, supra*. "Parliament has a legally unchallengeable right to make whatever law it thinks right"; *R. v. Home Secretary ex p. Fire Brigades Union* [1995] 2 A.C. 513 *per* Lord Mustill.

[75] [1974] A.C. 765. See P. Wallington, "Sovereignty Regained" (1974) 37 M.L.R. 686; and Chap. 11, *post*, for procedure in Private Bills.

[76] *Supra*.

by annual Acts to eight years by the Parliament that passed the Act of 1911,[77] and annual prolongations during the last war of the life of the Parliament that was elected in 1935[78]; the Act of Settlement 1700, which regulated the succession to the throne on the failure of Queen Anne's issue, and His Majesty's Declaration of Abdication Act 1936, which varied that succession; the Union with Scotland Act 1706, by which the English Parliament extinguished itself and transferred its authority to the new Parliament of Great Britain; the Government of Ireland Act 1920 and the Irish Free State Agreement Act 1922, dissolving the union between Great Britain and Ireland (which had been created by the Union with Ireland Act 1800), setting up a subordinate legislature in Northern Ireland[79] and giving Dominion status to the Irish Free State[80]; the Defence of the Realm Acts and Emergency Powers (Defence) Acts of the two World Wars, conferring extremely wide—though temporary—powers on the government.[81] Parliament may legislate with retroactive effect if it wishes. Although it is presumed that legislation is not intended to be retrospective[82] "If Parliament wishes to enact retrospectively it can do so, provided it uses sufficiently plain words. The intention to legislate retrospectively need not be expressed provided that there is a very clear implication to that effect."[83] Acts of Indemnity may legalise, for example, acts which when they were done were illegal, such as the Housing Finance (Special Provisions) Act 1975, removing further surcharges arising out of the failure of the Clay Cross councillors to implement the Housing Finance Act 1972 and terminating any local electoral disqualification arising from such surcharges.[84] Invalid delegated legislation may be retrospectively validated.[85] Other notable examples of retrospective legislation are the War Damage Act 1965,[86] and the Northern Ireland Act 1972 legalising retrospectively to 1920 the use of troops in Northern Ireland for certain civilian purposes.[87]

The absence of "fundamental" laws means, as we have seen in Chapter 2, that the courts have no jurisdiction to declare an Act of Parliament void as being *ultra vires* or "unconstitutional."

[77] Parliament and Local Elections Acts 1916, 1917 and 1918.
[78] Prolongation of Parliament Acts 1941, 1942, 1943 and 1944.
[79] *ante* p. 18.
[80] Recognised as the independent Republic of Ireland by the Ireland Act 1949.
[81] See especially, Emergency Powers (Defence) No. 2 Act 1940, authorising Defence Regulations to make provision "for requiring persons to place themselves, their services and their property at the disposal of His Majesty."
[82] *Waddington v. Miah* [1974] 1 W.L.R. 683, HL.
[83] *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd* [1983] 1 W.L.R. 1026, 1030 *per* Sir John Donaldson M.R. See also *Azam v. Secretary of State for the Home Dept.* [1974] A.C. 18. The interpretation of legislation which retrospectively imposed criminal liability would in appropriate proceedings, be subject to the rule laid down in section 3 of the Human Rights Act 1998; *post* 22–016 (Art. 7 prevents retrospective criminal legislation).
[84] J. E. Trice, "Rule of Law: Clay Cross," *New Law Journal*, April 4, 1974.
[85] National Health Service (Invalid Direction) Act 1980.
[86] Reversing the decision of the House of Lords as regards war damage in *Burmah Oil Co v. Lord Advocate* [1965] A.C. 75.
[87] Other examples of retrospective legislation include Marriage Validation Acts, the War Charges (Validity) Act 1925, the Truck Act 1940, the Charitable Trusts (Validation) Act 1954, the Wireless Telegraphy (Validation of Charges) Act 1954, the Finance Act 1960, s.39(5) ("the foregoing provisions of this section shall be deemed always to have had effect"); Finance Act 1984, s.8 (increase of surtax rates for 1972–1973). The Social Security (Miscellaneous Provisions) Act 1977, s.14(8); noted [1979] P.L.58. The Representation of the People Act 1981, s.1, the Employment Act 1982, s.2 and the London Regional Transport (Amendment) Act 1985.

Composition

3–019 Parliament is also free to alter its own composition. The composition of the House of Commons may be affected by redistribution of seats, alteration of the franchise or changes in the disqualifications for membership. The composition of the House of Lords has been affected by extending the qualification of Scottish peers, and the creation of life peerages and Lords of Appeal. Parliament could confine membership of the House of Lords to life peers. Indeed, Parliament could abolish the House of Lords, perhaps without its own consent under the provisions of the Parliament Act[88] and it could abolish the monarchy, though that would require the Royal Assent. It would be idle to speculate on the abolition of the House of Commons, as such an event postulates a completely different kind of constitution.

Persons and areas

3–020 With regard to persons and areas, since Parliament is the Parliament of the United Kingdom its Acts are presumed to apply to the United Kingdom and not to extend further. If an Act is not intended to apply to Wales,[89] Scotland or Northern Ireland, or if it is intended to apply outside the United Kingdom, *e.g.* to a colony, this must be expressly stated.[90] Thus the European Communities Act 1972 includes the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar. Parliament can define the country's territory,[91] fishery limits,[92] and continental shelf.[93] It can penalise offences of an international or Community character,[94] the broadcasting of election propaganda from abroad,[95] the operation of private radio stations outside territorial waters,[96] and the destruction of animals and plants in Antarctica.[97]

The general principle, however, is expressed in the words of Donaldson L.J. in *R. v. West Yorkshire Coroner ex p. Smith*,[98]

> "Every Parliamentary draftsman writes on paper which bears the legend, albeit in invisible ink, 'This Act shall not have extra-territorial effect save to the extent that it expressly so provides.' The court knows this and they read it into every statute."

The presumption against a parliamentary intention to make acts done abroad by aliens triable as criminal offences by British courts is particularly strong.[99] The presumption in the case of a British subject is less strong.[1]

[88] But see Peter Mirfield, "Can the House of Lords Lawfully be Abolished?" (1979) 95 L.Q.R. 36; George Winterton, "Is the House of Lords Immortal?" (1979) 95 L.Q.R. 386.

[89] References to "England" in Acts of Parliament after 1967 no longer include Wales: Welsh Language Act 1967.

[90] *R. v. Martin* [1956] 2 Q.B. 272, *per* Devlin J.

[91] Island of Rockall Act 1972.

[92] Fishery Limits Act 1976, extending British fishing limits to 200 miles from the territorial sea baselines of the United Kingdom.

[93] Continental Shelf Act 1964.

[94] Aviation Security Act 1982; European Communities Act 1972, s.11.

[95] Representation of the People Act 1983, s.92.

[96] Marine etc. Broadcasting (Offences) Act 1967; passed as a consequence of *R. v. Kent Justices, ex p. Lye* [1967] 2 K.B. 153 (D.C.); *Post Office v. Estuary Radio* [1967] 1 W.L.R. 1396, C.A.

[97] Antarctic Treaty Act 1967. Acts of this kind are usually based on international treaties.

[98] [1983] Q.B. 335.

[99] *Air India v. Wiggins* [1980] 1 W.L.R. 815, HL.

[1] *Re Tucker* [1987] 1 W.L.R. 928 (Bankruptcy proceedings).

For obvious reasons Parliament does not generally attempt to legislate with regard to acts done in foreign territory.[2] Under the Foreign Jurisdiction Acts 1890–1913, however, the Crown has power to make laws for overseas territories over which it has acquired jurisdiction. Criminal jurisdiction may be exercised over British citizens for acts committed abroad, for example, in the cases of murder, manslaughter and bigamy, under the Offences Against the Person Act 1861, ss.9 and 57 and in the case of any crime under the Merchant Shipping Act 1894, s.686(1).[3] Increasingly it is necessary to have resort to legislation with extra-territorial effect to deal with terrorism and give effect to international conventions aimed at its eradication.[4] An unusual example of legislation with extra-territorial effect is the Protection of Trading Interests Act 1980 under which British firms trading abroad may be guilty of criminal offences if, contrary to a direction of the Secretary of State, they comply with instructions from foreign courts or officials when to do so would in the Secretary of State's view damage the trading interests of the United Kingdom.[5] **3–021**

The application of legislation passed by the British Parliament to independent members of the Commonwealth is discussed later in Chapter 37.

Practical limitations

There are in practice, of course, factors which limit Parliament's ability to pass any laws it likes, or, rather, which limit the choice of measures that the government puts before Parliament for approval. These factors are the concern of the political scientist rather than the student of constitutional law, but it is convenient to mention some of the more important ones briefly here. **3–022**

The mandate or party manifesto

The government is expected to carry out the policy (if any) indicated at the last general election and is not expected to act contrary to that policy, according to the general and rather vague doctrine of the "mandate," which seems to have been invented in the latter part of the nineteenth century. But a government acts for the whole people, not only those who voted for their party. Ministers are servants of the Crown and members of Parliament are not delegates. The government must remain flexible and deal with emergencies, so that it may be its duty to ignore or even to act against the mandate. In any case, a government that has been in power for some time must meet changing circumstances in all fields of the national life such as defence and the state of the economy, and is not expected to mark time because it has exhausted its "mandate," which may have been expressed in very general terms and which few electors (except professional politicians) read. In Sir Ivor Jennings's words: "The doctrine of the mandate is part of the political cant. It is a stick used by the Opposition to beat the Government. . . . The doctrine is, however, of importance. Though it must necessarily be vague and its operation a matter of dispute, it is recognised to exist."[6] (*A fortiori* a local **3–023**

[2] With regard to independent members of the Commonwealth see *post*, Chap. 36.
[3] *R. v. Kelly* [1982] A.C. 665.
[4] Aviation Security Act 1982; Suppression of Terrorism Act 1978; Internationally Protected Persons Act 1978; Taking of Hostages Act 1982.
[5] See further, *British Airways Bd v. Laker Airways Ltd* [1985] A.C. 58.
[6] Jennings, *Cabinet Government* (3rd ed.), p. 505. See also C. S. Emden, *The People and the Constitution* (2nd ed.); G. H. L. Le May, "Parliament, the Constitution and the 'Doctrine of the Mandate'" (1957) 74 *South African Law Journal* 33.

authority cannot rely on the terms of its manifesto to avoid exercising discretionary powers vested in it in a reasonable manner.[7])

Public opinion

3–024 Parliament must also take account of the even vaguer concept of "public opinion." Public opinion expresses itself through the press, radio, television, trade unions, industrialists, local councillors, party organisations and in countless other ways. The manner in which it is interpreted by the government and other members of Parliament must obviously affect Parliament's activities, including the passing of legislation. The moral ideas and ideals of the community, especially as expressed through the leaders of the Churches, make their influence felt. The strength of the Opposition—although *ex hypothesi* a minority in the Commons—is a variable factor, but in our system of parliamentary government the official Opposition must always be taken into account. The government's legislative proposals must stand up to debate, the debates will be reported in the media or be available in *Hansard*, and the government must remember that within a few years at most it will have to face another general election.

Consultation of organised interests

3–025 In modern times the government does not in practice introduce legislation affecting well-defined sections of the community without first consulting organisations of the groups specially concerned or interested ("pressure groups"). In matters affecting industry or trade, for example, the Minister proposing to initiate legislation would consult the employers' associations, chambers of commerce and the trade unions, notably the officers of the Trade Unions Congress and the Confederation of British Industry. The National Farmers Union would be consulted in matters affecting agriculture. Any reorganisation of local government would involve discussions with the associations representing the different kinds of local authorities. Professional associations would expect to be consulted in any matter that concerned their professions. Thus the introduction of the National Health Service would have been impossible without the co-operation of the General Medical Council, and reforms in legal procedure would involve discussions with the Bar Council and the Law Society. Societies promoting causes, such as the Howard League for Penal Reform and the R.S.P.C.A., would also be consulted where appropriate.[8]

There is no general legal duty to consult. Still less is the Minister bound to accept the advice given, which will often be conflicting anyway. The practice is to discuss the general principles of the proposed legislation, rather than the draft Bill.[9]

International Law

3–026 The customary principles of International law are said to be part of the law of England,[10] but treaties do not automatically become part of English law.[11] Thus, according to the majority view in *R. v. Bow Street Magistrate ex p. Pinochet (No*

[7] *Bromley L.B.C. v. G.L.C.* [1983] 1 A.C. 768. But *cf. Secretary of State for Education and Science v. Tameside M.B.C.* [1977] A.C. 1014, HL.
[8] See F. E. Finer, *Anonymous Empire* (2nd ed.).
[9] Sir Ivor Jennings, *Parliament* (2nd ed.), Chap. 7.
[10] For a discussion of the doctrines of "incorporation" and "transformation," see *per* Lord Denning M.R. in *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] Q.B. 529, CA.
[11] *McWhirter v. Att.-Gen.* [1972] C.M.L.R. 882; CA *per* Lord Denning M.R. *post*, para. 15–028.

3),[12] the jurisdiction of the English courts rested on the Criminal Justice Act 1988, s.134, not on the United Kingdom's adherence to the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. International law as such does not bind Parliament, although the activities of Parliament are in fact restrained by considerations of international law and the comity of nations.[13] There is a presumption that Parliament does not intend to legislate contrary to the principles of international law, and a statute would be interpreted as far as possible so as not to conflict with them[14]; but the legal power of Parliament to make laws contrary thereto remains,[15] and redress would have to be sought by diplomatic action and not through the courts. Where a statute is clear and unambiguous the "comity of nations" is irrelevant (*per* Lord Porter in *Theophile v. Solicitor-General*[16]), its provisions must be followed even if they are contrary to international law (*per* Viscount Simonds in *I.R.C. v. Collco Dealings Ltd*),[17] for the sovereign power of Parliament extends even to breaking treaties (*per* Diplock L.J. in *Salomon v. Customs and Excise Commissioners*[18]).

3–027 This principle is well illustrated by the case of *Mortensen v. Peters*.[19] Mortensen, a Danish citizen and captain of a Norwegian trawler, was convicted by the High Court of Justiciary of infringing the Herring Fishery (Scotland) Act 1889, which forbad trawling in the Moray Firth, although the acts done took place outside the three-mile limit. Diplomatic representations were made to the Foreign Office, and the Crown remitted the fine, although it recognised that the Court was right to apply the Act of Parliament. Shortly afterwards an Act was passed[20] providing that prosecutions should not be brought under the Act of 1889 for trawling outside the three-mile limit, but that fish caught by prohibited methods might not be landed or sold in the United Kingdom. And in *R. v. Secretary of State for Home Department, ex p. Thakrar*,[21] where an Asian British protected person, who had been expelled from Uganda, claimed the right to enter the United Kingdom, the Court of Appeal held that any rule of international law requiring a state to receive its nationals expelled by another State was expressly excluded by the Immigration Act 1971.

Community Law and Human Rights

3–028 The impact of Community Law on the traditional doctrine of parliamentary supremacy will be discussed in Chapters 4 and 7. The position of the European Convention on Human Rights will be discussed in Chapter 22.

[12] [2000] 1 A.C. 147, HL.
[13] See *Cheney v. Conn* [1968] 1 W.L.R. 242, *ante*, p. 52, *Chung Chi Cheung v. The King* [1939] A.C. 160, 167–168, PC *per* Lord Atkin; Holdsworth, "The Relation of English Law to International Law" *Essays in Law and History*, p. 260; *History of English Law*, Vol. XIV, pp. 22–33.
[14] *The Zamora* [1916] A.C. 77, PC; *Co-operative Committee on Japanese Canadians v. Att.-Gen. for Canada* [1974] A.C. 87, 104, PC; *cf. Polites v. The Commonwealth* (1945) 70 C.L.R. 60 (High Ct. Austr.).
[15] *cf. Sovereignty within the Law*, by Arthur Larson, C. Wilfred Jenks and Others (1966).
[16] [1950] A.C. 186, 195.
[17] [1962] A.C. 1, HL.
[18] [1967] 2 Q.B. 116, CA.
[19] (1906), 8 F 93, *per* Lord Dunedin, Lord-Justice General. The ship was in fact British owned, but was given a foreign master and registration with a view to evading the Scottish fishery regulations.
[20] Trawling in Prohibited Areas Prevention Act 1909.
[21] [1974] Q.B. 684; anyway, such a rule between states could not be invoked by an individual.

CHAPTER 4

PARLIAMENTARY SUPREMACY II: PROBLEM OF SELF-LIMITATION[1]

The problem of self-limitation

4–001 The problem raised in this chapter is that known to logicians as self-referring or reflexive propositions. The view put forward here is that it is impracticable for a legislature to limit itself as to the laws it shall make[2] or repeal unless it is empowered, expressly or impliedly, so to limit itself by some "higher law," that is, some (logically and historically) prior law *not laid down by itself*.[3] If our courts were to recognise any limitation on the power of Parliament to pass statutes applicable within the United Kingdom, dealing with (say) the constitutional status of Northern Ireland or Community law or civil rights, there would have to be some juridical reason for such decision. In British constitutional law, what could be such a reason?

One of three possible higher laws might be suggested: (i) a supreme Constitution, that is, a written Constitution (not enacted by Parliament itself) containing provisions entrenched against alteration by (ordinary) Act of Parliament; (ii) the primacy of International law, including Community treaties, or (iii) natural law. However, we have seen in Chapter 2 that the first (a written Constitution with entrenched provisions) does not exist. As Lord Pearce said in *Bribery Commissioner v. Ranasinghe*[4]: "in the Constitution of the United Kingdom there is no governing instrument which prescribes the lawmaking powers and the forms which are essential to those powers." In Chapter 3 we have seen that judicial authority is strongly against the second (primacy of International law, including treaties), and there is no judicial decision in favour of the third (natural law).

The question may be illustrated in relation, first, to the subject-matter of legislation, and, secondly, to the "manner and form" of legislation.

[1] Dicey *Law of the Constitution* (10th ed.), pp. 64–70; Anson, *Law and Custom of the Constitution*, Vol. 1 (5th ed. Gwyer), pp. 7–8; H. W. R. Wade, "The Basis of *Legal Sovereignty* [1955] C.L.J. 172, and review in [1954] C.L.J. 265; Hood Phillips, *Reform of the Constitution* (1970), pp. 151–156; "Self-Limitation by the United Kingdom Parliament" (1975) 2 *Hastings Constitutional Law Quarterly*, 443.

cf. Sir Ivor Jennings, *The Law and the Constitution* (5th ed.), Chap. 4; D. V. Cowen, "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa" (1952) 15 M.L.R. 282; (1953) 16 M.L.R. 273; B. Beinart, Parliament and the Courts" [1954] *South African Law Review* 135; G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957), Chap. 4, and *Constitutional Theory* (1971) Chap. 3; R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed., 1964), Chap. 1; J. D. B. Mitchell, *Constitutional Law* (2nd ed., 1968), Chap. 4; George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 L.Q.R. 591.

[2] The Taxation of Colonies Act 1778, for removing all doubts and apprehensions, provided, that after the passing of the Act Parliament would not impose any taxes on the colonies in North America and the West Indies, except such duties as might be expedient for the regulation of commerce and for the use of the colony concerned.

[3] See Alf Ross, "On Self-Reference and a Puzzle of Constitutional Law" (1969) 78 *Mind*; Hans Kelsen, *General Theory of Law and State* (1945), pp. 124–128. *cf.* H. L. A. Hart, *The Concept of Law* (2nd ed., 1994) p. 149 *et seq.* distinguishing between *continuing* omnipotence (sovereignty) and *self-embracing* omnipotence (sovereignty): "it is clear that the presently accepted rule is one of continuing sovereignty so that Parliament cannot protect its statutes from repeal."

[4] [1965] A.C. 172, PC.

I. Subject-Matter of Legislation

Repeal or amendment

The Treason Act 1495, which was passed to protect subjects who had served a *de facto* king from being impeached or attainted for treason under some future *de jure* king, either by the course of law or by Act of Parliament, provided that if any such Act of Attainder were to be passed, it should be void and of no effect. Bacon wrote[5] that the latter provision was illusory. "For a supreme and absolute power cannot conclude itself, neither can that which is in its nature revocable be made fixed"; and Coke wrote[6] that the Act would be applicable to ordinary prosecutions for treason, but would not restrain any parliamentary attainder. Henry VIII procured an Act in 1536[7] enabling future kings to revoke any Acts passed while they were under the age of 24 years. This Act was repealed in the first year of Edward VI,[8] when he was 10 years old, the royal assent being given by the Protector, Somerset, and the Council consisting of Henry's executors. **4–002**

Coke introduces a section of his *Institutes* with the heading: "Acts against the power of the Parliament subsequent bind not ... for it is a matter in the law of the Parliament, *quod leges posteriores priores contrarias abrogant.*"[9] In *Godden v. Hales*[10] Herbert C.J. said: "if an Act of Parliament had a clause in it that it should never be repealed, yet without question, the same power that made it may repeal it." It is true that Parliament apparently thought it necessary in 1705 to pass two Acts[11] in order to naturalise Princess Sophia, Electress of Hanover (who was abroad), without her having to take the oath of allegiance at Westminster as required by the Naturalisation Act 1609; but it is submitted that one Act would have been sufficient, the Act of 1609 being regarded not as binding Parliament itself until repealed or amended but as being directed towards petitioners and officials. The Meeting of Parliament 1694 provided: "That from henceforth no Parliament whatsoever ... shall have any continuance longer than for three years only at the farthest." Yet at the time of the Jacobite rising Parliament enacted in the Septennial Act 1715[12]; "That this present Parliament and all Parliaments that shall at any time henceforth be called assembled or held shall and may have continuance for seven years and no longer" unless sooner dissolved by the Crown. This extension of the life of the existing Parliament as well as future Parliaments did in fact meet considerable opposition in both Houses, and the controversy over it outside Parliament continued for many years.

Blackstone, who quoted Coke's statement (*supra*), says[13]: "Acts of Parliament derogatory from the power of subsequent parliaments bind not. ... Because the **4–003**

[5] *History of Henry VII* (1622), p. 133.
[6] Co. Inst. 43.
[7] 28 Hen. VIII, c.17.
[8] 1 Edw. VI, c. 11. The repealing Act still allowed the king to revoke statutes passed while he was under 24 years of age, but such revocation was not to have retrospective effect.
[9] 2 Co. Inst. 685: "Later laws abrogate prior laws that are contrary to them"; and *Dr Foster's Case* (1615), 11 Co.Rep. 56b, 62b.
[10] (1686) 11 St.Tr. 1165, 1197.
[11] 4 & 5 Anne, c. 14 and c. 16. See *Att.-Gen. v. Prince Ernest Augustus of Hanover* [1957] A.C. 436, *per* Viscount Simonds.
[12] Amended by Parliament Act 1911, s.7, reducing the maximum life of Parliament to five years.
[13] 1 Bl. Comm. 90–91.

legislature being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislators. 'When you repeal the law itself,' says he, 'you at the same time repeal the prohibitory clause, which guards against such repeal.'" Dicey[14] followed this tradition. Many readers have formed the view that it is an exception to what these writers called the "sovereignty" of Parliament; but the apparent paradox is verbal only, as will be seen if the proposition is expressed the other way round: "Parliament is not bound by its predecessors." Indeed the marginal note in Coke's *Institutes* reads: "Subsequent Parliaments cannot be restrained by the former."

As has been suggested in the previous chapter, it is preferable to use the expression "legislative supremacy" rather than "sovereignty" in relation to Parliament's lawmaking power. In either event the power of *express* repeal is so well established that it has never been contested in the courts. "It is good constitutional doctrine," said Lord Reid extrajudicially,[15] "that Parliament cannot bind its successors."

4–004 There are two cases, however, in which it has been argued by counsel that a provision in an earlier Act precluded *implied* repeal in a later Act. The Acquisition of Land (Assessment of Compensation) Act 1919, s.7(1), stated: "The provisions of the Act or order by which the land is authorised to be acquired ... shall ... have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect. ..." The marginal note (which is not binding) to section 7 reads: "Effect of Act on existing enactments." In *Vauxhall Estates Ltd v. Liverpool Corporation*[16] the plaintiffs claimed that compensation for land compulsorily acquired from them should be assessed on the basis of the Act of 1919 and not on the less favourable terms provided by the Housing Act 1925. The Divisional Court held that even if the Act of 1919 could be construed as intended to govern future as well as existing Acts assessing compensation, which construction was doubtful, yet the relevant provisions must be regarded as impliedly overridden by the inconsistent provisions of the Act of 1925. In *Ellen Street Estates Ltd v. Minister of Health*[17] a similar argument on the relation between the provisions for compensation contained in the Act of 1919 and the Housing Act 1925 and 1930 was raised in the Court of Appeal. Here the decision that the Housing Acts impliedly repealed the Act of 1919 in so far as they were inconsistent with it was part of the ratio. "The Legislature cannot, according to our constitution," said Maugham L.J., "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."

[14] *loc. cit.*
[15] "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22, 25.
[16] [1932] 1 K.B. 733.
[17] [1934] 1 K.B. 590; approving *Vauxhall Estates Ltd v. Liverpool Corporation supra*, *cf.* F.M. Auburn, "Trends in Comparative Constitutional Law" (1972) 35 M.L.R. 129.

Three topics call for special treatment in this context, namely, Acts of Union, Independence Acts conferring independence on countries that formerly came under the authority of Parliament, and the European Communities Act 1972.

Acts of Union

Union with Ireland

The Union with Ireland was negotiated by commissioners,[18] and based on Acts of the British and Irish Parliaments[19] in response to messages from the Crown. The Union with Ireland Act 1800, passed by the British Parliament, provided that the Kingdoms of Great Britain and Ireland should be united "for ever" into one Kingdom, by the name of the United Kingdom of Great Britain and Ireland; and that the United Kingdom should be represented in one and the same Parliament. It further provided that the government and doctrine of the United Church of England and Ireland should be and should remain "for ever" assimilated to those of the existing Church of England, and that the continuance of the United Church should be deemed "an essential and fundamental part" of the Union of the two Kingdoms. Nevertheless, the Church of Ireland was disestablished by the Irish Church Act 1869,[20] some 50 years before the political Union itself was partly dissolved by the creation of the Irish Free State. Although there was much opposition in this country to the disestablishment of the Church of Ireland, it does not seem to have been based on the theory that the union of the Churches was legally indissoluble. Similarly, the difficulties preceding the separation of the Irish Free State from the United Kingdom by the Irish Free State (Constitution) Act 1922 were political and not legal. 4–005

When the secession of Eire (the Republic of Ireland) from the Commonwealth was recognised by the United Kingdom Parliament in the Ireland Act 1949 the following declaration was inserted in section 1(2): "It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland."

This provision was confirmed by the Northern Ireland (Temporary) Provisions Act 1972, which suspended the Parliament of Northern Ireland. Then the Northern Ireland Constitution Act 1973 abolished the Northern Ireland Parliament and replaced it by an Assembly, declaring and affirming in section 1 that in no event would Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for this purpose.[21] The Northern Ireland Act 1974 then abolished the Assembly, provided for the holding of a constitutional Convention (now extinct), and preserved the declaration in the 1973 Act with the provision for a referendum.[22] It appears that: (i) if the requirement in the 1949 Act for the consent of the Northern Ireland Parliament

[18] There was no formal treaty between Great Britain and Ireland.
[19] Union with Ireland Act 1800.
[20] *ex p. Selwyn* (1872) 36 J.P. 54; *ante*, para. 3–015
[21] A referendum was held in Northern Ireland in 1973 and a large majority of those voting favoured staying in the United Kingdom.
[22] The subsequent legislative history of Northern Ireland is dealt with in Chap. 5.

were binding on the United Kingdom Parliament, the provisions of the 1973 Act could not have been passed in the proper form; (ii) if the declaration in the 1949 Act were binding on Parliament, there would be no need to confirm it in 1972; and (iii) if the declaration in the 1973 Act were binding there would be no need to confirm it in 1974.

These declarations, it is submitted, should be regarded as expressions of intention and establishing a constitutional convention, based on agreement and analogous to that applying to self-governing colonies.[23]

Union with Scotland[24]

4–006 The Union was preceded by a treaty negotiated by the Parliaments of England and Scotland through commissioners. The Articles of Union were ratified first by the Scottish Parliament ("Estates") which also passed Acts for securing the Presbyterian Church government and concerning the election of Scottish representatives to the Parliament of Great Britain, which Acts were to be part of the terms of the Union. Then the English Parliament ratified the terms approved by the Scottish Estates, together with an Act for the security of the Church of England. While Englishmen refer to the English Act of Union, Scotsmen tend to refer to the "Treaty."

4–007 The Union with Scotland Act 1706, passed by the English Parliament, provided that the two Kingdoms of England and Scotland should for ever after be united into one Kingdom by the name of Great Britain (Art. I); the United Kingdom of Great Britain should "be represented by one and the same Parliament" to be styled the Parliament of Great Britain (Art. III); that (subject to a common public law) Scots law was to remain as before but alterable by the Parliament of Great Britain, except that no alterations should be made "in laws which concern private right except for evident utility of the subjects within Scotland" (Art. XVIII). Article XIX preserved the Court of Session and Court of Justiciary as superior Scottish courts in all time coming, subject to regulations made by the Parliament of Great Britain for better administration of justice. The Act incorporated an Act for securing the Protestant religion and Presbyterian Church governments in Scotland, paragraph 2 of which required professors of Scottish universities to subscribe to the Confession of Faith (a religious test), and paragraph 4 of which states that this Act with the establishment therein contained "shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two Kingdoms without any alteration thereof or derogation thereto in any sort for ever."

It was clearly intended that the Union itself should be permanent, and that certain provisions—concerning, or mainly concerning, the Scottish Church—

[23] *Cf.* Lord MacDermott, "The Decline of the Rule of Law" (1972) 23 N.I.L.Q. 474, 493, who suggests that the constitutional Acts relating to (Northern) Ireland from 1800 may together constitute a fundamental law, and it is arguable that the United Kingdom Parliament has no power to alienate the allegiance or reduce the status of the people of Northern Ireland. And see H. Calvert's "very tentative" arguments in *Constitutional Law of Northern Ireland* (1968), Chap. 1.

[24] Dicey and Rait, *Thoughts on the Union between England and Scotland* (1920) G.M. Trevelyan, *Ramillies and the Union with Scotland*, Chaps. 12–14; *cf.* T.B. Smith in *The British Commonwealth*, Vol. 1, Pt II, *Scotland*, pp. 641–650; "The Union of 1707 as Fundamental Law" [1957] P.L. 99; *British Justice: The Scottish Contribution* (1961), pp. 201–213; J.D.B. Mitchell, "Sovereignty of Parliament—Yet Again" (1963) 79 L.Q.R. 196; Lord Kilbrandon, "A Background to Constitutional Reform" (Holdsworth Club, University of Birmingham, 1975).

should be unalterable. The Church Patronage (Scotland) Act 1711,[25] repealing a Scottish Act and restoring lay patronage in Scotland, has been described as "the chief and almost the only example of an Act of the British Parliament passed in violation of the Act of Union," and is said to have been "opposed to the spirit, and probably the letter, of the Act of Union."[26] As early as 1713 a Bill to repeal the Union Act was introduced and nearly passed in the House of Lords.[27] The provision requiring professors at Scottish universities to subscribe to the Confession of Faith was repealed by the Universities (Scotland) Act 1853. With regard to changes in Scots private law, it is not certain whether Parliament or the Scottish courts are supposed to have the power to determine whether they are for the "evident utility" of Scottish citizens.

In *Gibson v. Lord Advocate*[28] G. sought a declaration that section 2(1) of the European Communities Act 1972 was contrary to Article XVIII of the Act of Union, and therefore null and void, in so far as it purported to enact as part of the law of Scotland certain Community Regulations providing for equal treatment of Member States with regard to fishing in maritime waters. He argued that, immediately before the Act of Union, Scottish subjects had exclusive fishing rights in Scottish coastal waters; that the laws conferring these rights concerned "private right," and that the Community Regulations were not "for the evident utility of the subjects within Scotland." Lord Keith dismissed the action on the grounds, first, that the action was incompetent in seeking consideration of the utility of an Act of Parliament and, secondly, that Community Regulations operate in the field of public and not private law. His Lordship stated that the question whether an Act purporting to alter a particular aspect of Scots private law was for "evident utility" of the subjects within Scotland (Art. XVIII) is not justiciable in the courts; but he reserved his opinion on the question whether the court would have jurisdiction where an Act purported to abolish the Court of Session or the Church of Scotland, or to substitute English law for the whole body of Scots private law.

4–008 The most significant question is whether Parliament has power to repeal or radically amend the provisions relating to the Presbyterian Church in Scotland. The orthodox view, at any rate among English writers, is that at the Union the English and Scottish Parliaments extinguished themselves and at the same time transferred their powers to the new Parliament of Great Britain, and it is assumed that the Parliament of Great Britain inherited and developed the characteristics of the English Parliament, including sovereignty.[29] If so, this means that the United Kingdom Parliament, although morally bound by the terms of the Union with regard to the Scottish Church, might legally repudiate them.[30] In the Scottish

[25] 10 Anne, c. 21.
[26] Dicey and Rait, *op. cit.* pp. 280–281.
[27] Dicey and Rait, *op. cit.* pp. 298–300.
[28] 1975 S.L.T. 134; [1975] 1 C.M.L.R. 563 (Outer House, Court of Session); *post*, para. 6–038. And see J.M. Thomson "Community Law, the Act of Union, and the Supremacy of Parliament" (1976) 92 L.Q.R. 36; A.W. Bradley, "Scots Private Law—'Evident Utility,'" in *Devolution* (Essays, ed. H. Calvert, 1975), p. 101.
[29] It is commonly said that the Scottish Parliament was not recognised as having sovereignty, but *cf.* Erskine, *Inst.* i, 1, 19; Bk. 1, Tit. IV, 61.
[30] So Blackstone, *Commentaries*, Introduction, para. 4 note; Austin, *The Province of Jurisprudence Determined* (ed. Hart) Lecture 6, pp. 256–257; Maitland, *Constitutional History*, p. 332. Dicey and Rait, *op. cit.* 252–254 thought that the declaration concerning the Scottish Church, though not a legal limitation represented a moral restriction and a warning.

courts, however, doubt has been expressed whether this view is sound. *MacCormick v. Lord Advocate*[31] (the "Royal Numeral Case") arose out of the official use in Scotland of the title "Elizabeth II," which was adopted by royal proclamation under a power conferred by the Royal Titles Act 1953. The Court of Session held that the Treaty did not prohibit the use of the numeral, and that the petitioners had no legal title or interest to sue. Either of these reasons would have been sufficient for the decision, but the Court added obiter that it was not satisfied that the Royal Titles Act would be conclusive if it had been repugnant to the Treaty, although in any event the court would have no jurisdiction to review a governmental act of this kind. "The principle of the unlimited sovereignty of Parliament," said Lord Cooper, "is a distinctively English principle which has no counterpart in Scottish constitutional law. . . . I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England." Here we have Scottish obiter dicta to the effect that Parliament is bound by the fundamental terms of the Treaty (or Act of Union), although the effect of the dicta is considerably reduced by the admission "that there is neither precedent or authority of any kind for the view that the domestic courts of either Scotland or England" have jurisdiction to review governmental acts done under unconstitutional legislation, and *a fortiori* (presumably) to review the unconstitutional legislation itself.

4–009 In *Sillars v. Smith*,[32] where the validity of the Criminal Justice (Scotland) Act 1980 was challenged, the Lord Justice-Clerk (Wheatley) cited both *Edinburgh and Dalkeith Ry Co v. Wauchope*[33] and *MacCormick v. Lord Advocate* before concluding that the appellants' plea should be rejected, "based as it is on a submission that the Act of 1980 which had gone through all the parliamentary processes and received the Royal Assent is invalid."

But to hold that Parliament is bound by certain articles of the Union—whatever that may mean in the absence of a judicial power of review—raises difficulties that appear to be insoluble in legal terms. It implies that there is a fundamental law to which Parliament is subordinate. Then what happens if this subordinate Parliament infringes the fundamental law? To say that the Union would be terminated involves the assumption that England and Scotland are still separately identifiable nations. If Parliament cannot alter these fundamental terms, who can? There might come a time when the Presbyterian Church was no longer a majority church in Scotland. How can the wishes of the Scottish people be known? The Members of Parliament for Scottish constituencies are a minority in the Commons and they are not necessarily Scotsmen. There is no provision in the Treaty for appointing commissioners to negotiate a revision, or for holding a plebiscite in Scotland. As a matter of legal theory the conclusion must be that the doctrine of sovereignty or legislative supremacy has developed since the Union as a characteristic of the United Kingdom Parliament.[34] It is highly probable that the House of Lords in its judicial capacity would hold this view if the matter

[31] 1953 S.C. 396; 1953 S.L.T. 255. See T.B. Smith, "Two Scots Cases" (1953) 69 L.Q.R. 512–516.
[32] 1982 S.L.T. 539.
[33] (1842) 8 Cl. & F. 710.
[34] D.G.T. Williams, "The Constitution of the United Kingdom," [1972B] C.L.J. 266, 270.

came before it, although there is no appeal from Scottish courts to the House of Lords in criminal cases.[35]

4–010 The power of the United Kingdom Parliament to make law for Scotland is expressly preserved by section 28(7) of the Scotland Act 1998 and section 37 provides that the Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to the 1998 Act. Logically those provisions cannot give the United Kingdom Parliament powers that did not already possess. They demonstrate, however, the view of Parliament that there are no existing limitations. It remains to be seen if the question should arise what view the courts would take.

Grants of Independence

Statute of Westminster 1931

4–011 Another problem (though scarcely of practical importance) is whether Parliament can continue to legislate for members (or former members) of the Commonwealth which have been granted independence. After the growth of conventions relating to self-governing colonies, the next legislative stage was section 4 of the Statute of Westminster 1931. This provides that an Act of the United Kingdom Parliament passed thereafter shall not extend, or be deemed to extend, to a Dominion (as therein defined) as part of the law of that Dominion unless it is expressly declared in the Act concerned that that Dominion[36] has requested, and consented to, its enactment. The definition of "Dominion" for this purpose now covers Canada, Australia and New Zealand.[37] This provision enacted what was already an established convention, which was also recited in the preamble to the Statute. It is a statement of Parliament's intention, and also a direction to the courts, which are concerned only with the presence or absence of a declaration in the Act of a Dominion's request and consent. The Statute did not purport to terminate Parliament's power to legislate for the Dominions altogether. It was contemplated that such request and consent might still be forthcoming in particular cases, as happened, for example, in connection with Australian and New Zealand emergency powers during the war and with the Cocos Islands Act 1955, which transferred the Cocos Islands to Australia. Further, reservations were made with regard to the power of constitutional amendment in some of the Dominions, which they would otherwise have had under section 2, so that in 1964 Parliament amended the Canadian Constitution

[35] Professor T.B. Smith ([1957] P.L. 99) argues that the twofold ratification constituted both a treaty *jure gentium* and a fundamental law for the Union, whereas the Acts of Parliament of each country bound the subjects within that country alone as ordinary legislation. The Treaty *qua* Treaty ceased to exist by merger of the parties at the Union. What is left, Professor Smith contends, is the "fundamental law" which cannot be altered except by (technical) revolution. On the question of judicial review, he admits that a private individual would seldom have a title to sue, and the Lord Advocate would presumably agree with the government of which he was a member.

Lord Kilbrandon, in "A background to Constitutional Reform," *loc. cit.* says the Treaty is now defunct since the independent countries of England and Scotland have ceased to exist, and its functions have been superseded by the Union Acts of the two Parliaments. If it is wrong to accept the unlimited sovereignty of the Parliament of Great Britain, he asks, where is the lawful machinery for putting the matter right?

[36] The request and consent required are those of the government of the Dominion concerned, and in the case of Australia those of its Parliament also.

[37] The Statute originally applied also to Newfoundland (now a province of Canada), and to South Africa and the Irish Free State (later Eire or the Republic of Ireland), which are no longer within the Commonwealth.

at Canada's request.[38] (Canada's legislative dependence on the United Kingdom was formally determined by the Canada Act 1982, s.2.[39])

Lord Sankey L.C. in *British Coal Corporation v. The King*[40] said obiter that as a matter of "abstract law" Parliament could repeal this Statute either expressly or by passing legislation inconsistent with it: but he added, "that is theory and has no relation to realities." More recently, in *Blackburn v. Attorney-General*[41] Lord Denning M.R. went so far as to say obiter; "We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can anyone imagine that Parliament could or would reverse that Statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse these laws and take away their independence? Most clearly not. Freedom once given cannot be taken away.[42] Legal theory must give way to practical politics." But Salmon L.J. was content to remark; "As to Parliament, in the present state of the law, it can enact, amend and repeal any legislation it pleases."

4–012 The meaning and effect of section 4 of the Statute of Westminster was considered in *Manuel v. Attorney General*.[43] The plaintiffs sued on behalf of themselves and certain Indian "bands." They sought declarations to the effect that the United Kingdom Parliament had no power to amend the Canadian Constitution so as to prejudice the Indian Nations of Canada without their consent, and that the Canada Act 1982 was therefore *ultra vires*. Indian rights had been confirmed by a Royal Proclamation made in 1763, subsequently confirmed under a number of "treaties" made with the Indian bands and entrenched under the British North American Acts. The plaintiffs argued that the amendment of certain entrenched Indian rights still required United Kingdom legislation even after the British North America (No. 2) Act 1949 conferred on the Canadian Parliament a limited power of constitutional amendment. At first instance Sir Robert Megarry V.-C. held that once he was satisfied that the document before him was an Act of Parliament it was his duty to apply it. The Vice-Chancellor went on to consider the dictum of Lord Denning in *Blackburn v. Attorney General*, quoted in the previous paragraph. He commented that it was clear from the context that Lord Denning was using the word "could" in the sense of "could effectively," and not "could as a matter of abstract law." His Lordship added:

> "I have grave doubts about the theory of the transfer of sovereignty as affecting the competence of Parliament. In my view it is a fundamental of the English constitution that Parliament is supreme. As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its omnipotence. On the authority of Parliament the courts of a

[38] British North America Act 1964, empowering the Canadian Parliament to legislate with regard to old age pensions.

[39] *post*, para. 36–008. See also, *post* para. 36–010 for the Australian Act 1986.

[40] [1935] A.C. 500, 520, the case concerned Canadian legislation passed before the Statute of Westminster.

[41] [1972] C.M.L.R. 882, CA.

[42] An echo of the words of Stratford A.C.J. in *Ndlwana v. Hofmeyr* [1937] A.D. 229, 237, "Freedom once conferred cannot be revoked."

[43] [1983] Ch. 77. See O. Hood Phillips, "Statute of Westminster in the Courts" (1983) 99 L.Q.R. 342.

territory may be released from their legal duty to obey Parliament, but that does not trench on the acceptance by the English courts of all that Parliament does. Nor must validity in law be confused with practical enforceability."[44]

In the Court of Appeal, Slade L.J., delivering the judgment of the Court, held that the Canada Act 1982 complied with the requirements of section 4 which

"does not provide that no Act of the United Kingdom Parliament shall extend to a Dominion as part of the law of that Dominion unless the Dominion has in fact requested and consented to the enactment thereof. The condition that must be satisfied is a quite different one, namely, that it must be 'expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.' ... If an Act of Parliament contains an express declaration in the precise form required by section 4, such declaration is in our opinion conclusive as far as section 4 is concerned."[45]

The Court of Appeal did not therefore have to consider the effect of a failure to comply with the provisions of section 4.

4–013 If section 4 of the Statute of Westminster is regarded primarily as a rule of construction addressed to the courts,[46] it seems probable that British courts (if the question could be brought before them) would continue to regard Parliament as unrestricted by it, at least as far as the monarchies are concerned.[47] Section 4 refers to alteration of *the law of a Dominion*, not to alteration of *the law in this country*. As Lord Reid stated with reference to the Statute of Westminster in *Madzimbamuto v. Lardner-Burke*[48]: "It is often said it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid." However, the courts of the country (former "Dominion") concerned (in so far as they could not construe such Act as not being intended to infringe the section) would presumably decline to apply an offending British statute, and an appeal to the Privy Council could be prevented or nullified by local legislation where such appeals have not already been abolished. And appeals from that country to the Privy Council would very soon be abolished. Such a divergence of judicial decisions in other parts of the Commonwealth from decisions in this country would be a reflection in the courts of a (technical) revolution that had already taken place in the political sphere.[49]

It has been suggested above that the local court would, if possible, construe an Act of Parliament as not being intended to apply to the Dominion, unless passed at its request and with its consent. This is borne out by *Copyright Owners*

[44] [1983] Ch. 77, 89.
[45] At p. 106.
[46] See K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed.), Chap. 6, s.3. And see further *post*, Chap. 36.
[47] A republic is not one of Her Majesty's dominions, and it may be that on this ground an Act of Parliament would not be construed as extending to it.
[48] [1969] 1 A.C. 645, 723, PC.
[49] s.2(2) of the Statute of Westminster allows the Dominions to pass laws repugnant to United Kingdom legislation, but to say that this would enable the Dominions to nullify a repeal of the Statute begs the question.

Reproduction Society v. E.M.I. (Australia) Pty Ltd.[50] where the High Court of Australia held that Copyright Acts of 1928 and 1956 did not apply to Australia. Dixon C.J. said that even before 1931 there was a strong convention that the United Kingdom Parliament would not legislate for a Dominion without its consent: there was therefore in Australian courts a rule of construction that, in the absence of evidence of such consent, a United Kingdom Act was not intended to apply to that Dominion.

Independence Acts

4–014 The "Dominion status" of 1931, by the further development of constitutional conventions in relation to the countries concerned, has in effect become independence within the Commonwealth. The grant of independence to a number of former dependent territories from 1947 onwards has been done by separate Acts of Parliament. As regards legislative powers, the Independence Acts for Ceylon (1947) and Ghana (1957) followed the Statute of Westminster,[51] but the Act for Nigeria (1960) and those that followed did not contemplate that the country concerned would in future request the United Kingdom to legislate for it. The post-war Independence Acts have gone further than the Statute of Westminster by expressly divesting the United Kingdom Government of any responsibility for the government of those countries.

A distinction might be drawn between the mere transfer of the *legislative* powers of Parliament under the Statute of Westminster and the transfer also of the *governmental* powers of the United Kingdom under the post-war Independence Acts. Where in relation to a particular territory the sovereignty of the Crown as head of the United Kingdom Government has been transferred to a sovereign state, or in such a way as to make the transferred a sovereign state—recognised as such by other countries, and becoming a member of the United Nations—it seems absurd to say that Parliament can still legislate for such territory. Could Parliament cancel the cession of Heligoland to Germany,[52] or even repudiate the independence of the United States.[53] Nonetheless in the words of Sir Robert Megarry V.-C.

> "Plainly once statute has granted independence to a country the repeal of the statute will not make the country dependent once more: what is done is done, and is not undone by revoking the authority to do it. Heligoland did not in 1953 again become British. But if Parliament then passes an Act applying to such a country I cannot see why that Act should not be in the same position

[50] (1958) 100 C.L.R. 597. The Acts concerned were the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act 1928, and the Copyright Act 1956. The draftsmen of the 1956 Act indicated that the repeal of the Copyright Act 1911 was not intended to affect the law of any country other than the United Kingdom. And see H.R. Gray, "The Sovereignty of the Imperial Parliament" (1960) 23 M.L.R. 647.

[51] The Indian Independence Act 1947 followed the Status of the Union Act 1934 (South Africa) in providing that Acts of the United Kingdom Parliament would not extend thereto unless adopted by its own legislature.

[52] Anglo-German Agreement Act 1890. This Act was repealed by the Statute Law Revision Act 1953.

[53] An Act of 1782 (22 Geo. III, c.46) authorised the Crown to negotiate a truce with America, and by the Treaty of Paris 1783, signed between Great Britain and the United States, Britain acknowledged the United States to be free, sovereign and independent states; and relinquished all claims to the government of the same. Statutes of 1782 relating to trade with America and American loyalists (23 Geo. III, c. 26, 39, 80) implied that the United States were no longer British colonies: *Doe* d. *Thomas* v. *Acklam* (1824) 2 B. & C. 778.

as an Act applying to what has always been a foreign country, namely, an Act which the English courts will recognise and apply but one which the other country will in all probability ignore . . . "[54]

The distinction between the method used in 1931 and the method used after 1947, however, is probably no longer significant. When the courts recognise the political fact that territory formerly under the authority of Parliament has become independent of that authority, then Parliament can no longer alter the law in that territory; although it may pass laws in relation to persons or acts in such territory as in any other "foreign" country, which may be enforceable in the courts of this country.[55] 4–015

The legislative supremacy of Parliament, then, is a concept of British public law. It is recognised by the Courts of the United Kingdom[56] and its dependencies,[57] and is enforced by these courts in relation to persons and property which are or which come within their jurisdiction.

European Communities Act 1972

The Treaties whereby the United Kingdom agreed to join the European Communities (the "Common Market") were executive acts, affecting the relations between the United Kingdom and the other member States. In order to provide for the consequent changes of law in this country an Act of Parliament was necessary.[58] This was the European Communities Act 1972, which is discussed more fully in Chapter 6. Its main provisions are briefly as follows. Section 2(1) gives effect to rights and obligations created by or arising under the Treaties, *i.e.* created by the Treaties themselves and by existing and future Community Regulations which take effect directly as law in the Member States. (Enforceable Community Rights). With regard to future Community Regulations this was a constitutional innovation, introducing a new and special kind of secondary legislation.[59] Section 2(2) confers a limited power to give effect by Statutory Instrument to Community Directives. Section 2(4) provides, in effect, that delegated legislation made under section 2(2) may make any such provision as might be made by Act of Parliament, and that existing and future enactments are to be construed and have effect subject to the provisions of section 2. It should be emphasised that the Act contains no provision purporting to exclude or limit the power of Parliament to repeal or amend the Act itself. Section 3 provides that for the purpose of legal proceedings, the meaning of the Treaties and the validity or meaning of any Community Instrument are questions of law which, if not referred to the European Court of Justice at Luxembourg for a preliminary ruling, are to be determined in accordance with the principles laid down by that Court. The general effect of the European Communities Act is to override *existing* domestic law so far as is inconsistent therewith, and to impose a presumption of interpretation that *future* statute law is to be read subject to Community law for the time being in force. Parliament is expected to refrain from passing legislation inconsistent with Community law. 4–016

[54] *Manuel v. Att.-Gen.* [1983] Ch. 77, 88.
[55] *ante*, para. 3–020.
[56] But as to Scotland, *cf. ante*, para. 4–006.
[57] *i.e.* colonies and other dependencies from whose courts appeal lies to the Privy Council.
[58] *Case of Proclamations* (1610) 12 Co.Rep. 74; Bill of Rights 1688, Art. 4.
[59] *post*, Chap. 6.

4–017 It was widely objected that Parliament, by passing the European Communities Act, would surrender a large part of its "sovereignty" to the Community institutions, and that as there is no time limit in the Treaties Parliament would be binding itself for ever. In *Blackburn v. Attorney-General*[60] the plaintiff sought a declaration that the government, by signing the Treaty of Rome, would surrender in part the sovereignty of Parliament and would surrender it for ever, which would be in breach of law. The Court of Appeal decided that the statement of claim disclosed no cause of action and should be struck out. The Treaty of Accession to the EEC was a prerogative act, and the question with regard to Parliament was hypothetical. Lord Denning M.R. after stating that "in theory Mr Blackburn is quite right in saying that no Parliament can bind another, and that any Parliament can reverse what a previous Parliament has done," added: "nevertheless so far as this court is concerned, I think we will wait till that day comes;" but he did so (it is submitted) not because he doubted the soundness of Mr Blackburn's proposition, but because courts do not answer hypothetical questions that have not yet arisen. In *McWhirter v. Attorney-General*[61] the Court of Appeal held that the plaintiff might not argue that joining the EEC would be contrary to the Bill of Rights, which declared that full powers of government are vested in the Crown. The exercise of the prerogative could not be impugned in the courts, either before or after a treaty is signed. "Even though the Treaty of Rome has been signed," said Lord Denning M.R. "it has no effect, so far as these Courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these Courts must go by the Act of Parliament." A similar lack of success attended the efforts of Lord Rees-Mogg to challenge provisions of the Maastricht Treaty, despite the Court of Appeal agreeing that he had raised interesting issues.[62]

4–018 Successive Lord Chancellors, both in the House of Lords and extra-judicially, denied either that Parliament would surrender its sovereignty or that the Act would be irreversible—Lord Kilmuir and Lord Dilhorne in the House of Lords in 1962, Lord Gardiner in the House of Lords in 1967, and Lord Hailsham of St Marylebone in 1971.[63] Lord Gardiner[64] pointed out that the United Kingdom had accepted restraints on its legislative power to take account of obligations arising out of such treaties as the United Nations Charter, the European Convention on Human Rights, NATO and GATT. The treaty obligations are reciprocal: all the members remain sovereign States: the United Kingdom would take part in the making of new Regulations (which in practice is done unanimously),[65] and also in the judicial work of the EEC tribunals. Lord Hailsham[66] further pointed out that there were "stacks" of treaties designed to last for an indefinite period, some designed to last for ever, and most peace treaties fall under one of these heads. He saw membership of the Community not as a derogation from sovereignty, but as sovereignty plus the advantages of membership. Lord Gardiner also said:

[60] [1971] 1 W.L.R. 1037, C.A.
[61] [1972] C.M.L.R. 882, C.A.
[62] [1994] Q.B. 552, C.A.
[63] H.L.Deb., Vol. 322, cols. 195–208.
[64] H.L.Deb. cols. 1202–1204 (May 8, 1967).
[65] The unanimity principle is used in important matters, and could not be abrogated without the agreement of the United Kingdom, whose Ministers depend on Parliamentary support: see letter from Lord Gladwyn to *The Times*, January 9, 1975.
[66] At the Mansion House: *The Times*, July 14, 1971. Lord Hailsham also said: "either Dilhorne or Kilmuir got every leading lawyer . . . to discuss this very question and they came to the same conclusion": *The Listener*, July 13, 1972, p. 40.

"Under the British constitutional doctrine of Parliamentary sovereignty no Parliament can preclude its successors from changing the law. . . . There is in theory no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law"; but he added that repeal of the Act would be a breach of *international obligations*, unless it was justified by exceptional circumstances and had the approval of the other member States.[67]

Again, Lord Diplock has expressed the opinion extrajudicially that: "If the Queen in Parliament was to make laws which were in conflict with this country's obligations under the Treaty of Rome, those laws and not the conflicting provisions of the Treaty would be given effect to as the domestic law of the United Kingdom."[68] And Lord Justice Scarman (as he then was) has written: "The European Communities Act preserves, of course, the *de jure* sovereignty of Parliament. Community law has the force of law because Parliament says so. . . . The European Communities Act cannot be read as limiting the sovereignty of Parliament. No British court could, I suggest, go so far as to hold that Parliament today had limited the freedom of action of Parliament tomorrow without a constitutional reform that is in fact beyond the power of Parliament by statute to effect."[69] 4–019

The attitude of leading statesmen and responsible political parties is also relevant in considering the fundamentals of the Constitution. Mr Harold Wilson, then Leader of the Opposition, is reported to have said in a speech at Bonn in February 1972[70] that a future Labour Government would withdraw from the EEC if it could not satisfactorily renegotiate the terms for British membership: it would recognise "the British constitutional doctrine that one Parliament cannot bind its successors." Again, in February 1974, he announced that if Labour won the pending general election (which it did) it would renegotiate the terms of Britain's entry (*sic*) into the EEC, and if these negotiations did not succeed then the existing treaty obligations would not be regarded as binding.[71] It was publicly known that the Labour Government, formed in 1974, was sharply divided on the question of Britain's continued membership of the EEC. Renegotiation of the terms of membership attracted little attention, but in order to preserve the unity of their party in the Commons, the Government (advocating continued membership) adopted the unprecedented and controversial device of a referendum.[72] The passing of the Referendum Act 1975, under the authority of which the referendum was held,[73] implied that the Government and members of Parliament generally presumed that, if the result of the referendum in the United Kingdom as a whole went against continued membership, this country would withdraw from the EEC and Parliament would pass legislation repealing the European

[67] See note 64, *ante*.
[68] "The Common Market and the Common Law" (1972) 6 *Law Teacher*, 3, 5.
[69] "The Law of Establishment in the European Economic Community" (1973) 24 N.I.L.Q. 61, 70–72.
[70] *The Times*, February 5, 1972.
[71] *The Times*, February 13, 1974.
[72] *Referendum on United Kingdom Membership of the European Community* Cmnd. 5925 (1975).
[73] The question was: "Do you think that the United Kingdom should stay in the European Community (the Common Market)?" Votes were counted in England and Wales by counties, in Scotland by regions and in Northern Ireland as a whole. Courts were precluded from entertaining any proceedings for questioning the numbers of ballot papers counted or answers given in the referendum. And see R. E. M. Irving, "The United Kingdom Referendum, June 1975" (1975) 1 *European Law Review* 3.

Communities Act and disentangling our domestic law from Community law. The Government conceded that Parliament would not be bound by the result of the referendum, but indicated that the Government itself would abide by it. In the event a large majority in England and smaller majorities in Scotland, Wales and Northern Ireland voted in favour of the United Kingdom remaining in the EEC.

Conflict between United Kingdom law and Community law

4–020 Two provisions of the European Communities Act 1972 deal with the relationship between Community Law and the domestic law of the United Kingdom. Section 2(4) provides:

> "The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section, but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations."

Section 3(1) provides:

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court."

Section 2(4) is a complex piece of draftsmanship which is best regarded as consisting of three parts. The first (from the beginning to "as might be made by Act of Parliament") deals with the making of delegated legislation to implement Community obligations (under section 2(2)), and provides that such subordinate legislation has the effect of an Act of Parliament or that it may not merely change the common law but may amend or repeal Acts of Parliament. The third part (from the words "but, except as may be provided" to the end) protects Schedule 2 from amendment by delegated legislation made under the Act. Thus it imposes a limit to the wide powers conferred by the first part of the subsection.

4–021 The second part of the subsection—and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section—can only be described as obscure. It would not be surprising if it were dealing only with delegated legislation; the other two parts of the subsection are, unarguably, so confined.[74] If "enactment to be passed" includes future Acts of Parliament, as is generally assumed, what becomes of the reference to "in this Part of this Act." Is "enactment" being used to mean both statute and section? No explanation of these cryptic words is entirely satisfactory. Probably the least unsatisfactory is that they lay down a rule of construction or a presumption of interpretation in the

[74] See J. M. Thomson, "The Supremacy of European Community Law?" [1976] S.L.T. 273.

absence of a clear express intention in a later Act.[75] With regard to existing legislation, section 2 confers power to make such amendments as may be necessary to give effect to Community law. With regard to future legislation, subsection (4) expresses a rule of construction that would have to give way in a British court to a contrary expressed intention.[76] Parliament did not even purport to entrench this provision which, at most, attempts[77] or, better, pretends to secure the supremacy of Community law.

In *Garland v. British Rail Engineering Ltd*[78] Lord Diplock, with whom the other members of the House concurred, clearly treated section 2(4) as establishing a rule of interpretation. He envisaged that an English (*semble*, Scottish also) court would have to apply "an express, positive statement in an Act of Parliament passed after January 1, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community Treaty." The only question was what, if anything, short of an express, positive statement would justify a court in the United Kingdom applying domestic law which conflicted with Community law.

4–022 It might be thought that there is little likelihood of *implied* conflicts[79] because of the presumption of construction contained in section 2(4) and the judicial ingenuity exercisable in the construction of statutes. This has been exhibited in a number of cases relating to equal pay legislation.[80] In *O'Brien v. Sim-Chem*[81] the House of Lords managed to reach a conclusion compatible with Community law while unable to explain how it reached that conclusion. Lord Russell, who delivered the only speech, could do little more than say that he was happy "to echo the words of Lord Bramwell in *Bank of England v. Vagliano Brothers* [1891] A.C. 107, 138: 'This beats me' and jettison the words in dispute as making no contribution to the manifest intention of Parliament."

In *Pickstone v. Freemans plc*[82] the House of Lords felt entitled, in order to interpret regulations made under the Equal Pay Act 1970, to take account of

[75] There is no problem about conflict between United Kingdom statutes passed before January 1, 1973 and Community Law. The European Communities Act itself resolves any such conflict in favour of Community law: sub. ss.2(1) and 2(2). In such cases it is true to say that the Act "enacted that relevant Common Market law should be applied in this country, and should, where there is a conflict, override English law," *per* Graham J. in *Aero Zipp Fasteners v. Y.K.K. Fasteners (U.K.) Ltd* [1973] C.M.L.R. 819, 820. (Interpretation of pre-1973 rules of court).

[76] The words "shall be construed" surely supply the answer to the argument that s.2(4) cannot be "a mere rule of construction"; de Smith, *Constitutional and Administrative Law* (5th ed. 1985), p. 91.

[77] H.W.R. Wade, *Constitutional Fundamentals* (1980) pp. 25–27 and 31–34.

[78] [1983] 2 A.C. 751, 771. See further, O. Hood Phillips, "A Garland for the Lords: Parliament and Community Law Again," (1982) 98 L.Q.R. 524.

[79] Any unintended conflicts could be remedied by amending Acts, either *ad hoc* or (if such conflicts should become frequent) by an annual Communities Act: H.W.R. Wade, "Sovereignty and the European Communities" (1972) 88 L.Q.R. 1. See also E.A. Trindale, "Parliamentary Sovereignty and the Primacy of European Community Law" (1972) 35 M.L.R. 375. See also, on implied repeal and conflict, Evelyn Ellis, "Supremacy of Parliament and European Law" (1980) 96 L.Q.R. 511; "Parliamentary Supremacy After a Decade of EEC Membership," (1982) 7 *Holdsworth Law Review* 105.

[80] See, for example, *Shields v. E. Coomes (Holdings) Ltd* [1978] 1 W.L.R. 1408; *Clay Cross (Quarry Services) Ltd v. Fletcher* [1978] 1 W.L.R. 1429; *Rainey v. Greater Glasgow Health Board*, HL [1987] A.C. 224.

[81] [1980] 1 W.L.R. 1011, 1017; noted (1981) 97 L.Q.R. 5.

[82] [1989] A.C. 66, HL.

Parliament's intention, as ascertained from Hansard that the regulations were intended to give effect to Community law.[83] In *Litster v. Forth Dry Dock & Engineering Co Ltd*[84] the House felt able to give to regulations, meant to implement a European Directive, the required meaning by implying into the regulations some additional words. In *Webb v. EMO Air Cargo (U.K.) Ltd (No. 2)*[85] the House of Lords recognised that it must construe United Kingdom legislation consistently with the provisions of a Directive even where the legislation was made before the Directive.[86]

4–023 As will be seen in Chapter 6, the House of Lords has gone beyond construing United legislation so as to make it consistent with Community law to holding that even an Act of Parliament which is inconsistent with Community law must be disregarded by the courts in litigation having a Community element: *R. v. Secretary of State for Transport, ex p. Factortame Ltd*[87]; *R. v. Secretary of State for Employment ex p. Equal Opportunities Commission*.[88] In neither case, it should be noted, did the relevant legislation *explicitly* contradict Community law. Thus the House of Lords could claim to be following the wishes of Parliament as laid down in the European Communities Act 1972 section 3 that it should decide cases involving Community law in accordance with the principles laid down by the European court, one of which is the primacy of Community law over inconsistent municipal law.[89]

European Convention on Human Rights

4–024 The unique relationship between Community law and domestic law was recognised in the White Paper[90] which preceded the Human Rights Act 1998 and in the legislation itself. The White Paper referred to the importance which the Government attached to Parliamentary sovereignty and to the absence from the European Convention on Human Rights of any requirement that signatory States accord priority to its provisions over their domestic law, unlike the position in the case of Community law. This view finds expression in the Human Rights Act 1998 under which the superior courts may make a finding that legislation is incompatible with the Convention but it is up to Parliament to amend such legislation.[91] There is no judicial power to set aside legislation. And most courts can—and must—minimise conflicts between domestic law and Convention rights by giving effect to domestic legislation "so far as it is possible to do so" in a way which is compatible with Convention rights. (Section 3)

[83] Thus anticipating the decision in *Pepper v. Hart* [1993] A.C. 593.
[84] [1990] 1 A.C. 546.
[85] [1995] 1 W.L.R. 1454.
[86] See later, para. 6–013 for Community law on the interpretation of municipal law by municipal courts. *Duke v. Reliance Systems Ltd* [1988] A.C. 618 and *Finnegan v. Clowney Youth Training Programme Ltd* [1990] 2 A.C. 407, where the House of Lords refused to apply interpretative ingenuity, are discussed later, *post* para. 6–013.
[87] [1990] 2 A.C. 85; [1991] 1 A.C. 603. It is one of the curiosities of legal history that litigation of such significance should have been later revealed to have been based on a mistaken view of English law: *Re M.* [1994] 1 A.C. 377, HL.
[88] [1991] 1 A.C. 1.
[89] See *post* para. 6–012. By simply asserting the supremacy of Community law Lord Bridge, in *Factortame* avoided any reference to the doctrine of implied repeal of legislation by a later Act: see *ante* para. 4–004.
[90] (1997) CM 3782.
[91] ss.4 and 10, *post*, Chap. 22.

II. "Manner and Form" of Legislation

The next question is whether Parliament can bind its successors as to the "manner and form"[92] of legislation, that is, as regards its own procedure. **4–025**

Authentication of Acts of Parliament

There must be some rules logically prior to Parliament by which an act can be recognised as the act of Parliament.[93] This is not a matter of limiting Parliament, but of identifying its enactments. The principle applies to all legislatures, and is not a problem relating specifically to "sovereignty." For many centuries, except during the revolutionary Commonwealth period in the seventeenth century, "Parliament" has meant the Monarch, the Lords and Commons in Parliament assembled. "There is no Act of Parliament," says Coke,[94] "but must have the consent of the Lords, the Commons and the Royal Assent of the King, and as it appeareth by Records and our Books, whatsoever passeth in Parliament by this threefold consent, hath the force of an Act of Parliament." And in *Middleton v. Croft*[95] Lord Hardwicke L.C., said: "As to the general nature, and fundamentals of our constitution, no new law can bind the people of this land, but what is made by the King and Parliament; nor any law made by the King alone, nor by the King with consent of any particular number or body of men." It has been a custom since the reign of Edward III for the Lords and Commons to deliberate separately,[96] but Parliament's formal acts until 1967 were always done by one body in the Parliament chambers.[97] An Act of Parliament then, is a measure enacted by these three elements acting together in a way customarily prescribed by themselves, namely, by a simple majority of the members present and voting in each House separately, and assented to by the Queen. The legislative formula for ordinary Acts of Parliament has long been established as follows: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows. . . ."[98] It will be noticed that this formula does not refer to the Houses of Lords and Commons. **4–026**

The chief original sources for Acts of Parliament before 1849 are the Statute Rolls and Parliament Rolls, consisting of inrollments in Chancery and proceedings in Parliament. We also have most of the original Acts since Henry VII, *i.e.* the drafts from which the Clerk of the Parliaments made up the inrollments. Since 1849 the Queen's printer has made two vellum prints authenticated by the proper officer of each House, one of which is kept in the House of Lords and the other deposited in the Public Record Office. Except in rare cases of doubt, printed

[92] The expression is taken from the Colonial Laws Validity Act 1865, s.5 and ultimately from the Foreign Jurisdiction Act 1843.

[93] These rules are both common law and fact.

[94] 4 Inst. 25. And see *The Prince's Case, post.*

[95] (1743) Cas. T. Hard. 326 (Eccls. Ct.).

[96] A. F. Pollard, *Evolution of Parliament* (2nd ed.), pp. 120–123.

[97] Pollard, *op. cit.* p. 123. And see Chitty, *Prerogatives of the Crown*, p. 75: "That which constitutes law is the concurring assent of all the branches of the legislature, wherever it may originate, whatever may happen to be the form of it." For the giving of the Royal Assent, and the Royal Assent Act 1967, see *post*, para. 8–011.

[98] Different formulae are used for Finance and Appropriation Acts, private Acts, and Acts passed under the special procedure of the Parliament Acts.

copies of the statutes are sufficient—the King's (Queen's) printer's copies for Acts passed since 1713, and Statutes of the Realm for statutes passed down to that year.

4–027 It appears from *The Prince's Case*[99] that it was sometimes difficult to determine the authenticity of earlier Acts, and that a charter (recited as coming from the King and apparently having the authority of Parliament) would be accepted as an Act of Parliament if it was entered on the Parliament Roll and had always been allowed as an Act. In *Heath v. Pryn*[1] counsel challenged the Parliament Act 1660 on the ground that the Lords and Commons were not summoned by the King's writ, but the Court of King's Bench said: "the Act being made by the King, Lords and Commons they ought not now to pry into any defects of the circumstances of calling them together." The recital of the assent of the Monarch, Lords and Commons is generally taken to be conclusive, and it is doubted whether a *litigant* would be allowed to attempt to prove that one of these assents had not in fact been given. On the other hand, *either House* may have the privilege of asserting by reference to its journals that it had not agreed to the Bill, or that amendments proposed by one House had not been agreed by the other. A House of Lords amendment to the Bill that became the Rent (Agriculture) Act 1976 was agreed to by the Commons under the guillotine procedure without discussion: but through the inadvertance of the House of Lords officials who prepare Bills for the Royal assent, the amendment was not inserted. Parliament consequently passed the Rent (Agriculture) Amendment Act 1977 in order to give effect to the amendment.

Although the question of the authentication of Acts is sometimes brought into discussions about the legislative supremacy of Parliament, it is more appropriately described by Erskine May as "Subsidiary Points in connection with Legislative Procedure."[2] Under the Parliament Acts, however, the Speaker's certificate is stated to be conclusive.[3]

Courts not concerned with procedure in Parliament

4–028 Centlivres C.J. in *Harris v. Minister of the Interior*[4] suggested that a Bill passed by both Houses of British Parliament sitting together would not be an Act of Parliament, as otherwise a Conservative Prime Minister who had lost his majority in the Commons could get a Bill passed by the Lords and Commons sitting together. But Centlivres C.J. took as his example a particular case which would be constitutionally objectionable. It may be replied, conversely, that it would be absurd for a court to deny validity to an Act passed unanimously by both Houses sitting together. There seems to be no strictly legal objection to the Lords and Commons debating and voting in a joint sitting. The matter seems now to be one of the Commons' privileges and of constitutional convention. If it is one of the Lords' privileges also, both Houses would have to agree before a joint sitting could be held. It is submitted that the courts would not wish to involve themselves in these procedural matters.

[99] (1606) 8 Co.Rep. 1a., 13b, 18a–19b, 20b, 28a. The Court included Lord Ellesmere L.C., Coke C.J. and Fleming C.B.

[1] (1670) 1 Vent. 14.

[2] Erskine May *Parliamentary Practice* (22nd ed. 1997) p. 571. See Craies, *Statute Law* (7th ed. 1971), pp. 37–38.

[3] *cf. post*, p. 144.

[4] (1952) (2) S.A. (A.D.) 428, 470. And see R. T. E. Latham, "The Law of the Commonwealth," in *Survey of British Commonwealth Affairs*, Vol. 1, ed. Hancock, pp. 523–524.

The decision of the Court of Appeal in *Ellen Street Estates Ltd v. Minister of Health*[5] is a precedent for saying that Parliament cannot bind its successors as to the form of subsequent legislation by providing that there shall be no *implied* repeal of an Act.

4–029 The judgment of the House of Lords in *Pickin v. British Railways Board*[6] may be relied on in relation to public as well as private Acts (although as to public Acts the considered statement was strictly *obiter*), to the effect that the courts will not concern themselves with the *procedure* by which a Bill passed through either House. Suppose that when a Labour Government was in office Parliament had passed an Industrial Relations Act which contained a provision that it might not be repealed or amended unless the Bill for that purpose was approved by the votes of not fewer than two-thirds of the members of the House of Commons.[7] It is submitted that if Parliament under a future Conservative Government passed an Act purporting to repeal or amend that earlier Act, the courts would hold the subsequent Act valid even though it could be shown that it had received fewer than two-thirds of the votes of the members of the Commons. Similarly, with an Act to alter the status of Northern Ireland as part of the United Kingdom which was passed without first holding a referendum.[8]

It is submitted that the courts would regard these as procedural matters. This does not mean that if Parliament made such statutory provisions they would be "void." Steps taken under them to hold a national referendum or a plebiscite in Northern Ireland would be lawful. What we are saying is that the same Parliament, or a subsequent Parliament (probably of a different political complexion), could repeal these provisions or simply ignore them. There is no reason why a later Act should be accorded less authority than an earlier one.

Contrary arguments

4–030 It has been argued by Sir Ivor Jennings[9] and others that the requirement of a referendum or the approval of some outside body such as the Parliament of Northern Ireland would constitute, not a procedural requirement, but a change in the *composition* of Parliament (which for this purpose would include the electorate or the Northern Ireland Parliament, as the case might be) and so be binding on the legislature. This view, if followed through to its logical conclusion, would lead to absurd results, for by the law and custom of Parliament all the elements constituting Parliament must be summoned to Westminister by Royal Writs to deliberate, vote and hear the Royal Assent. The application of this argument to the repeal of the European Communities Act 1972, implementing withdrawal of the United Kingdom from the EEC, would require us to regard the governments or legislatures, or even the electorates, of the other Member States (although aliens) as forming part of the composition of Parliament of this purpose. Again, a change in the composition of Parliament has been classified as a matter of

[5] [1934] 1 K.B. 590; *ante*, para. 4–004.
[6] [1974] A.C. 765; *ante*, para. 3–017.
[7] Such a provision would require a government to have the unusual majority of more than 200 in the Commons.
[8] *ante*, para. 3–018.
[9] *e.g.* Jennings, *Constitutional Laws of the Commonwealth* (1957), pp. 124–125; R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed., 1964); and see Jennings, *The Law and the Constitution* (5th ed., 1959), pp. 151–163.

procedure rather than subject-matter, and so (it is argued) binding on Parliament.[10] But if this were so the members of the Commons elected for three years under the Triennial Act 1694[11] who took part in passing the Septennial Act 1715 would not have been qualified to sit for the extra four years, with incalculable consequences for the validity of subsequent legislation.

Alternatively it has been argued by followers of D.V. Cowen[12] that a requirement such as a special majority of (say) two-thirds in either House or both Houses would constitute a *redefinition* of "Parliament" for this purpose, so in that case "Parliament" would mean the Queen, Lords and the Commons approving by a majority of not less than two-thirds. This "*redefinition*," it should be noticed, would be done not by some higher law as in the South African case of *Harris v. Minister of the Interior*[13] but by Parliament itself. To say that Parliament (while retaining its existing composition) can redefine *itself* in this way begs the question. It is a fiction or formula designed to avoid classifying the matter as "procedural," and so not within the ambit of the courts. The argument applied to the Triennial Act would mean that Parliament in 1694 redefined itself in such a way that a future Parliament was not competent to legislate after three years. In so far as this argument differs from the "composition" argument, also, it would lead to the consequence that the word "Parliament" as applied to the United Kingdom Parliament could have an indefinite number of meanings.

4–031 The unicameral New Zealand Parliament is similarly not limited by a higher law,[14] and an "uncontrolled"[15] constitution can be amended by implication by an ordinary statute.[16] The Electoral Act passed by the New Zealand Parliament in 1956 included section 189 which states that certain provisions relating to such matters as the life of Parliament, the franchise and secret ballot, may not be repealed or amended except by a majority of 75 per cent. of all the members of the House of Representatives or by a simple majority of votes in a referendum. Section 189 did not itself require this special procedure for its own repeal or amendment. It has been argued, first, that in any event in order to alter these electoral provisions it would be necessary to repeal section 189 (*semble* by a simple majority); but, secondly, that section 189 is probably binding on the New Zealand Parliament as a "redefinition" of the legislature for this purpose.[17] Most New Zealand lawyers and politicians at the time, however, admitted that the sanction provided by section 189 was merely moral and conventional,[18] and it is submitted that this is the correct view. The reason why the legislature did not try to "entrench" section 189 itself was that it recognised that such an attempt would be ineffectual.

[10] G. Marshall, *Constitutional Theory*, p. 42; G. Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined*, *loc. cit.*

[11] Now entitled the Meeting of Parliament Act.

[12] D. V. Cowen, *Parliamentary Sovereignty and the Entrenched Sections of the South Africa* (1957).

[13] D. V. Cowen's original argument referred to the meanings of "Parliament" in different sections of the constituent South Africa Act.

[14] New Zealand Constitution Amendment Act 1973 (NZ). *cf.* the dictim of Moller J. at first instance in *R. v. Fineberg* [1958] N.Z.L.R. 119.

[15] See *McCawley v. R.* [1920] A.C. 691, PC *per* Lord Birkenhead L.C.

[16] *Kariapper v. Wijesinha* [1968] A.C. 717, PC; *cf. Ibralebbe v. R.* [1964] A.C. 900, PC; no implied repeal of entrenched provisions. And *cf. R. v. Drybones* (1969) 9 D.L.R. (3d) (S.C. Canada) on Canadian Bill of Rights.

[17] See *e.g.* Aikman, *New Zealand, its Laws and Constitution* (2nd ed. Robson), pp. 66–69.

[18] See *e.g.* K.J. Scott, *The New Zealand Constitution* (1962), pp. 6–9.

4–032 The arguments concerning "manner and form" or "redefinition" in relation to the United Kingdom Parliament have also prayed in aid cases concerning legislatures that are subordinate to a higher law, or "controlled" constitutions. The first and best known of these is *Attorney-General for New South Wales v. Trethowan*.[19] The New South Wales legislature had passed an Act in 1929 providing that no Bill to abolish the Legislative Council (the Upper House) should be presented to the Governor for his assent unless it had been approved at a referendum, and that this provision should also apply to any Bill to repeal or amend the Act. After a change of government in 1930 two Bills were introduced, one to repeal the Act of 1929 and the other to abolish the Legislative Council. The Privy Council held that if they received the Governor's assent without being approved at a referendum the Acts would be void, because they would not have been passed in the "manner and form" required by the law in force in New South Wales. It is clear from the judgment of the Privy Council, and has been confirmed since by the Australian High Court,[20] that the decision in *Trethowan*'s case was based on the ground that New South Wales (although no longer a "colony") was still subject to the Colonial Laws Validity Act 1865, which recognises the lawmaking power of a representative colonial legislature provided that its laws are passed "in such manner and form as may from time to time be required by an Act of Parliament . . . or colonial law for the time being in force in the said Colony." "The answer depends," said Lord Sankey L.C. in that case, "entirely upon the consideration of the meaning and effect of section 5 of the Act of 1865." The limitation placed on itself by the New South Wales legislature in 1929 was therefore binding on it in 1930 *by virtue of the Colonial Laws Validity Act*, a "higher law" passed by a legislature to which it was legally subordinate. The case is no authority whatsoever for saying that the United Kingdom Parliament can bind itself in this way.

4–033 The application of the "manner and form" argument to the United Kingdom Parliament appears to have been initiated by an obiter dictum of Dixon J., as he then was, in the Australian High Court in *Trethowan*'s case.[21] His lordship suggested that if the United Kingdom Parliament passed legislation concerning the abolition of the House of Lords similar to that passed by the New South Wales legislature in 1929, it would be unlawful to present a repealing or abolition Bill for the Royal Assent; and if it was found possible (*sic*) to raise the question for judicial decision the court would be bound to pronounce it unlawful to do so; further that, if such Bill did receive the Royal Assent without being submitted to a referendum, the courts might (*sic*) be called upon to consider whether the

[19] [1932] A.C. 526, PC on appeal from the High Court of Australia in *Trethowan v. Peden* (1931) 44 C.L.R. 394. The case could have been argued on the question whether an injunction would lie to prevent the Bills from being presented to the Governor for the Royal Assent, but the Australian High Court allowed special leave to appeal to the Privy Council only on the question of "manner and form." The use of the case in this context is largely due to the fact that it was "a recent decision" when Jennings published the first edition of his *The Law and the Constitution* in 1933. See also O. Hood Phillips, "Ryan's Case" (1936) 52 L.Q.R. 241.

[20] *Clayton v. Heffron* (1960) 105 C.L.R. 214; G. Sawer in [1961] P.L. 131. Dixon C.J. and the majority of the court said the case had no analogy to *Trethowan*, where there was a definite statutory prohibition against presenting the Bill to the Governor: here the ground was that the procedure was not correctly followed. And see *per* Dixon C.J. in *Hughes and Vale Pty. Ltd v. Gair* (1954) 90 C.L.R. 203. *cf.* W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950) 24 A.L.J. 103.

[21] 44 C.L.R. 426. The dictum seems to have been inspired by counsel's argument.

supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside. He concluded that the answer was "not clear." In a later Australian case,[22] however, Dixon C.J. (as he had become) said that in Australian law an injunction ought not to be granted in connection with the legislative process,[23] that therefore *Trethowan*'s case was probably wrongly decided, and the remedy was judicial review after the Royal Assent had been given. He implied that it was unlikely that such a case could be brought before the courts in the United Kingdom. The disinclination of English courts to intervene by injunction in the process of private Bill or delegated legislation is shown in several decisions.[24] *A fortiori* they are unlikely to intervene in the process of public Bill legislation, which is a matter within the cognisance of Parliament.[25] In *Harper v. Home Secretary*,[26] where an injunction was refused to restrain the Home Secretary from presenting a draft electoral boundaries order (approved by both Houses) to the Privy Council, Lord Evershed M.R. pointed out that *Trethowan*'s case was concerned with a strictly limited legislature, and said: "That seems to me quite a different case from the present. We are here in no sense concerned with a Parliament or legislature having limited legislative functions according to the constitution."

In *Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong*[27] the Privy Council held that no declaration or injunction lay to restrain the colonial legislature of Hong Kong from debating, passing and presenting to the Governor a copyright Bill, although it might, if enacted by the Governor's assent, be void under the Colonial Laws Validity Act 1865, s.5, as being repugnant to United Kingdom statute. The principle of this decision would clearly rule out declaration or injunction as ways of preventing the presentation of a Bill to the Queen for the Royal Assent.

4–034 What we have said about cases concerning subordinate legislatures applies also to two appeals to the Privy Council from Ceylon, which are sometimes cited in this context. The reason for the invalidity of the Bribery Tribunal in *Bribery Commissioner v. Ranasinghe*[28] and of the special court in *Liyanage v. R.*,[29] was

[22] *Hughes & Vale Pty. Ltd v. Gair* (1954) 90 C.L.R. 203.

[23] It might be regarded as a breach of privilege: *Clayton v. Heffron* (1960) 105 C.L.R. 214.

[24] *Bilston Corporation v. Wolverhampton Corporation* [1942] 1 Ch. 391 (statutory obligation not to oppose application for private Bill); *Hammersmith Borough Council v. Boundary Commission for England, The Times*, December 15, 1954 (forwarding of Boundary Commission's report to Home Secretary); *Merricks v. Heathcoat-Amory* [1955] Ch. 567 (ministerial marketing scheme); *Harper v. Home Secretary* [1955] Ch. 238, CA. And see W. S. Holdsworth (1943) 59 L.Q.R. 2 (denying jurisdiction of courts in such cases); Z. Cowen, "The Injunction and Parliamentary Process" (1955) 71 L.Q.R. 336.

[25] On injunctions against minister of the Crown, and the Crown Proceedings Act 1947, s.21, see *Re M* [1994] 1 A.C. 377, HL., *post*, para. 33–017.

[26] [1955] Ch. 238, *ante*.

[27] [1970] A.C. 1136; O. Hood Phillips, "Judicial Intervention in the Legislative Process" (1971) 87 L.Q.R. 321. *cf. G.* Sawer, "Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence" (1944) 60 L.Q.R. 83: suppose an Act expressly authorises the citizen and the courts to intervene by injunction.

[28] [1965] A.C. 172. *cf.* G. Marshall, "Parliamentary Sovereignty: A Recent Development" (1966–67) 12 McGill L.J. 523.

[29] [1967] 1 A.C. 259.

that the setting up of these judicial institutions had not been done by the special legislative procedure of constitutional amendment required by the written[30] Constitution of Ceylon, although that country was a sovereign state. In the *Ranasinghe* case Lord Pearce said that there was no analogy to the British Constitution, which has no instrument governing the forms of the lawmaking power.[31]

Attempts have been made to suggest drafting formulae by which Parliament might bind itself, but none of them would be effective to prevent repeal or amendment by a later Act.[32] (The European Communities Act 1972 does not, it should be remembered, contain any provision purporting to bind future Parliaments.)

Parliament Acts[33]

Public Acts (with one specific exception) may, in certain circumstances, be passed by the Queen and the Commons without the consent of the Lords under the Parliament Acts 1911 and 1949. It has been argued that by the Parliament Acts Parliament has bound itself for the future as to the manner and form of legislation, or that for this purpose "Parliament" now consists of the Queen and the Commons. It is submitted that both arguments are unsound. In the first place, the Parliament Acts do not limit the powers of Parliament. All Bills (including Money Bills) must be sent to the Lords, and the Lords have the opportunity of agreeing to them all if they wish. What the Parliament Acts do is to alter the usual procedure for public Bills by limiting the time during which the Lords may deliberate: after that time a Bill may be sent for the Royal Assent although the Lords have not agreed to it. This is an alternative permissive procedure, which only comes into play after the prescribed period if the Lords do not consent to a Bill in the form approved by the Commons. Again, the five-year maximum life of Parliament is effective in that, if Parliament is not dissolved by prerogative by the end of five years, it would be dissolved automatically by the Parliament Act 1911; but Parliament can during the five-year period pass an Act in the ordinary way extending or reducing its life.[34] **4–035**

Secondly, the Parliament Acts do not alter the composition of Parliament.[35] When an Act is passed by the Queen and the Commons under the provisions of the Parliament Acts, the enacting formula must state that this is done in accordance with the provisions of those Acts (which include the sending of the Bill to

[30] The Ceylon Constitution of 1947 was not merely "written," but contained entrenched clauses subject to judicial review.

[31] "The cases cited by the 'manner and form' school do not, in the end, seem very helpful"; Munro *Studies in Constitutional Law* (2nd ed.), p. 160.

[32] *e.g.* Keir and Lawson, *Cases in Constitutional Law* (4th ed., 1954), p. 7: an Act providing that no Bill to repeal it should have effect unless approved by a referendum (passage omitted from later editions); J. L. Montrose, *Precedent in English Law and other Essays* (1968) and J. D. B. Mitchell, *Constitutional Law* (2nd ed., 1968), p. 89, cite the National Insurance Act 1965, s.116, which reproduced certain departmental regulations but provided that their validity might be determined as though they remained delegated legislation. Montrose, *op. cit.* pp. 283–284, also suggested the application of Interpretation Acts and the maxim *generalia specialibus non derogant* as possible limitations on the doctrine that Parliament cannot bind itself.

[33] See further, *post*, Chap. 8.

[34] Parliament in fact extended its life during both World Wars.

[35] *cf.* Jennings, *Constitutional Laws of the Commonwealth* (1957), pp. 124–125.

the Lords),[36] and so it may best be regarded as a kind of subordinate or delegated legislation.[37]

Indeed, we may doubt whether the measure calling itself "the Parliament Act 1949" is valid.[38] The Parliament Act 1911, of course, received the consent of the House of Lords; but the "Parliament Act 1949"—designed to reduce still further the period during which the Lords might delay a public Bill other than a Money Bill—did not receive the consent of the Lords but purported to be passed in accordance with the provisions of the Parliament Act 1911. It therefore offended against the general principle of logic and law that delegates (the Queen and Commons) cannot enlarge the authority delegated to them. We are not, of course, arguing—as it is impossible in English law to argue—that an Act of Parliament is invalid; what we are questioning is whether the measure called "the Parliament Act 1949" bears the character of an Act of Parliament. In other words we are contending that the Parliament Act 1911, as an enabling Act, cannot itself be amended by subordinate legislation of the Queen and Commons.[39]

4–036 No Act purported to be passed without the consent of the Lords "in accordance with the provisions of the Parliament Acts 1911 and 1949" until the War Crimes Act 1991, followed within a few years by the European Parliamentary Elections Act 1999. At one stage it appeared that opposition from hereditary peers might lead to reliance on "the Parliament Acts 1911 and 1949" in order to secure the passing of the House of Lords Bill but ultimately the House of Lords Act 1999 became law with the consent of the Upper House. The 1949 Act was, however, invoked recently to secure the enactment of the Sexual Offences Amendment Act 2000 which reduces the age of homosexual consent from 18 to 16.

The validity of the War Crimes Act 1991 was, apparently, unsuccessfully challenged in the trial of *Serafinowicz* but there is no reported judgment on the issue and, it is believed, counsel did not raise the question in the trial of *Sawoniuk*.

It has been suggested that the argument raised in earlier editions has been undermined by the decision of the House of Lords in *Pepper v. Hart*.[40] It is true that an examination of Hansard reveals the belief of government ministers that the procedures of the 1911 Act could be used to amend the 1911 Act itself. But it is equally clear that section 4 of the Act—which required legislation passed without the consent of the House of Lords to be introduced by the special words of enactment which explicitly refer to the 1911 Act—was introduced by peers who did not wish to see its procedures used to further reduce the powers of the House.

4–037 The decision in *Pepper v. Hart* seemed self evidently correct when the Inland Revenue sought to tax an individual on a basis which had been explicitly repudiated by the relevant minister when the legislation was being debated. But can a minister by making wide claims for what he wants to achieve bind later

[36] A number of procedural provisions must be complied with, as to which the Speaker's certificate is stated to be conclusive: Parliament Act 1911, s.3. *cf. Akar v. Att.-Gen. of Sierra Leone* [1970] A.C. 853, PC.

[37] H. W. R. Wade [1954] C.L.J. 265; [1955] C.L.J. 193.

[38] Hood Phillips, *Reform of the Constitution*, pp. 18–19, 91–93; letter from O. Hood Phillips to *The Times*, July 15, 1968; Graham Zellick, "Is the Parliament Act *Ultra Vires*?" (1969) 119 New L.J. 716.

[39] *R. v. Burah* (1878) 3 App Cas 889 and *Hodge v. R.* (1883) 9 App Cas 117 are, it is suggested, not inconsistent with this proposition.

[40] [1993] A.C. 593.

courts to accept his interpretation of a statute—or even to accept an interpretation which gives him or the House of Commons powers which the law says they do not have.[41] *Pepper v. Hart* will need further elaboration in later litigation if it is not to have very unfortunate consequences.[42]

It has also been argued that giving the words of section 2 of the 1911 Act their ordinary and natural meaning—the first rule of statutory interpretation—they are sufficiently wide to extend to later amendments of the 1911 Act, such as the legislation of 1949. To that it can be replied that it is equally fundamental that legislation is not to be taken to make any alteration in the common law beyond what it expressly so does.[43]

In recognition of the controversy surrounding the Parliament Act 1949, Lord Donaldson of Lymington, a former Master of the Rolls, introduced into the House of Lords in November 2000, the Parliament Acts (Amendment) Bill. The purpose of the Bill, which did not become law, was to confirm the status of the 1949 Act and the Acts which, at that time had been passed under its terms and to ensure that the provisions of the 1911 and 1949 Acts could not be used for the future to affect the constitution or powers of the House of Lords and could not themselves be amended except by Act of Parliament passed in the conventional way.

Regency Acts[44]

The Regency Acts 1937–53 provide that if the Sovereign is under 18 years of age, the royal functions shall be exercised by a Regent appointed under the provisions of the Acts. The Regent may assent to Bills, except Bills altering the succession to the throne or repealing the Acts securing the Scottish Church. It is clear that the Regent and the two Houses could not repeal these exceptions, not because Parliament has bound its successors, but because legislation passed with the Regent's assent is a kind of subordinate or delegated legislation which must keep within the limits prescribed by the Regency Acts. On the other hand, it seems that a Sovereign under the age of eighteen could assent to Bills, including Bills excepted from the Regent's authority and Bills to repeal or amend the Regency Acts themselves,[45] for a Sovereign is never an infant at common law and Parliament is not bound by the procedure provided by the Regency Acts. This does not mean that these provisions of the Regency Acts are "void." They are valid and effective so long as they remain unrepealed in that, if a Regent is appointed, Bills assented to by him (subject to the two exceptions) will be recognised as valid statutes. **4–038**

[41] Obviously a court will not be bound under the Human Rights Act 1998 by a minister's statement under s.19 that the provisions of legislation are compatible with the Convention rights.

[42] For a searching critique, see D. Robertson, *Judicial Discretion in the House of Lords* (1998) Chap. 5. "To take the opinion whether of a minister or an official or a committee as to the intended meaning in particular applications of a clause or phrase would be a stunting of the law and not a healthy development": *per* Lord Wilberforce, *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 at p. 630.

[43] *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 at p. 614 *per* Lord Reid; *A.G. v. Brotherton* [1992] 1 A.C. 425 at p. 439 *per* Lord Oliver. For an application of the principle, no doubt unattractive to modern susceptibilities, see *Viscountess Rhondda's Claim* [1922] 2 A.C. 33.

[44] See further, *post*, Chap. 4.

[45] H. W. R. Wade [1955] C.L.J. 193n.

Conclusion

4–039 It appears that the only way by which the legislature of this country could become legally limited would be for the United Kingdom Parliament to extinguish itself, after surrendering its powers to a new written constitution,[46] with entrenched provisions (*e.g.* as to abolition of the Second Chamber, the life of Parliament, membership of EEC, and a Bill of Rights) and judicial review—a constitution limiting the powers of the new legislature *and to which the new legislature would owe its existence*. The new constitution could either be drafted by the existing Parliament, or its drafting could be entrusted to a constituent assembly, the new constitution perhaps receiving the extra moral sanction of an inaugural referendum. In either case there would be a *breach of continuity* between the old and the new constitutions.[47]

It is, of course, true that Parliament is unlikely to repeal the European Communities Act 1972 or the Human Rights Act 1998. Devolution is, no doubt, here to stay. But predictions about what Parliament might wish to do or, in political terms, might or might not be able to do, are irrelevant to the importance of the legal doctrine of Parliamentary Supremacy. It is because of that doctrine that when Parliament wishes to do something it can, safe from challenge in the courts and from the need to follow particular procedures.

[46] *cf.* A. V. Dicey, *England's Case against Home Rule* (3rd ed., 1887), pp. 241–245; could Parliament merely transfer its powers to another legislature?

[47] Hood Phillips, *Reform of the Constitution*, pp. 156 *et seq.* For another suggestion, see Lord Hailsham, *The Dilemma of Democracy*, Chap. 36.

CHAPTER 5

DEVOLUTION AND REGIONALISM

Introduction

5–001 In chapter 2 we saw how the United Kingdom evolved from a union of England, Wales, Scotland and Ireland. As a consequence of this history the United Kingdom had a unitary constitution in which political and legal powers were centralised to a remarkable extent. However, within this system there was a measure of devolution of administrative powers to Scotland, and to a lesser extent to Wales. From 1921 to 1972 Northern Ireland enjoyed an extensive degree of devolution with legislative and executive powers devolved to the Province's Parliament and government. The extend to which there was devolution within the United Kingdom before 1999 will first be considered.

I. DEVOLUTION

5–002 The term devolution[1] refers to the delegation of central government powers without the relinquishment of supremacy by the central legislature. Devolution may be legislative or administrative or both, and in its more advanced forms involves the exercise of powers by persons or bodies who, although acting on authority delegated by the Westminster Parliament, are not directly answerable to it or to the central government.[2] Devolution is said not to affect the unity of the United Kingdom or the power of Westminster to legislate (even in devolved matters) for all or any part of the United Kingdom, or to repeal or amend the devolution arrangements themselves. It should be distinguished from "decentralisation", which is a method whereby some central government powers of decision-making are exercised by officials of the central government located in various regions,[3] and federalism. In a federal system supremacy is *divided* between the federal legislature and government on the one hand and the legislatures and governments of the constituent units on the other, and the basic terms of a federal constitution (notably the distribution of powers) are *entrenched* so that they cannot be amended at the sole discretion of the federation or of any province or combination of provinces.[4]

Northern Ireland[5]

5–003 From 1921 to 1972 the Northern Ireland Parliament and government had powers under the Government of Ireland Act 1920 to make laws "for the peace order and good government of Northern Ireland", only matters such as foreign

[1] For the background see: (1973) Cmnd. 5460, *Report of Royal Commission on the Constitution* (Kilbrandon); Cmnd. 5460–61, *Memorandum of Dissent*; (1974) Cmnd. 5732, *Democracy and Devolution: Proposals for Scotland and Wales*; (1975) Cmnd. 6348, *Our Changing Democracy: Devolution to Scotland and Wales*; (1976) Cmnd. 6585, *Devolution to Scotland and Wales: Supplementary Statement*; (1977) Cmnd. 6890, *Devolution: Financing the Devolved Services*.

[2] Cmnd. 5460, p. 165.

[3] Cmnd. 6348, pp. 55–56.

[4] Cmnd. 5460, pp. 152–154.

[5] See C. McCrudden, "Northern Ireland and the British Constitution", in *The Changing Constitution*, (J. Jowell and D. Oliver eds, 3rd ed., 1994); B. Hadfield, "The Northern Ireland Constitution", in *Northern Ireland: Politics and the Constitution* (B. Hadfield ed., 1992).

relations, defence and nationality were reserved to Westminster. Local Northern Ireland ministries and departments were established in the usual areas of government, and in this period Northern Ireland passed its own laws and had its own system of administration and its own civil service. The Home Office was the United Kingdom department with responsibility for Northern Ireland, but it had no presence in Northern Ireland and had little direct knowledge of what was happening there. Although Westminster had retained ultimate legislative power, a convention developed that it did not concern itself with matters formally devolved to Northern Ireland. Devolution as envisaged by the Government of Ireland Act 1920 came to an end in 1972: that it did so was not a defect in the concept of devolution,[6] but a reflection on a system which failed to take account of the divisions within the Province, allowed one party which represented the majority of the people in Northern Ireland to ignore the interests of any other group, and too great a willingness by successive United Kingdom governments not to intervene.

Scotland[7] and Wales

5–004 Although the central administration of Scotland had been the exclusive responsibility of the British Government since 1707, and the Westminster Parliament the sole source of legislation for Scotland, the distinctive Scottish legal system and Scots law were guaranteed by the Treaty of Union 1707. In 1885 a Scottish Office headed by a Minister with a seat in the cabinet, was created. The office was upgraded to Secretary of State in 1937, and in 1939 the main base of the Scottish Office became Edinburgh. Gradually executive powers were devolved to the Scottish Office, which was able to devise, execute and administer the policies of the United Kingdom government in a Scottish context. In addition the different legal system required statutes that applied only to Scotland to be made by Westminster. Scotland then had a system of administrative devolution.

Wales also had administrative devolution, but it had developed at a slower pace than in Scotland. By 1945 fifteen government departments had Welsh sections with offices in Wales, but it was not until 1964 that the Welsh Office and a Secretary of State for Wales were created, although a Minister of State for Welsh Affairs had been established in 1951. Initially the Secretary of State for Wales had limited powers, with powers being extended gradually. Unlike Scotland, Wales did not have its own laws and legal system, and there was no need to legislate separately for Wales, except for legislation connected with such matters as Welsh language, culture and heritage.

The Scotland Act 1978 and the Wales Act 1978

5–005 Nationalism in Scotland and Wales first became a considerable electoral factor at the general election of 1966, when the Nationalist parties received the votes of 20 per cent of the electors in those countries. A Royal Commission on the Constitution was set up in 1969. Its terms of reference were "to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; and to consider ... whether any changes are desirable ... in the present constitutional and economic relationships ..." Although the terms of reference were wide enough to cover almost any aspect of the Constitution, the Commission limited its review

[6] See the Kilbrandon Report, (see *ante* note 1) para. 548.
[7] See the Stair Encyclopedia, *The Laws of Scotland*, vol. 5.

almost entirely to the question of national feelings and devolution. The terms of reference insisted on the preservation of the political and economic unity of the United Kingdom. The Kilbrandon Commission issued majority and minority reports in 1973.[8] The Government did not accept either report in its entirety, but held further discussions and issued several White Papers. In particular the Government pointed out that there were few parallels anywhere for dividing between two levels of government powers and functions long exercised centrally in a unitary state, and that after devolution to Scotland and Wales each part of the United Kingdom would have a different form of government.

5–006 The impetus to introduce legislation devolving power to Scottish and Welsh assemblies was the parlous position of Mr Callaghan's minority government from 1976 onwards and his wish to secure political allies wherever they could be found. Initially one bill to deal with both countries was introduced in the 1976–77 Session of Parliament but was abandoned after the government's defeat when it attempted to introduce a guillotine motion. Two separate bills were introduced in the 1977–78 Session, which after a long parliamentary struggle became the Scotland Act 1978 and the Wales Act 1978. The Scotland Act provided for a directly elected Assembly with legislative and executive powers, the Wales Act for an Assembly with executive powers only. The devolution legislation required the Acts to be approved in referendums; it also required the approval of 40 per cent of those entitled to vote before the provisions would come into effect. This threshold was not achieved in either country, and the legislation was repealed.

Background to the 1998 devolution statutes

Scotland and Wales[9]

5–007 From 1978 to 1992 the pressures for devolution to Scotland and Wales mainly came from outside government and parliament; the then Conservative government was committed to the preservation of the Union, and opposed to devolution. The Scottish Constitutional Convention—a pressure group established in 1989—helped to pave the way for devolution by the publication of reports and proposals.[10] In the 1992 general election both the Labour Party and the Liberal Democratic Party were in favour of devolution to Scotland and Wales. The Conservative Party, re-elected in 1992, remained opposed to devolution, and instead introduced a series of procedural reforms designed to enhance the treatment of Scottish and Welsh business in Parliament, improve aspects of the Scottish and Welsh Offices and increase executive devolution.[11] Throughout the period of Conservative government, the Conservative Party had little electoral support in Scotland and Wales. This difference between the electoral preferences of the people in Scotland and Wales, and the political composition of

[8] *op. cit.* note 1. Of 16 Commission members, eight favoured a scheme of legislative as well as executive devolution to Scotland, six favoured a similar scheme of devolution to Wales, and eight members were in favour of coordinating and advisory Regional Councils for England, partly indirectly elected by the local authorities and partly nominated.

[9] See James Mitchell, "The Creation of the Scottish Parliament: Journey without End", (1999) 52 Parl. Affairs 651; Laura McAllister, "The Road to Cardiff Bay: The Process of Establishing the National Assembly for Wales", (1999) 52 Parl. Affairs. 635.

[10] *Towards Scotland's Parliament* (1990), *Scotland's Parliament, Scotland's Right* (1995).

[11] *Scotland in the union: a partnership for good*, Cm. 2225 (1993); see Patricia Leopold Chap. XIII "Autonomy and the British Constitution", in *Autonomy: Applications and Implications* (Markku Suksi ed., 1998).

the government at Westminster, increased the demands in Scotland and Wales for devolution. In 1997 Labour won the general election with a commitment to institute a wide range of constitutional reforms. White Papers on Scottish and Welsh devolution were published in July 1997[12] in which devolution was placed in the wider context of a series of constitutional reforms which would decentralise power, open up government, reform Parliament and increase individual rights. The Referendums (Scotland and Wales) Act 1997 was passed to give voters in each country the opportunity to decide if the government should go ahead and introduce legislation for devolution based on the respective White Papers. In a 60 per cent turnout, 74.3 per cent of those voting agreed that there should be a Scottish Parliament; a week later, in a 51 per cent turnout, 50.3 per cent of those voting supported the creation of a Welsh Assembly. The 1979 referendums had required 40 per cent of the electorate to support the devolution legislation, there was no such threshold in the 1997 Act, and the on the basis of the referendum results the Scotland Bill and the Government of Wales Bill were published. Both Bills received the Royal Assent in 1998, and the first elections were held in May 1999.

Northern Ireland

5–008 The establishment of lasting new provisions for the government of Northern Ireland had been the aim of successive governments for many years. United Kingdom governments came to recognise that solutions to the problems of Northern Ireland had to involve the Republic of Ireland, and in 1981 both governments agreed to establish an Anglo-Irish Inter-government Council. In 1985 the Governments of the United Kingdom and the Republic of Ireland concluded the Anglo-Irish Agreement which established within the framework of the Inter-Government Council, an Inter-governmental Conference. This would consider, on a regular basis, matters relating to Northern Ireland and relations between the two parts of the island of Ireland. The Agreement specified the matters to be considered: political matters; security and related matters; legal matters, including the administration of justice and the promotion of cross-border co-operation. The Agreement was unsuccessfully challenged by four Unionist Members of Parliament on the basis *inter alia* that it would fetter the statutory functions of the Secretary of State for Northern Ireland, that it handed over partial sovereignty to the Irish Republic and would be in breach of the Union with Ireland Act 1800.[13] Although the Anglo-Irish Agreement committed the British Government to the restoration of devolution to Northern Ireland, the opposition of the Unionists to the Agreement meant that no progress was made.

5–009 In 1993 behind the scenes talks between several of the political parties in Northern Ireland progressed sufficiently to allow the "peace process" to be given official recognition and encouragement. The Downing Street Declaration[14] between the British and Irish governments recognised and renewed the position of Northern Ireland as part of the United Kingdom so long as that was the wish of the majority of the people of Northern Ireland. It also stated that the British government had no "selfish, strategic or economic interest in Northern Ireland", thereby indicating the neutrality of the British government in the future constitutional position of Northern Ireland. Although ceasefires were announced in 1994,

[12] *Scotland's Parliament*, Cm. 3658, *A Voice for Wales* (Cm. 3718).
[13] *ex p. Molyneaux* [1986] 1 W.L.R. 331.
[14] Cm. 2442 (1993).

it proved impossible to convene multi-party talks. The governments of the United Kingdom and Ireland continued to work towards a constitutional settlement, and in 1995 a series of Frameworks documents were agreed. These documents outlined proposals for a power-sharing model of devolution which would include both the main communities in Northern Ireland, and address the relationship between the two parts of Ireland and that between Ireland and the United Kingdom. In 1995 unsuccessful attempts were made to encourage the holding of multi-party talks by the establishment of an international body chaired by a former U.S. Senator, George Mitchell. Unionist opposition to the Frameworks proposals, the slim majority of the Conservative Government, and the ending of the ceasefire put back the hopes of a constitutional settlement for Northern Ireland. The election of a Labour Government did not mark any change of policy on Northern Ireland, but the Government's clear commitment to general constitutional reform and sound majority in the House of Commons provided the necessary impetus to make new progress. Multi-party negotiations—which with the renewal of its cease-fire included Sinn Fein—under the chairmanship of Mr George Mitchell started and concluded on Good Friday 1998 with the Belfast Agreement.[15] The Belfast Agreement was supplemented by agreements between the British and Irish governments on its implementation.[16]

5–010 There are several aspects to the Belfast Agreement. First it provided that Northern Ireland would remain part of the United Kingdom and would not cease to do so unless the people of Northern Ireland voted otherwise in a border poll; the claim to jurisdiction over all of Ireland provided in the constitution of the Republic of Ireland was to be repealed. Secondly the Agreement provided in three strands the institutional framework for devolution, each strand representing one of the sets of relationships that exist in Northern Ireland. Strand One required the establishment of an elected Assembly with legislative powers and an Executive. Strand Two provided for the establishment of a North-South Ministerial Council to deal with matters of mutual interest to the Assembly and the Irish Government.[17] Strand Three created the British-Irish Council.[18] Finally the Agreement addressed a variety of issues of concern to both sides of the community: the establishment of a Human Rights Commission and an Equality Council; an Independent Commission on Decommissioning, and a commitment to the disarmament of the paramilitary organisations; policing; security; prisoner releases and the criminal justice system. In May 1998 referendums on the Belfast Agreement were held in Northern Ireland and the Republic of Ireland. In a 80.98 per cent turnout, 71.2 per cent of those who voted approved the agreement in Northern Ireland, and in a 55.47 per cent turnout, 94 per cent of those who voted did so in the Republic of Ireland.

5–011 The procedure for the introduction of the Northern Ireland Assembly began with transitional arrangements found in the Northern Ireland (Elections) Act 1998. This resulted in elections in June 1998 for the "new Northern Ireland Assembly", which was to become the Northern Ireland Assembly once an Order in Council was made implementing Parts I and III of the Northern Ireland Act

[15] *The Agreement reached in multi-party negotiations* Cm. 4292 (1998).
[16] *Agreement Establishing Implementing Bodies* Cm. 4293 (1998); *Agreement Establishing a North-South Ministerial Council* Cm. 4294 (1998); *Agreement Establishing a British-Irish Council* Cm. 4296 (1998).
[17] *post* para. 5–047
[18] *post* para. 5–048

1998—the Act which implemented the Belfast Agreement.[19] Until that time Northern Ireland remained subject to direct rule from Westminster, and the elected "new Assembly" was to start work establishing committees, standing orders etc. in anticipation of the implementation of the 1998 Act. The Devolution Order in Council was to be made, "If it appeared to the Secretary of State that sufficient progress has been made in implementing the Belfast Agreement" (section 3 of the Northern Ireland Act 1998). Mr George Mitchell returned to attempt to persuade the various parties to implement the Belfast Agreement, the apparent success of this process lead to the necessary Devolution Order being made in December 1999. It was short lived; devolution was suspended 10 weeks later[20] but was restored again in May 2000.[21]

The 1998 Provisions for Devolution[22]

5–012 The devolution schemes for Scotland, Northern Ireland and Wales were devised to meet the perceived different needs and circumstances of each country. "The union state, which was never entirely uniform, may be seen to be more disparate than before. Political factors have produced an asymmetrical state, where Westminster and Whitehall have different relationships with each of the constituent parts of the United Kingdom."[23] However there are certain similarities between the different devolution schemes, and these will be outlined before considering each scheme individually.

Similarities in the three devolution schemes

The electoral systems

5–013 In all three countries there is one legislative chamber and elections are by proportional representation (PR). The relevant devolution legislation provides precise details of how elections are to be conducted. Supervision of electoral systems is given to the relevant Secretary of State for each country, and in the case of Northern Ireland elections are an "excepted matter".[24] Systems of PR were established to encourage multi-party "government" in the devolved administrations.

The system for Scotland and Wales gives voters two votes. The first is a vote for a constituency member elected by the traditional first past the post method; 73 Members of the Scottish Parliament (M.S.P.) and 40 Members of the Welsh Assembly are elected this way. The second vote is for members to represent the regions, which are based on the European Parliament election regions. Scotland has eight regions each returning seven members, Wales five, each returning four members. These additional regional members are elected by the d'Hondt[25]

[19] The aspects of the Belfast Agreement which dealt with policing and prisoner releases were dealt with in separate legislative provisions.

[20] Northern Ireland Act 2000.

[21] See Rick Wilford and Robin Wilson, "A 'Bare Knuckle Ride': Northern Ireland", in *The State and the Nations: The First Years of Devolution in the United Kingdom* (R. Hazell ed., 2000).

[22] See Vernon Bogdanor, *Devolution in the United Kingdom* (1999); Alan Ward, "Devolution: Labour's Strange Constitutional 'Design' ", in *The Changing Constitution* (Jowell and Oliver eds, 4th ed., 2000); Noreen Burrows *Devolution* (2000).

[23] Colin Munro *Studies in Constitutional Law* (2nd ed., 1999) at p. 44.

[24] Schedule 2.12 to the Northern Ireland Act 1998; this means that powers over elections can not be transferred to the Northern Ireland Assembly. Elections by PR had been provided in the Government of Ireland Act 1920, but was not an excepted matter, and was abandoned by the Northern Ireland Parliament in 1929.

[25] Named after its inventor.

system of proportional representation whereby each elector casts his vote for a particular party list[26] and seats are allocated by reference to the votes cast for each party in the region. As Scotland elects 56 of its 129 members by this system compared to 20 of the 60 members in the Welsh Assembly, representation in the Scottish Parliament is likely to be more proportional to the votes cast than is the case in Wales.

A different system of PR was adopted for the Northern Ireland Assembly: the single transferable vote, whereby voters mark their preference numerically against their chosen candidates, the application of a formula establishes the quotas required to elect the necessary number of representatives. The 18 Westminster constituencies for Northern Ireland each return six members to the Assembly.

Subordination to Westminster

5–014 It is a characteristic of a devolved system that powers are delegated by the centre to the regions without relinquishment of sovereignty.[27] The 1997 White Paper stated that: "The United Kingdom Parliament is and will remain sovereign in all matters."[28] Acts passed by the Scottish Parliament and by the Northern Ireland Assembly are not sovereign, and may be set aside by the courts if they exceed the institution's legislative competence. The Scotland Act[29] and the Northern Ireland Act[30] both make it clear that the Westminster Parliament retains power to legislate for both countries, not only on matters specifically reserved to Westminster, but also on devolved matters. Since Westminster remains the principal law maker for Wales there was no need for a similar provision in the Government of Wales Act. The precise details of the relationships between each of the new institutions and Westminster (and Whitehall) were not provided in the relevant statutes, but are found in a variety of non-binding written agreements. Included in this is a convention which states that Westminster will not normally legislate with regard to devolved matters without the consent of the relevant devolved institution.[31] In the first two years of devolution, 14 Bills that fell within the legislative powers of the Scottish Parliament were passed by Westminster.[32] So far as Scotland is concerned, the constitutional theory of the legislative supremacy of Westminster will have to be considered in the light of the political reality that it is the Scottish Parliament that legislates and speaks for Scotland. During the 1920–1972 period of devolution to Northern Ireland Westminster found it difficult to exercise its supremacy over Northern Ireland, despite the fact that the Unionist dominated Parliament saw devolution as second best to full integration into the United Kingdom, and did not wish to provoke conflict with the British government. It will be even more difficult in the case of Scotland

[26] It is also possible to vote for a particular candidate on a party list, *cf.* the system for the elections to the European Parliament. For an explanation of the different types of voting system see Munro *Studies in Constitutional Law* (1999), Chap. 4.

[27] *Kilbrandon Report* (see *ante* note 1) para. 543.

[28] Cm. 3658, para. 42.

[29] s.28(7) provides that Scotland's legislative power "does not affect the power of the United kingdom to make laws for Scotland." The Secretary of State for Scotland has powers to override the Scottish Parliament (s.35) and Executive (s.58).

[30] ss.5(6), 15(4), 26.

[31] *Memorandum of Understanding and Supplementary Agreement*, (1999) Cm. 444, para. 13; see also H.C. 148 (1998–99), and see *post* para. 5–047.

[32] Including the Race Relations (Amendment) Act 2000, the Regulation of Investigatory Powers Act 2000 and the Sexual Offences (Amendment) Act 2000. In each case the consent of the Scottish Parliament was sought and given.

where independence is an option; a dispute with the government of the United Kingdom could make this option more attractive to many in Scotland.

There also remain Secretaries for State for each of the countries, who have responsibilities for promoting the devolution settlement, ensuring effective working relationships between the Government and the devolved administrations, and helping to resolve any disputes which may arise.[33] This representation of Scotland, Wales and Northern Ireland at Cabinet level, gives them advantages over the English regions. The different devolution arrangements for each devolved administration mean that each Secretary of State has different roles within these responsibilities. For example the Secretary of State for Wales has a particular role to safeguard Welsh interests when legislation is going through Westminster; the Secretary of State for Scotland has powers to prevent or require action by the Scottish Executive to ensure compatibility with international obligations[34]; it is the Secretary of State for Northern Ireland who submits Bills for the Royal Assent. The future role of the territorial Secretaries of State is unclear; it has been suggested that if the separate offices continue, then devolution will have failed.[35]

Devolution issues

5–015 Devolution issues are described in all three Acts as questions concerning the lawful exercise of power under respectively, the Scotland Act, the Government of Wales Act and the Northern Ireland Act.[36] Each Act defines the term by listing the questions that are to be regarded as devolution issues for the purposes of that Act.[37] In short these are questions concerned with whether the relevant body has acted within its statutory powers, or infringed a European Convention right[38] or European Community law. Special judicial procedures are provided to resolve these questions. All three Acts provide the same scheme for lower courts to refer devolution issues to higher courts and for further appeals in respect of such decisions. The Judicial Committee of the Privy Council[39] has final jurisdiction in such matters. A question on legislative competence may be referred to the Privy Council while a Bill is going through its legislative procedures.[40] The relevant law officers within their jurisdictions have to be notified of any devolution issue proceedings to which they are not a party, and can require devolution proceedings to which they are a party to be referred to the Judicial Committee. There is a wide variation in the roles and powers of the law officers with respect to devolution issues in the three jurisdictions, reflecting differences in the existence, roles and powers of the law officers in each country.[41]

[33] *Memorandum of Understanding* Cm. 4444 (1999) p. 1. See also *the Procedural Consequences of Devolution* H.C. 147 (1998–99).

[34] As does the Secretary of State for Northern Ireland.

[35] R. Hazell (ed.), *Constitutional Futures* (1999, Oxford University Press), p. 137.

[36] See *Hoekstra v. H.M. Advocate* [2001] A.C. 216; 2001 S.L.T. 28 where the Privy Council considered the meaning of a devolution issue.

[37] See Scotland Act 1998, sched. 6, Northern Ireland Act 1998, sched. 10, Government of Wales Act 1998, sched. 8.

[38] The first Act passed by the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, was unsuccessfully challenged in the Court of Session as being contrary to Art. 5 E.C.H.R.: *A v. The Scottish Ministers* 2001 S.C. 1.

[39] See *post* Chap. 16.

[40] Scotland Act 1998, s.33 and Northern Ireland Act 1998, s.11.

[41] See Burrows, *Devolution* (2000), Chap. 6.

Human rights

5–016 The devolved bodies are bound by the E.C.H.R. by the Human Rights Act 1998; Acts made by the Scottish Parliament and Northern Irish Assembly are regarded as subordinate legislation for the purpose of the Human Rights Act (s.21(1)), enabling Acts which are incompatible with Convention rights to be quashed by a higher court. The Human Rights Act applied to the devolved bodies before it came into effect for the rest of the United Kingdom.

The obligation to comply with Convention rights is reinforced by the devolution legislation which also provides that the devolved bodies should apply E.C.H.R. rights: acting in a way that appears to be incompatible with Convention rights will raise a devolution issue. The Scotland Act, s.29 and the Northern Ireland Act, s.6 provide that legislation that is incompatible with Convention rights is outside the legislative competence of the relevant institution. Sections 57 and 24 respectively prohibit members of the respective Executives from making subordinate legislation that is incompatible with Convention rights.[42] Section 107 of the Government of Wales Act provides similar restrictions on the more limited law-making powers of the Welsh Assembly, however the Assembly will not have acted *ultra vires* if it makes secondary legislation which is incompatible with Convention rights where this is required by United Kingdom primary legislation. Since there is no legal restriction to prevent Westminster legislating contrary to the Human Rights Act, nor is there any obligation on it legislating in response to a declaration of incompatibility,[43] it is possible that there could be legal provisions in England and Wales, that would not be permissable in Scotland or Northern Ireland.

The Northern Ireland Act provides for additional human rights protections not found elsewhere in the United Kingdom. A Minister or Northern Ireland Department may not make subordinate legislation, or do any act which discriminates against a person or class of persons on the grounds of religious belief or political opinion (section 24(1)(c)); a statutory Human Rights Commission is established to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights" (sections 68 and 69). There is widespread support in the Scottish Parliament for the establishment of a similar Commission there.

Cabinet style of government

5–017 In all three countries an executive is drawn from the elected members, but the formation and powers of the executives is very different. Borrows describes them as "'designer cabinets', tailored to suit very different constitutional settlements."[44] As will be seen,[45] the method of selecting the Executives is laid down in some detail in the relevant statutes, as is the basis of the relationship between the Executives and the elected bodies; the exact relationships will be determined by the development of constitutional conventions. The very different types of cabinet government mean that the convention of collective responsibility with its characteristics of unanimity, confidentiality and the need for the confidence of the legislature which have developed with respect cabinet government for the United

[42] As defined by the Human Rights Act 1998, see *post* Chap. 22.
[43] See *post* Chap. 22.
[44] At p. 104.
[45] *post* paras 5–022, 5–031 and 5–040.

Kingdom, cannot apply in the same way to the cabinets in the devolved institutions.[46]

Funding

5–018 The funding arrangements for all three countries is basically the same as pre-devolution. Block grants of money are paid to each administration by Westminster. The sums are uprated annually in accordance with the Barnett Formula,[47] which allocates increased funds on a pro rata basis to increases in England. This formula has tended to contribute to higher public expenditure per head in Scotland, Wales and Northern Ireland compared to poorer regions of England and the Barnett formula was subject to inquiry in advance of devolution.[48] However, the application of the Barnett Formula means that the actual money available to Scotland, Wales and Northern Ireland depends on how United Kingdom Ministers in the spending departments such as education and health (largely devolved), protect their budgets against claims for funding by departments such as defence and foreign relations (not devolved). United Kingdom government policy decisions will effect the level of the block grant, irrespective of how the Barnett Formula works in the allocation of funds. The Barnett Formula is an administrative measure and was not given statutory force by the devolution legislation; it can be changed or replaced by the United Kingdom Government, as it was in July 2000 when, contrary to the formula, the assigned budget for Wales was increased. Each administration determines for itself how to spend the money assigned in the block grant. In all three devolved schemes there are statutory provisions for the scrutiny of accounts.

Only Scotland is not totally dependent on Westminster for its revenue. One of the questions in the 1997 referendum was whether the Scottish Parliament should have tax varying powers; 65.5 per cent of those who voted were in favour of such powers, which are found in Part IV the Scotland Act. This allows the Scottish Parliament with respect to Scottish tax payers to increase or decrease the basic rate of income tax set by the United Kingdom Parliament by a maximum of 3 per cent. If the Scottish Parliament decreases the tax rate, a payment has to be made to the Inland Revenue to account for the shortfall.

Members' Interests and conduct and privileges

5–019 The devolution legislation adopts a mixture of statutory and non-statutory provisions to regulate this, based on the experience at Westminster. The establishment of a public Register of Members' Interests and a prohibition on paid advocacy is found in the devolution legislation.[49] It is for the devolved institutions within this statutory framework to establish rules and procedures, and in certain circumstances it will be a criminal offence to fail to comply with the rules. Codes of Conduct for members and Ministers, overseen by a committee on Standards and Privileges, have been agreed and published in all three countries. A more restricted freedom of speech than that found at Westminster[50] is provided in the devolution legislation.[51] All three devolved legislatures have statutory

[46] See Burrows *Devolution* (2000), Chap. 4.

[47] Named after the former Chief Secretary to the Treasury, this formula has been used since the late 1970s.

[48] See H.C. 341 (1997–98), H.C. 619 (1998–99).

[49] s.39 Scotland Act; s.43 Northern Ireland Act; s.72 Government of Wales Act.

[50] *post* Chap. 13.

[51] ss.41, 42 Scotland Act; s.50 Northern Ireland Act; ss.77, 78 Government of Wales Act. The provision are not identical in the three statutes, but have broadly the same effect.

powers to call for witnesses and documents in connection with matters within the competence of the relevant body. Unlike the position at Westminster, there is provision in certain circumstances for the prosecution of un-cooperative witnesses—including members of the legislature.[52] The devolution legislation specifically provides that each of the legislatures is a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916.[53] This ensures that the statute law on the corrupt making or acceptance of payments in connection with a public body's business applies, something that is unclear with respect to Westminster.[54]

II. Scotland

5–020 The Scotland Act 1998 provides for both a Scottish Executive and a Parliament. Of the three schemes of devolution, the Scottish one is closest to that found at Westminster, although the 1998 Act allows for the Scottish Parliament to regulate itself by means of Standing Orders. In advance of the first elections a cross party Consultative Steering Group was established to make recommendations on the procedure and working of the new Parliament.[55] After the first election these recommendations were the basis for the establishment of Standing Orders on for example, the making of legislation, and the committee structure.

Devolved and legislative competence

5–021 The functions of the Scottish Parliament and the Scottish Executive are only those within their "devolved competencies". This means that both bodies have to act within the powers as provided by the 1998 Act. The powers of the Executive are in effect circumscribed by the powers of the Parliament.[56] However, unlike the Scotland Act 1978 where specifically defined legislative and executive competencies were transferred to the new Scottish bodies leaving all other powers to be exercised by Westminster and United Kingdom ministers, the 1998 legislation lists those matters reserved for Westminster and United Kingdom ministers, leaving the rest for the Scottish bodies. The Scottish Parliament has a general power to make laws, known as Acts of the Scottish Parliament (section 28),[57] "within its legislative competence" (section 29), which means that Acts must not:

(i) Modify those "protected provisions" listed in Schedule 4. These include aspects of the Acts of Union, 1706, 1707; the Human Rights Act 1998; parts of the European Communities Act 1972, and most of the Scotland Act 1998.

(ii) Concern "reserved matters" listed in Schedule 5. Part I of the schedule provides five general reserved matters: the constitution, political parties, foreign affairs, public service, defence, and treason. Part II provides

[52] ss. 23–26 Scotland Act; ss. 44–46 Northern Ireland Act; ss. 74–75 Government of Wales Act.
[53] s.43 Scotland Act; s.79 Government of Wales Act.
[54] See Joint Committee on Parliamentary Privilege Report, H.L. Paper 43, H.C. 214 (1998–99), Chap. 3, and *post* Chap. 13.
[55] *Shaping Scotland's Parliament* (H.M.S.O., 1998).
[56] Unless the Executive is acting on the basis of additional powers transferred to it by Order in Council or on an agency basis.
[57] See Burrows *Devolution* (2000), pp. 57–65 for a discussion on whether Acts of the Scottish Parliament and Northern Ireland Assembly are a species of primary legislation or a species of subordinate legislation.

specific reservations with eleven broad heads, under each of which are listed the particular items which are not within the competence of the Scottish Parliament and Executive. The broad heads are: financial and economic matters, home affairs, trade and industry, energy, transport, social security, regulation of the professions, employment, health and medicine, media and culture and miscellaneous. There is provision for the modification by Order in Council of reserved matters (section 30(2)), so enabling an increase in the powers of the Scottish Parliament and Executive.

(iii) Be incompatible with European Convention rights or European Community law.

(iv) Have extra-territorial effect.

(v) Remove the Lord Advocate as head of the system of criminal prosecution in Scotland.

The fields in which the Scottish Parliament and Executive have powers include: the health service,[58] local government—including expenditure and the financing of local government, education and training, housing, transport, sport, the legal system including law and order, farming, fishing, forestry, the arts, the countryside and economic development. The Scottish Parliament has a limited tax varying power.[59] it has to approve a Scottish budget and can debate any matter of national or international importance, irrespective of whether the subject matter is devolved or reserved.

The Executive

Appointment and dismissal and composition

5–022 Section 44 of the Scotland Act states that the Scottish Executive comprises the First Minister, other ministers appointed by Her Majesty on his recommendation, and the Scottish Law Officers (the Lord Advocate and the Solicitor General for Scotland, who may, but need not be, M.S.P.s).[60] The First Minister is appointed by Her Majesty from among M.S.P.s. Her Majesty's discretion may be regarded as limited by section 45 which requires the Scottish Parliament to nominate a First Minister from its members, who will then be recommended by the Presiding Officer[61] to Her Majesty for appointment.[62] The First Minister is required to have his Ministerial recommendations approved by the Scottish Parliament (section 47(2)), so establishing the notion that the Executive is responsible to Parliament. Ministers may resign from office, or be removed by the First Minister. If the Scottish Parliament resolves by simple majority that it has no confidence in the

[58] Apart from those matters reserved to Westminster which include abortion; embryology, surrogacy and genetics; medicines, medical supplies and poisons (sched. 5 Pt II Head J).

[59] *ante*, para. 5–018.

[60] The press release in which the first Executive was named referred to it as "the Cabinet"; more recently the First Minister has referred to it as the "government". Its composition is as provided by s.44, apart from the exclusion of the Solicitor General.

[61] The Presiding Officer (and his two deputies) have similar roles to the Speaker of the House of Commons, but with additional statutory functions and powers.

[62] The Scotland Act does not specifically require an election, but where, as has happened, there are several nominations there was an election.

Executive it must resign immediately (section 45(2)), but a general election will only follow if a replacement Executive cannot be established.

In the 1999 elections no one party had an overall majority. A "Partnership for Scotland" was agreed between the Labour Party and the Scottish Liberal Democrats, and the political composition of the Executive reflected this agreement. The ministerial team of 19 is much larger than the ministerial team found in the Scottish Office prior to devolution.

Executive Functions

5–023 The Scotland Act transfers to Scottish Ministers functions previously exercised by Ministers of the Crown that are within "devolved competence",[63] including the exercise of the prerogative and any functions conferred on a Minister of the Crown by any statute in force before devolution came into effect (section 53(2)).[64] The Scottish Executive therefore exercises devolved executive powers on behalf of the Crown. In due course, additional statutory functions will be conferred on Scottish Ministers by Acts of the Scottish Parliament (section 52). Executive functions are vested in the Scottish Ministers collectively but, with the exception of the specific powers of the First Minister and the Lord Advocate, can be exercised by any member of the Scottish Executive (section 52(5)). There are specified exceptions to the general transfer of functions provided in section 53. Section 56 lists certain functions (shared powers) which although transferred to Scottish Ministers can be also exercised by Ministers of the Crown; section 57 extends shared powers to the power of Scottish Ministers under section 2(2) of the European Communities Act 1972 to implement Community law obligations.[65]

The Sovereign retains direct executive powers to appoint and remove Ministers, to dissolve the Parliament and require a general election to be held and to give the Royal Assent to Bills passed by the Scottish Parliament. Several powers remain with the government of the United Kingdom including: elections; the power to prevent or require action in connection with international obligations (sections 35, 58); payment of money into the Scottish Consolidated Fund; the entitlement of the Attorney General to initiate and participate in devolution proceedings; powers of Her Majesty in Council to alter Parliament's legislative competence, and transfer additional ministerial function to Scottish Ministers.

It is for the Scottish Executive to decide the policy and legislative programme to be followed, and a four year plan was published in September 1999.

The Parliament

Committees in the Scottish Parliament

5–024 The Scottish Parliament works extensively through committees, although unlike the devolution legislation for Wales and Northern Ireland, detailed provisions on committees are not included in the Scotland Act. The establishment of

[63] See *ante* para. 5–021.

[64] s.63 allows for additional powers to be transferred to Scottish Ministers by Order in Council; s.108 provides authority to transfer powers from Scottish Ministers to a Minister of the Crown.

[65] See *post* para. 6–018. The *Concordat on Co-ordination of E.U. Policy Issues* attempts to set out the role of the Scottish Executive in European matters, see Cm. 4444 (1999) paras. 17, 19, and *post* para. 5–049.

certain committees is mandatory: Procedures; Standards; Finance; Audit; European; Subordinate legislation; Equal Opportunities and Public Petitions. In addition the Scottish Parliament has general powers to establish subject committees.[66] Eight have been established: Education, Culture and Sport, Enterprise and Lifelong Learning, Health and Community Care, Justice and Home Affairs, Social Inclusion, Transport and the Environment. These subject committees have several roles: to assist in the scrutiny and revision of legislation; to scrutinise the Executive; to conduct inquiries as required by the Parliament; initiate legislation; scrutinise financial proposals. The volume of work imposed on these committees could put a strain on their ability to work effectively.

Legislative procedures in Scotland

5–025 The Scottish Parliament may pass both primary and secondary legislation for Scotland. As the Parliament is unicameral its procedures must ensure that there is proper scrutiny of both types of legislation.

Primary legislation

5–026 Standing Orders require pre-legislative consultation with bodies or parties who would be concerned with the proposed legislation. On introducing a Bill the relevant Minister must provide:

(i) written statements from both the member of the Executive in charge of the Bill and the Presiding Officer that in his or her view it is within the legislative competence of the Parliament (section 31(1),(2));

(ii) a financial memorandum giving estimates of the administrative and other costs, and indicating where those cost will fall;

(iii) explanatory notes summarising what the Bill will do;

(iv) a policy memorandum setting out the policy objectives of the Bill, the alternative approaches considered and discounted, the consultation undertaken, effect of the legislation on equal opportunities, human rights sustainable development, etc.

Section 36 requires a Bill to pass through three stages, but leaves the details to be provided by Standing Orders.[67] In Stage one the general principles of the Bill are considered, this will usually involve a Bill being referred to one or more subject committee; the final debate and vote will be before the whole Parliament. In stage two the Bill is subjected to detailed scrutiny, either by a committee or by a committee of the whole Parliament, amendments may be introduced at this stage and at the third stage, when the Parliament will vote on whether the Bill should be passed.

A Bill will be presented for the Royal Assent by the Presiding Officer, provided it has not been referred to the Privy Council. Section 33 provides that, within a four week period of a Bill being passed, the Advocate General (a member of the Scottish Executive), the Lord Advocate or the Attorney General

[66] These are the equivalent of statutory committees in Northern Ireland; in Wales subject committees are included within the general heading of statutory committees.

[67] Standing Orders of the Scottish Parliament provide for a slightly different procedure for seven different types of Public Bills: Member's Bill (the equivalent of a Private Member's Bill at Westminster); Committee Bill; Budget Bills, Consolidation Bills, Statute Law Revision or Repeal Bills; Emergency Bills. There is also a separate procedure for Private Bills.

(both United Kingdom ministers) may refer a question of the legislative competence of the Parliament to pass the Bill to the Judicial Committee of the Privy Council. In addition the Secretary of State for Scotland may intervene to prohibit the Presiding Officer from presenting a Bill for the Royal Assent where he has reasonable grounds to believe that it would be incompatible with any international obligation or the interests of defence or national security or would have an adverse effect on the law as it applies to reserved matters (section 35). This gives a United Kingdom Minister of the Crown a power to prevent the enactment of legislation by the Scottish Parliament.

Since May 1999 a variety of Acts have been passed, including two based on long standing recommendations of the Scottish Law Commission, examples of the benefit of devolution. The Bail, Judicial Appointments, etc. (Scotland) Act 2000 was passed to ensure compatibility with the E.C.H.R. of several aspects of Scots law and procedure including: procedures for the granting of bail; the terms of appointment of temporary sheriffs, following the decision of the High Court of Justiciary in *Starrs and Chambers v. Procurator Fiscal Linlithgow*[68]; and the court duties of Justices of the Peace.

Secondary Legislation

5–027 A Subordinate Legislation Committee considers all instruments laid before Parliament on a variety of procedural aspects. An instrument is then referred to the lead committee, the committee within whose remit the subject matter of the instrument falls; this committee must report within 40 days whether the instrument should be approved or annulled.

The scrutiny functions of the Scottish Parliament

5–028 The Scottish Parliament holds the Executive to account[69] in much the same way as at Westminster: by debate, parliamentary questions[70] and committees including subject committees which shadow the portfolios of the Scottish Ministers. A Code of Conduct for Scottish Ministers adopted in July 1999 is similar to that found at Westminster. It states that Ministers have a duty to account and be held to account for the policies, decisions and actions taken within their field of responsibility. A Code of Practice on Access to Scottish Executive Information will eventually be replaced by a Scottish Freedom of Information Act.

The Scottish Parliament may only force an election before the end of its four year term if such a move has the support of two thirds of its members, or if a vacancy arises in the officer of First Minister and no member is able to win sufficient support to form a new government within 28 days (section 4).

III. Northern Ireland

5–029 The very different background to the devolution settlement for Northern Ireland is seen in section 1 of the Northern Ireland Act 1998. This declares that Northern Ireland remains part of the United Kingdom, and provides that it will not cease to be so without the consent of the people of Northern Ireland voting

[68] [2000] S.L.T. 42, this decision also lead to moves by the Scottish Executive to establish an independent Judicial Appointments Commission.

[69] The word "accountable" does not appear in s.44 of the Scotland Act which establishes the Scottish Executive *cf.* s.56 of the Government of Wales Act, which establishes the Welsh Executive Committee.

[70] Provided for in Standing Orders; in the first four months of the Scottish Parliament's existence more questions were put down than in a year at Westminster.

in a poll for that purpose. It marks a new beginning for devolution in the Province by repealing the Government of Ireland Act 1920.[71]

Devolved and Legislative Competence

5–030 A general legislative power is devolved to the Northern Ireland Assembly, but this power is subject to greater restraints than is the case in Scotland. Three types of powers are defined in the Northern Ireland Act: "transferred matters", "excepted matters" and "reserved matters." The Northern Ireland Assembly and Northern Ireland Executive have functions in relation to "transferred matters", which are all matters which are not "excepted" or "reserved". Excepted matters are set out in Schedule 2, and are matters which, in effect, will never be transferred to the Northern Ireland institutions; these include: Crown matters, Parliament, international relations, defence, treason, elections, national security, nuclear energy and the Northern Ireland Constitution including parts of the 1998 Act.[72] A much longer list of reserved matters is laid down in Schedule 3 including Crown property, post office and postal services, criminal law, courts, firearms and explosives, telecommunications, measurements, surrogacy, data protection and consumer safety. An item on the reserved list is potentially within the legislative competence of the Assembly but only with the consent of the Secretary of State for Northern Ireland (section 8(b)). However, as in Scotland, the Assembly even with respect to transferred matters, must act within its legislative competence,[73] which means that Acts must not:

(i) have extra-territorial application;

(ii) deal with an "excepted matter" other than in an ancillary way;

(iii) be incompatible with E.C.H.R. rights or European Community law;

(iv) discriminate against any person or class of persons on the ground of religious belief or political opinion[74];

(v) modify an "entrenched enactment".[75]

The legislative powers of the Northern Ireland Assembly include agriculture, environment, education, health,[76] social services, culture and the arts. Unlike the position in Scotland, employment, the civil service[77] and social security[78] are within the powers of the Assembly. Powers have been transferred to the Executive within those areas that fall within the legislative competence of the Assembly[79]: additional powers can be conferred by a Act of the Assembly (section 22).

[71] See Brigid Hadfield, "The Belfast Agreement, Sovereignty and the State of the Union", [1998] P.L. 599.

[72] "Excepted matters" under the Northern Ireland Act are similar to "reserved matters" under the Scotland Act.

[73] Similar restrictions apply to limit the powers of Northern Ireland Ministers and their Departments.

[74] There is no such limitation on the Scottish Parliament or Executive.

[75] *viz.* most of the European Communities Act 1972, the Human Rights Act 1998 and various sections of the Northern Ireland Act 1998 (s.7).

[76] Apart from those matters reserved to Westminster which include embryology, surrogacy and genetics.

[77] Northern Ireland has always had its own civil service, it is possible that Scotland and Wales will eventually seek their own civil service.

[78] Benefit rates must remain the same as elsewhere in the United Kingdom.

[79] Subject to similar restrictions ss.24, 25, 26.

The Executive

Appointment, dismissal and composition

5–031 The particular problems of Northern Ireland have led to a complex procedure for the establishment of the Northern Ireland Executive which aims to move Northern Ireland towards power-sharing. The Assembly elects the First and Deputy First Ministers as a team,[80] and both are designated as chairmen of the Northern Ireland Executive Committee (section 20(2)). They are required to act jointly when exercising their functions which include nominating Ministers to the North-South and British-Irish Councils, exercising certain prerogative powers of the Crown in Northern Ireland and deciding on the number and functions of the Northern Ireland Ministers.[81] The latter decision has to be approved by the Assembly. Unlike the position in Scotland and Wales, the First Minister and his deputy have no powers to nominate, appoint or dismiss other members of the Executive Committee. Ministers to fill the positions have to be elected by the Assembly using the d'Hondt system of proportional representation which is designed to give the parties ministerial posts in proportion to their strength in the Assembly, but not necessarily the posts of their choice. The Executive Committee so established is a multi-party body which will require cross-community support[82] from the Assembly; it is not bound by collective responsibility and neither the First Minister nor his deputy have any power to discipline the Executive as a whole.

The establishment of the first Northern Ireland Executive Committee was a long drawn out affair, with the Assembly and the Executive committee suspended for a time. It was not until May 2000 that devolution was reinstated, but without the participation of two Democratic Unionist Ministers.[83]

Executive Functions

5–032 Executive power in Northern Ireland continues to be vested in Her Majesty, but with respect to transferred matters it will exercised on Her Majesty's behalf by Northern Ireland Ministers and Departments (section 23). The Executive Committee, composed of the various Ministers, has the functions set out in Strand One of the Belfast Agreement. It was part of this Agreement that Ministers should agree a Programme for Government; the first draft programme was eventually agreed in October 2000, as was a draft budget which reflected the regional priorities of Northern Ireland. A Code of Conduct for Ministers, similar to the one which applies to United Kingdom Ministers, was agreed in March 1999.

The United Kingdom Government retains a number of powers to legislate for the Assembly by Order in Council, *e.g.* to amend the list of reserved and excepted matters following a request from the Assembly.

[80] Each successful candidate must have the support of a majority of the Assembly and the support of both the majority of Unionist and Nationalist members.

[81] Up to a statutory maximum of 10.

[82] A variety of decisions in the Assembly can only be taken if there is "cross-community support." Members are required when signing the Assembly roll to designate themselves as "unionist", "nationalist" or other. Calculations as to whether a measure has cross-community support are based on these designations.

[83] See *ante* para. 5–011.

The Assembly

Committees in the Assembly

5–033 The 1998 Act provides for statutory committees to "advise and assist each Minister in the formulation of policy" (section 29). The d'Hondt method of election is used to ensure that the committees represent the Assembly composition, making them another feature of power sharing within the Assembly. These committees have several different roles: to scrutinise and revise legislation in the course of its passage through the Assembly; to assist in the formulation of policy; to initiate legislation; and to hold the Executive to account.

Legislative procedure in the Assembly

5–034 The Northern Ireland Assembly can pass both primary and subordinate legislation. Procedure for both is broadly the same as that in Scotland,[84] with the following differences with respect to primary legislation:

(i) at the pre-legislative stage, the Civic Forum[85] has to be consulted on social, economic and cultural matters;

(ii) the Presiding Officer[86] must scrutinise a Bill on its introduction to the Assembly and before its final stage to ensure it is within the legislative competence of the Assembly; if he considers that a Bill is concerned with an excepted matter in an ancillary fashion, or with a reserved matter, he has to refer it to the Secretary of State to determine if the legislative process can continue (section 10);

(iii) the Presiding Officer must send a copy of every Bill to the Northern Ireland Human Rights Commission[87] which can advise as to the compatibility of the Bill with human rights, including the E.C.H.R. (section 13(4));

(iv) a committee established by the Assembly has power to examine Bills to ensure their conformity with equality and human rights requirements;

(v) only the Attorney-General of Northern Ireland (a United Kingdom government minister)[88] within a four week period of a Bill being passed may make a reference to the Privy Council on any question of the legislative competence of the Assembly (section 11);

(vi) the Secretary of State for Northern Ireland submits Bills for the Royal Assent and has a discretion not to do so in certain circumstances (section 14).

Only three Acts were passed by the Assembly in 1999–2000, two further Bills that were going through the Assembly when it was suspended were brought into force by the Secretary of State acting under section 48 of the 1998 Act.

[84] Statutory committees can delegate their responsibilities in relation to the procedural scrutiny of subordinate legislation to an officer of the Assembly known as the Examiner of Statutory Rules.
[85] Established under Strand One of the Belfast Agreement, it has 60 members, and includes representatives of business, agriculture, the churches, voluntary bodies etc.
[86] A similar position to that found in Scotland, *ante* note 61.
[87] See ss. 68–70, and *ante* para. 5–016, it replaces the previous Standing Advisory Committee on Human Rights.
[88] There is no equivalent to the Scottish Lord Advocate in Northern Ireland. From 1921–1972 Northern Ireland had its own Attorney-General.

The scrutiny functions of the Northern Ireland Assembly

Ministers are required by statute to: "be accountable . . . through the Assembly, for the activities within their responsibilities, (and) their stewardship of public funds . . . ; (and to) ensure all reasonable requests for information from the Assembly . . . are complied with."[89] The Assembly has the same means of holding the Executive to account as in Scotland: debates, question time and committees. **5–035**

An additional unique type of accountability to the Assembly is found in the powers of the Assembly to police "the pledge of office",[90] to which all serving Ministers must subscribe. This, *inter alia*, commits Ministers to democratic and non-violent government and to serve all the people of Northern Ireland equally. The Assembly can resolve that it has no confidence in a Minister either because he is not committed to non-violence and exclusively peaceful and democratic means or he has failed to observe any other of the terms of the pledge of office.[91] If carried, such a resolution (which requires cross-community support; section 30) would exclude a Minister from office for a 12 month period. The Assembly may on similar grounds resolve that it has no confidence in a particular party.[92]

IV. Wales

The National Assembly

The National Assembly for Wales is elected for a four year term with no provision for early dissolution: such provision was unnecessary as it is not a legislative body able to refuse to pass government Bills, all powers to make primary legislation remain with Westminster. The Secretary of State for Wales is required to "carry out such consultation (with the Assembly) about the government's legislative programme for the session as appears to him to be appropriate" (section 31).[93] This requires him to attend and participate in the Assembly's proceedings at least once each parliamentary session. The National Assembly may consider and make representations to the United Kingdom government about any matter affecting Wales (section 33), which the Assembly has interpreted as a right to propose Bills and suggest amendments to Bills before Westminster: there is no obligation on the Government to take such representations into account.[94] **5–036**

The National Assembly was established to replace the Secretary of State for Wales in the administration of Wales and in the enactment of subordinate legislation, known as Assembly Orders,[95] as well as the issuing of circulars setting out policy statements and giving guidance on the carrying out of statutory

[89] See Sched. 4 of the 1998 Act which includes this obligation in the Ministerial Code of Conduct.

[90] See Sched. 4 to the 1998 Act.

[91] Which includes compliance with the Ministerial Code of Conduct.

[92] A motion to this effect may be moved by any 30 members of the Assembly, by the First and Deputy Ministers acting together, or the Presiding Officer acting on instructions from the Secretary of State ss.18(12) and 30).

[93] He need not consult about a Bill if he considers that there are considerations which make it inappropriate for him to do so (s.31(4)).

[94] The relationship between the Assembly and the Secretary of State for Wales has been further explained in a Protocol adopted in January 2000; *Devolution—A Dynamic, Settled Process* (Institute for Welsh Affairs).

[95] Standing Orders provide for the procedures for the enactment of subordinate legislation, subject to the requirements of ss.64–68 of the Government of Wales Act 1998.

powers. In consequence Assembly Members are members of both the executive and the legislature in Wales.

Powers and functions of the National Assembly

5–037 *Devolved and legislative competence* The Assembly has such specific powers and functions as are transferred, conferred or imposed on it by the 1998 Act or any other Act (section 22). Before these powers could be exercised the Secretary of State for Wales, by Order in Council, had to transfer the ministerial functions laid down in Schedule 2 of the 1998 Act to the National Assembly. The necessary Order[96] came into effect in July 1999, and the National Assembly has had conferred on it powers in the fields of: agriculture, forestry, fisheries and food; culture (including museums, galleries and libraries); economic development; education and training; the environment; health and the health services; highways; housing; industry; local government; social services; sport and recreation; tourism; town and country planning; transport, water and flood defence; and the Welsh language. Additional powers will be transferred to the National Assembly as new legislation is enacted by Westminster. The extent and expansion of its powers depends on the extent to which the Westminster parliament is willing to delegate further discretionary powers to it.

The National Assembly has powers to transfer to itself by statutory instrument all or any of the functions of any of the Welsh health authorities (section 27). It also has a variety of powers with respect to those Welsh public bodies listed in schedule 4, including the Further Education Funding Council for Wales, the Welsh Tourist Board and the Sports Council for Wales (section 28). It may in certain circumstances make regulations under section 2(2) of the European Communities Act 1972 (section 29).

The functions exercised by the Assembly or the members of the Assembly Cabinet[97] are only exercisable within the scope of the powers transferred to or conferred on them. There are specific limitations on its legislative powers with respect to European Community obligations (section 106), human rights (section 107) and international obligations (section 108).

5–038 *Additional functions* The Assembly is expected to contribute to the economic growth of Wales by setting a new economic agenda for Wales, while promoting sustainable development (section 121).[98] It is also required to sustain and promote local government in Wales (section 113), promote the interests of voluntary organisations (section 114) and consult with business organisations (section 115). It is a national debating and investigatory forum for Wales and Welsh affairs and may to cause inquires to be held in any matter relevant to its functions (section 35).

The 1998 Act established the National Assembly as a "body corporate" (section 1(2)), and all Assembly staff are members of the home civil service (section 34). The Assembly has instituted steps to give its civil servants greater independence and to move away from body corporate status. The Assembly is required, so far as is possible, to treat the English and Welsh languages equally;

[96] (S.I. 1999 No. 672); Sched. 1 of the Order lists Acts of the Westminster Parliament which delegated powers to Ministers of the Crown, which so far as they relate to Wales are transferred to the National Assembly.

[97] *post* para. 5–040.

[98] See also s.126 on reforms to the Welsh Development Agency.

members may speak in either language and simultaneous translation is provided for speeches made in Welsh.

The Committee structure

5–039 The Welsh Assembly runs under a committee structure. The 1998 Act requires the Assembly to establish an executive committee, subject committees, a subordinate legislation scrutiny committee, an audit committee and regional committees.[99]

The Executive Committee

5–040 Although the Welsh Assembly is the executive in Wales, the equivalent to a cabinet is found in the form of the Executive Committee. Its members are the Assembly First Secretary, the chair of the Executive Committee, and the Assembly Secretaries (section 56). The 1998 Act allows the Assembly to provide its own title for this committee and it has decided that it should be called the Cabinet and its members known as Ministers headed by a First Minister, the nomenclature which will be adopted here. The First Minister is elected by the National Assembly[1] and he notifies the Assembly of the Ministerial appointments he has made (section 53).[2] The Assembly has no role in the appointment or dismissal of the other Ministers.[3] The First Minister has discretion as to the how to allocate the fields of responsibilities devolved to the Assembly to his Ministers. The Assembly can delegate the powers and functions transferred to it to any committee of the Assembly,[4] or to the First Minister (section 62).

The Welsh Cabinet is of a different type to that found at Westminster, and the Ministers are not ministers in the same way as at Westminster or in Scotland and Northern Ireland; it exercises its functions on behalf of the Assembly and in co-operation with it and Ministers do not have powers by virtue of their office. The more powers and functions that are delegated to the Cabinet and its Ministers, the more the Welsh Cabinet will begin to function like its Westminster equivalent.

The First Minister is accountable to the Assembly for the Assembly Cabinet as a whole, and each Minister is accountable to the Assembly for the exercise of those parts of the Assembly's functions allocated to him (section 56). The Assembly is required to include provisions in its standing orders to allow for questions to the members of the Assembly Cabinet. Assembly committees play an important role in enforcing accountability.

5–041 In the 1999 election the Labour Party emerged as the largest party, but without overall control of the National Assembly. It decided to form a minority administration, but in February 2000, a vote of no confidence in the First Minister resulted in his resignation. The election of a new First Minister, Rhodri Morgan resulted in a informal relationship with Plaid Cymru and the publication of a policy document which was in part supported by Plaid Cymru. In October 2000

[99] Additional committees may be established as the Assembly considers appropriate (s.54), *e.g.* a committee on Equal Opportunities and on European Affairs.

[1] If the First Minister resigns, or loses the confidence of the Assembly, a replacement has to be elected by the Assembly; the other Ministers remain in office. In February 2000, Alun Michael resigned as First Minister shortly before a vote of no confidence was carried by 31 votes to 27.

[2] Standing Orders provide a maximum of nine Ministers including the First Minister.

[3] It can pass a motion of censure on a Minister as it did by 30 votes to 27 in respect of the Agriculture Secretary in October 1999; she remained in office until dismissed by the First Minister in July 2000.

[4] Which can further delegate the power to the Minister or a sub-committee (s.62).

a more formal coalition between Labour and the Liberal Democratic Party—which was give two seats in the Cabinet—emerged with the publication of a Partnership Agreement.

Subject committees with responsibilities for the fields in which the Assembly have functions are elected by the Assembly. (section 57). The Minister for that field or fields is a member of the relevant committee, but does not chair it. The roles of these committees include:

(i) holding the administration to account by calling for papers and witnesses to appear before them;

(ii) policy-making both with respect to the work of the Welsh Assembly and by responding to, developing and amending Westminster legislative proposals;

(iii) considering such draft secondary legislation as the Deputy Presiding Officers decide should be referred to them;

(iv) reviewing expenditure and advising on budget allocation.

There is a *subordinate legislation committee* which scrutinises all subordinate legislation that comes before the Assembly to ensure that it is not defective and that all the necessary procedures have been complied with. *The Audit Committee* is responsible for ensuring that the Assembly's resources are used properly and efficiently. It examines and reports on the reports of the accounts of the Assembly prepared by the Auditor General for Wales. It may take evidence on behalf of the House of Commons' Public Accounts Committee, which can continue to investigate public expenditure in Wales. *Regional Committees* for each of the four regions of Wales have to meet in their regions at least twice a year and advise the Assembly on matters affecting the relevant region.

V. England

5–042 England is the only country in the United Kingdom without its own particular institutions.[5] A separate regional parliament and government for England would put England in the same position as Scotland, Wales and Northern Ireland. This solution would be a move towards a federation in which England, by virtue of its size, would be dominant and become a rival to Westminster. It was for these reasons that in 1973 the Kilbrandon Commission concluded that a United Kingdom federation of four countries with a federal Parliament and four provincial Parliaments was unrealistic.[6] A variation would be to exclude Scottish, Welsh and Northern Irish M.P.s from taking part in "English business" at Westminster, creating an English parliament within Westminster.[7] The problem with this solution is that it ignores the fact that any issue involving the expenditure of public money is of concern to all of the United Kingdom, since the level of the block grant to the devolved administrations is dependant on the level of expenditure in England.[8] The least radical solution would be to introduce a

[5] This raises the role of Scottish M.P.s in the passing of legislation that will not apply to Scotland, see *post* para. 5–045.

[6] Cmnd. 5460.

[7] See H.C. 185 (1998–99) for a discussion of this proposal; it is a proposal which appears to have the support of the Conservative Party. See Robert Hazell, "The English question: can Westminster be a proxy for an English Parliament?" [2001] P.L. 268.

[8] *ante* para. 5–018.

variety of procedural reforms within Westminster.[9] The alternative would be to create a series of regional assemblies for the various regions of England.[10] Although no moves have been made towards any of these solutions, the Regional Development Agencies Act 1998 could be regarded as a first step towards regional devolution within England.

The Regional Development Agencies Act 1998 provides for the creation of eight new Regional Development Agencies which came into effect from April 1999.[11] The purposes of these agencies is: to further economic development and regeneration; to promote business, employment and the development of the skills required in the relevant area; and where relevant to an area, to contribute to sustainable development in the United Kingdom (section 4).[12] Broad powers are conferred on the Agencies to do whatever they think is necessary to achieve these purposes (section 3). The Agencies are established as non-department public bodies, to operate independently from government (section 3). However, the Secretary of State has extensive statutory powers with respect to the Agencies including the power to appoint members, alter the extent of a region, make grants, issue guidance and directions. The ability of the RDAs to implement the roles assigned to them was initially constrained by their budgets and restrictions on how they spend the money allocated to them.[13]

5–043 The RDA Act provides the potential for a statutory relationship to develop between RDAs and Regional Chambers. Regional Chambers are non-statutory bodies which have been set up as voluntary associations of local councillors and representatives from businesses, trade unions, voluntary organisations etc. All eight English regions have established such Chambers, most calling such bodies "assemblies". Where the Secretary of State is of the opinion that a Chamber is suitable[14] he may designate it as the Regional Chamber for the region (section 8), thereby requiring the RDA in the exercise of its functions, to consult and have regard to the views expressed by the Chamber. Section 18 enables the Secretary of State to extend the roles of the Chambers by developing a line of accountability between a RDA and a Regional Chamber. How this will work will depend on the directions given by the Secretary of State which could include directing that the RDA should supply the Chamber with certain specified information and answer questions about the information supplied by it to the Chamber. The fact that the Chambers are unelected and lack statutory authority limits the extend to which they can develop meaningful powers. The pressure for regional assemblies in England is uneven with the regional bodies in the north of England taking most of the initiatives.

Government Offices

5–044 In 1994 Government Offices were established in each of the eight English regions with the task of providing better integration of government activity. The work of these regional offices should be strengthened by the establishment in April 2000 of a Regional Coordination Unit, headed by a government minister.

[9] *post* para. 5–046.

[10] One of the problems with this solution is that there are not always obvious regions within England.

[11] Provision was made for a ninth Agency in London, which was established in April 2000 as part of the Greater London Authority.

[12] See the White Paper, *Building Partnerships for Prosperity*, Cm. 3814 (1997).

[13] Combined RDA budgets should rise by £500m per year by 2003–4.

[14] The basic criteria were laid down in the White Paper (Cm. 3814 (1997)); further guidance was issued in September 1998.

It remains to be seen whether these initiatives (and proposals to establish formal relationships between regional Government Offices with RDAs) will strengthen central government in the regions rather than encourage regionalism.

Westminster and England, Scotland, Wales and Northern Ireland

5–045 No immediate change was made in the number of M.P.s sent to Westminster by Scotland, Wales or Northern Ireland. Section 86 of the Scotland Act 1998 by amending the rules for the redistribution of seats in the Parliamentary Constituencies Act 1986, allows for a reduction in the number of Scottish seats in the House of Commons[15]: this reduction is to be put into effect after the next review by the Boundary Commission for Scotland, sometime between 2002 and 2006. No similar provisions are found in the legislation for Wales or Northern Ireland.[16]

A matter that has not been resolved is what has come to be known as the "West Lothian Question",[17] or more accurately the English Question. Since M.P.s representing English, Welsh or Northern Ireland constituencies have no votes on legislation passed by the Scottish Parliament, why should M.P.s representing Scottish constituencies at Westminster be allowed to vote on legislation which applies to England and Wales, but not to Scotland? No solution has been put forward to this question by the Government. Possible solutions were discussed above.[18]

5–046 Prior to devolution Scotland, Wales and Northern Ireland each had a Grand Committee in the House of Commons. These committees, in particular the Scottish Grand Committee, had their roles enhanced in 1994–95 to enable them to hold ministers to account and debate matters of concern to the relevant country. The Procedure Committee has concluded that post-devolution such committees should be abolished.[19] There was no equivalent committee for England—a Committee on Regional Affairs had been established and abandoned in the mid 1970s. The standing orders to update and re-establish this committee were approved by the Commons in April 2000 and it met once, the day before the House was dissolved in May 2001. The committee had 15 members representing English constituencies, and its meetings could be attended by any English M.P.; its role was to consider any matter relating to regional affairs in England which might be referred to it.[20] If re-established, it could become a forum for English regional issues. Westminster Hall sessions[21] could provide another opportunity to debate matters pertaining to England.

[15] See *post* Chap. 10. At present there are 72 Scottish constituencies, which is likely to be reduced to about 58. Schedule 1 to the Scotland Act requires constituencies for the Scottish Parliament to be the same as the Westminster constituencies; unless the Scotland Act is amended, a reduction in the number of Westminster constituencies would result in a reduction in the size of the Scottish Parliament.

[16] From 1922 to 1979 Northern Ireland sent 12 M.P.s to Westminster; as a consequence of the abolition of the Northern Ireland Parliament and the imposition of direct rule this was eventually raised to 17 in 1979, and subsequently to 18.

[17] Named after the constituency then represented by Mr Tam Dalyell who raised issue in the 1970s.

[18] *ante* para. 5–042.

[19] H.C. 376 (1998–99).

[20] S.O. 117.

[21] *post* para. 11–017.

VI. Devolution and Intra-Government Relations[22]

5–047 The relationship between the devolved institutions and the United Kingdom is one that is being worked out using a mixture of informal and formal machinery. The *Memorandum of Understanding*[23] and supplementary agreements provide the basis for these relationships. It established the Joint Ministerial Committee and set out five principles to govern intra-governmental relations post devolution: good communication; co-operation; exchange of scientific, technical and policy information; confidentiality; accountability. At the informal level there are the daily contacts between the relevant Whitehall department and the relevant departments in the devolved administrations. The relationships between departments are found in concordats, some of which were published at the same time as the *Memorandum of Understanding*[24] one clear purpose of these concordats is to avoid litigation. In addition Devolution Guidance Notes are published from time to time by the Cabinet Office.[25]

At the formal level the *Joint Ministerial Committee* (JMC) was established to provide central co-ordination of the overall relationship between the United Kingdom government and the devolved institutions. It is a meeting of the Prime Minister and his deputy, the Scottish and Northern Irish First Ministers and Deputy First Ministers, the Welsh First Minister and one other Minister and the territorial Secretaries of State, and has to meet in plenary session once a year. It may also meet in a functional format with representatives of the relevant Ministers of, for example, health or education, or in a bilateral format where there is a dispute between the United Kingdom Government and a devolved administration. The chair is always taken by a United Kingdom Government Minister.

The Belfast Agreement committed the parties to the creation of institutions on an all Ireland basis and on a United Kingdom and Irish basis. The *North-South Ministerial Council* is a meeting of Ministers from the Republic of Ireland and Northern Ireland with the purpose of developing "consultation, cooperation and action within the island of Ireland."[26] Its terms of reference laid down in the Belfast agreement are that it is to: exchange information, discuss and consult; use best endeavours to reach agreement on the adoption of common policies; take decisions on policies for implementation separately in each jurisdiction; take decisions on policies and actions for cross-border bodies. It has met regularly since power was devolved to Northern Ireland.

5–048 The *British-Irish Council* was created to provide for "harmonious and mutually beneficial development of the totality of relationships among the people of these islands."[27] It includes representatives from the British and Irish governments, the devolved administrations, the Isle of Man and the Channel Islands. It meets twice a year in plenary format, and can meet in functional format at any

[22] See R. Cornes, "Intergovernmental Relations in a Devolved United Kingdom: Making Devolution Work", in *Constitutional Futures: a history of the next ten years* (R. Hazell ed., 1999); R. Hazell "Intergovernmental Relations: Whitehall Rules OK?" in *The State and the Nations* (R. Hazell, ed., 2000). J. Poirer, "The Functions of Intergovermental Agreements: Post-Devolution Concordats in a Comparative Perspective", [2001] P.L. 134

[23] Cm. 4444 (1999). It is stated that this is a statement of political intent and not a binding agreement.

[24] The four published with the *Memorandum* were on Coordination of E.U. Policy Issues; Financial Assistance to Industry; International Relations and Statistics.

[25] *e.g.* on the roles of the territorial Secretaries of State; post devolution primary legislation affecting Scotland and Wales.

[26] Cm. 4294 (1999).

[27] Belfast Agreement.

other time. In the first meeting drugs, social exclusion, environment, transport and the knowledge economy were discussed. The *British-Irish Intergovernmental Conference* is a standing Conference of the British and Irish governments designed to promote bilateral co-operation on matters of mutual interest. Its main focus is likely to be security matters.

5–049 An area where there is potential for conflict between the devolved administrations and the United Kingdom government is European policy.[28] Matters such as agriculture, transport and the environment have been devolved, but these are matters which are also subject to E.U. law. It is the United Kingdom government which is responsible for representing the interests of the devolved administrations as well as that of the United Kingdom as a whole. The devolved bodies have to observe European law, and may be required to implement directives: providing a concurrent power of implementation with Westminster. This is one of the most complicated parts of the devolved relationship, and was the subject of one of the first concordats. The concordat provides for full information to be provided to the devolved administrations and for consultations to allow the latter to have input into the government negotiating line. It is possible for ministers from the devolved administrations to be part of the United Kingdom delegation to the Council of Ministers. The JMC meeting in European format may be used to discuss and resolve European matters: European matters may also be discussed in the three institutions established under the Belfast Agreement. All three devolved administrations have opened offices in Brussels, but they are required to act in a manner consistent with the responsibilities of the United Kingdom government for European matters.

The future of devolution and the unitary constitution[29]

5–050 Devolution in Northern Ireland is subject to pressures unlike those found in the other countries: policing, decommissioning, violence, sectarianism. Even without these problems it has been suggested that the devolution settlement is based on a "democratic constitution unlike any other attempted", which asks the Northern Ireland politicians to "make something work that on its face is unworkable".[30] Direct rule of the Province from Westminster may return.

Devolution for Scotland and to a lesser extent for Wales, was in part to prevent demands for separatism and to preserve the Union. The different schemes for Scotland and Wales not only reflected the differences in administrative devolution to the two countries before 1998, they also reflected the perceived lack of substantial support for devolution in Wales. The scheme of only giving executive devolution to Wales may be temporary. The workings of the Welsh National Assembly are being considered by a Review Group from the Assembly, and an independent review of the Assembly's powers has been instituted. How quickly pressure is put on Westminster to provide Wales with something similar to that found in Scotland, may depend on how United Kingdom governments respond to Welsh interests in preparing their legislative programmes. Scotland, despite its Parliament with legislative powers, may also ask for more powers. Should Scotland wish to seek independence it could not do so unilaterally: the Scottish Parliament cannot amend the Scotland Act, the matter would be for negotiation with the rest of the United Kingdom. Unlike Northern Ireland, where the devolution legislation provides for the right of the people of Northern Ireland to

[28] Geoffrey Clark, "Scottish Devolution and the European Union" [1999] P.L. 504.
[29] Borrows, Chap. 7 "The future of Devolution?" in *Devolution* (2000).
[30] Alan Ward, in *The Changing Constitution* (Jowell and Oliver eds, 4th ed., 2000) pp. 133, 134.

leave the union if and when a majority so wishes, leaving the union is not formally part of the 1998 constitutional settlement with Scotland.[31]

5–051 Devolution is accommodated within the unitary British state. It has resulted in the limitation of the power of the central state, while still maintaining the sovereignty of the Westminster Parliament.[32] What has been achieved has some of the characteristics of a federation[33]: the Judicial Committee of the Privy Council as a new constitutional court; a formal division of legislative powers between Westminster and Scotland and Northern Ireland respectively; the use of referendums politically, if not legally, to entrench the arrangements; institutional machinery to consider inter-governmental relations. There are several ways in which the devolution arrangements are quite different from those found in a federation: the statutes establishing the devolved systems are subject to the legislative control of Westminster[34]; the schemes for devolution are different in all three countries; England has no institutions exercising devolved powers and United Kingdom Ministers represent the interest of England and the United Kingdom in inter-governmental discussions with representatives of the devolved bodies; financially the devolved administrations are dependant on the centre for funding. The United Kingdom has not become a federal system, but it is moving in at least a quasi-federal direction.

[31] The Union with Scotland Act 1706 and the Union with England Act 1707 remain in force and have effect subject to the Scotland Act 1998 (s.37).

[32] *ante* para. 5–014.

[33] See A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (1959) p. 144.

[34] Although it is arguable that with respect to Scotland this is of greater legal than political significance, see *ante* para. 5–014.

CHAPTER 6

THE UNITED KINGDOM AND EUROPE

I. INTRODUCTION

6–001 In Western Europe, in the years following the end of the Second World War, statesmen's actions and policies were guided by their memories of the atrocities of the recently defeated Nazi regime in Germany and the growing threat posed by the Red Army in the East of Europe and powerful Communist parties, loyal to the Soviets, in the Western democracies, particularly in Italy and France. The newly adopted written constitutions of the European democracies recognised the fundamental value of human rights and the status of international law as superior to municipal law. These developments led to a European-wide recognition of the importance of certain basic human rights in the European Convention for the Protection of Human Rights and Fundamental Freedom, 1950. This Convention, in the drafting of which British lawyers played a leading role, was ratified by the United Kingdom in 1951. The subsequent history of the Convention in British courts and the coming into force of the Human Rights Act 1998 in October 2000 are considered later in Chapter 22.

The Convention on Human Rights was adopted by the Council of Europe, a widely based body, established in 1949, to safeguard and realise the ideals and principles which represent their common heritage. At the same time, however, a smaller group of six nations—France, the German Federal Republic,[1] Italy, Belgium, Holland and Luxembourg—set about establishing close economic and commercial links which would both strengthen the individual members but also remove the possibility of war between them from the future. It is these early plans which explain the use in the plural of the phrase "European Communities" and despite the subsequent creation of a European Union, these bodies retain their separate, if attenuated existence. In 1951 the six created the European Coal and Steel Community by the Treaty of Paris; in 1957 the European Atomic Energy Community and the European Economic Community were established by two Treaties of Rome. The United Kingdom, after a period of scepticism, applied to join the Communities in 1961, when Mr Macmillan was Prime Minister and Mr Heath led the negotiations on behalf of the Government. This attempt to join was frustrated in 1963 by France. Mr Wilson's Government renewed the application in 1967, and negotiations were continued after the general election of 1970 by Mr Heath's Government. With the approval of Parliament a Treaty of Accession was signed at Brussels in 1972, to take effect from January 1, 1973. At the same time Denmark and the Republic of Ireland become members. Subsequently Greece, Spain, Portugal, Austria, Finland and Sweden have become members. Norway has twice successfully applied for membership but on both occasions

[1] *i.e.* West Germany with its capital at Bonn. East Germany was a satellite of Russia and Berlin was administered by a commission representing the four (former) allies—the United States, the United Kingdom, France and Russia—until the unification of Germany in 1989, following the dismantling of the Berlin Wall.

(1972 and 1995) the Norwegian voters have rejected membership in a referendum. At present a large number of other states, many formerly part of the Russian Communist Empire, are in the process of attempting to join the Communities.[2]

Important amendments to the provisions of the original treaties were effected by the agreement known as the Single European Act which was signed in 1986 and entered into force in 1987. **6–002**

In 1993 even more extensive amendments and developments were effected by the Treaty of European Union (the Maastricht Treaty) which, *inter alia* created the European Union. Further important reforms were effected by the Treaty of Amsterdam which came into effect in 1999. At the time of writing negotiations on further changes, particularly to cope with the accession of new members, have been concluded and will lead, when ratified to a Treaty of Nice.

The constitutional significance of the United Kingdom membership of the Communities and the Union rests in the unique relationship between our domestic law and the law emanating from the Treaty of Rome which established the European Economic Community (renamed the European Community by the Maastricht Treaty). From the beginning of the Coal and Steel Community in 1951 the members envisaged an organisation where, contrary to the traditional principles of international law, decisions of community bodies would have a supra-national authority inside the territories of the Member States. The relationship of national and community law would be one of *monism*, not *dualism*. It is this feature of Community law which presents problems for all Member States but particularly for the United Kingdom which has never accorded any authority to treaty law unless made part of domestic law by legislation.[3]

Before, however, considering this issue it is convenient to outline briefly at this stage the structure and institutions of the Union and allied communities, the sources of Community law and the special characteristics of the legal orders created by the treaties.[4]

The Institutions

Article 7[4] of the European Community Treaty, as amended and renumbered,[5] provides that the tasks entrusted to the Community shall be carried out by a European Parliament, a Council, a Commission, a Court of Justice and a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by the Treaty. The Council and the Commission are assisted by an Economic and Social Committee and a Committee of the Regions, acting in an advisory capacity. **6–003**

[2] Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus, Malta and Turkey.

[3] *ante*, para. 3–026 and *post*, para. 15–028 *et seq.*

[4] See further, A. Arnull, A. Dashwood, M. Ross and D. Wyatt, *Wyatt and Dashwood's European Union Law* (4th ed., 2000, Sweet & Maxwell); S. Weatherill and P. Beaumont, *European Union Law* (3rd ed., 1999, Penguin); T. C. Hartley, *Foundations of European Community Law* (4th ed., 2000, Oxford); L. Collins, *European Community Law in the United Kingdom* (5th ed., 2001).

[5] The Treaty on European Union formally effected the change of name from European Economic Community. The Treaty of Amsterdam renumbered the Articles of the EC Treaty, the new number being given here first and the old number in brackets. The old numbers will still be found in judgments and literature pre-dating the Treaty of Amsterdam. Although there continue to exist distinct communities they operate through one set of institutions which exercise, as appropriate, the relevant powers under the particular constituting treaty.

Article 4[D] of the Treaty on European Union gives formal recognition to the existence of the European Council—a regular meeting of ministers which had developed a *de facto* existence outside the provisions of the various treaties. The European Council brings together the Heads of State or of Government of the Member States and the President of the Commission. The European Council meets at least twice a year under the chairmanship of the Head of State or of Government which holds the Presidency of the Council. It submits a report to the European Parliament after each of its meetings and a yearly written report on the progress achieved by the Union.

The European Parliament

6–004 For the first 30 years of its life the European Parliament was correctly referred to as the Assembly and, until elections held in 1979, its members were chosen by the legislatures of the Member States from among their own members. The new title, which dates from the coming into effect of the Single European Act, reflects its changing role as a body, directly elected by voters of the Member States and its growing powers. At present the Parliament has 626 members. The representation by state ranges from 99 (Germany) to 6 (Luxembourg).[6] Inevitably, to put any limit on overall size, while allowing effective representation for the smaller states, the smaller states, in terms of votes required to elect a member, are over represented compared to the larger.

The Treaty of Nice envisages an expansion in numbers to 738. To accommodate the new members will require a reduction in the representation of the existing members—except for Luxembourg which retains six members and Germany whose continued 99 will reflect its pre-eminent position in terms of population, while France, Italy and the United Kingdom for example will each lose 13 members, Spain will lose 12 members and with 52 members will have equal representation to Poland, the largest of the aspiring entrants.[7]

The Parliament now has extensive powers in various fields: it participates in the law-making processes of the Communities; it shares budgetary powers with the Council and has powers of supervision over the Commission with the ultimate power of a motion of censure over the Commission as a whole: Art. 201 [144]. In March 1999 the then Commission resigned *en masse* after a critical report on its conduct without the Parliament moving to a formal vote of censure. Whatever lessons can or should be drawn from that surprising event, it clearly means that the Parliament can no longer be disregarded in the workings of the Communities.

The Council

6–005 This body, which must be distinguished from the European Council, was established by the founding treaties. The Council consists of a representative of each Member State at ministerial level, authorised to commit the government of that Member State: Art. 203 [146]. The importance of the Council is clear from the terms of Art. 202 [145] which provides that the Council is to ensure co-ordination of the general economic policies of the Member States and to make decisions.

[6] France, Italy and the United Kingdom each has 87 members; Spain, 64; Holland, 31; Belgium, Greece and Portugal, 25 each; Denmark and Finland, 16 each; Ireland, 15; Sweden, 22;

[7] Of the other existing members Belgium, Greece and Portugal will have 20 members each, Sweden 18; Denmark and Finland, 13 each; Ireland, 12.

Article 205(1)[148(1)] provides that the Council may reach decisions by a majority vote of its members, except where otherwise provided in the Treaty. In most cases where a decision can be reached by a majority the Treaty requires a "qualified majority", that is by 62 votes out of 87. For this purpose each member state has a number of votes, weighted to represent its population: Luxembourg has two votes, France 10.[8] Germany also has 10 although since reunification its population is greater than that of France or any other member state. Its wish to see this distinction reflected in voting power led to difficulties in the negotiations leading to the Treaty of Nice. But in Europe there is a solution to every difficulty. In the new enlarged Council France and Germany will continue to have the same voting power: 29. But a qualified majority will require not merely a certain number of votes (255) but also that that majority represents countries whose combined population amounts to 62 per cent of the population of the Communities—thus giving added importance to the German vote while retaining numerical equality between France and Germany.[9]

Another source of dissension at Nice was the extension of qualified majority voting to issues which had hitherto required unanimity. **6–006**

Earlier disputes, even where the Treaties provided for decision-making by qualified majority, revealed an insight into the political reality behind the language of the texts. In 1966 the Members of the Council adopted the Luxembourg Compromise in which they agreed that where a member state regarded a decision as involving an important national interest the Council, instead of proceeding by qualified majority, would attempt to reach a solution acceptable to all members. The legal status of the compromise was regarded as open to doubt and the members did not agree on exactly what had been settled by it.[10] However, provisions similar in terms to the Compromise now appear in the Community Treaty and the Treaty on European Union.[11]

The Commission

Article 211 [155] defines the role of the Commission as ensuring the proper functioning and development of the common market. **6–007**

Article 213 [157] provides that the Commission consists of 20 members. The Commissioners must be chosen on the grounds of their general competence and their independence must be beyond doubt. They must act in the general interest of the Community and be completely independent in the performance of their duties. Nonetheless the Member States insist on ensuring that each has a national on the Commission (in the case of the smaller states) and two nationals (in the case of Germany, France, Italy, Spain and the United Kingdom). The nomination of the President (chosen by common accord of the governments of the Member States: Art. 216 [158]) and of the Commissioners (chosen by the government of the President-designate) are subject to approval by the European Parliament.

[8] Italy and the United Kingdom have 10 votes: Spain 8: Belgium, Greece, Holland and Portugal, 5: Austria and Sweden, 4: Denmark, Ireland and Finland, 3.

[9] The proposed new voting arrangements for the other existing members: Italy and the United Kingdom, 29 votes each: Spain, 27: Belgium, Greece, Holland and Portugal, 13: Austria and Sweden, 10: Denmark, Ireland and Finland, 7. Of the proposed entrants, Poland will receive 27 votes, while at the other extreme 4 votes are proposed for Cyprus and Latvia, 3 for Malta.

[10] The United Kingdom invoked the Compromise unsuccessfully in 1982; Germany, successfully, in 1985.

[11] Art. 11 [5a] EC Treaty (initiatives on closer co- operation in the Community sphere); Art. 40 [K. 12] TEU (closer co-operation in the fields of Justice and Home Affairs); Art. 23(2) [J.13(2)] TEU (common foreign and security policy).

Commissioners are appointed for a term of five years, which is renewable and their decisions are reached by a simple majority.

As the number of Member States increases reforms will obviously be required to the method of nominating Commissioners if the body is not to become too large to function effectively. At Nice a maximum number of 27 Commissioners was envisaged. The larger states would give up their right to nominate two commissioners from 2005 and a rotation system will keep the size of the Commission to the agreed maximum.

The Commission has a wide range of important powers and duties. Article 211 [155] provides that it shall ensure the application of the provisions of the Treaty. It may make recommendations to the Council relating to the making of new law and is responsible for carrying out the policies given legal effect by decisions of the Council. Article 226 [169] confers a power to ensure compliance with the terms of the Treaty by Member States and, if necessary, institute proceedings before the Court of Justice.[12]

The Court[13]

6–008 The Court of Justice at present consists of 15 judges (Art. 221 [165]), assisted by 8 Advocates-General (Art. 222 [166]).[14] The Court may sit in plenary session or in Chambers, consisting of three or five judges. Article 223 provides that the judges and advocates-general must possess the qualifications required for appointment to the highest judicial offices in their respective countries or be jurisconsults of recognised competence. The further requirement that appointment (for a term of six years) shall be by common accord of the governments of the Member States has enabled the Member States to ensure that each has one of its nationals appointed to the Court. (The five largest states always provide an advocate general).

The increasing work load of the Court with the resulting delays in dealing with case led to the establishment of a Court of First Instance in 1988 by the Council, exercising powers conferred on it by the Single European Act and now to be found in Art. 225 [168a] of the Treaty. As with the Court of Justice, membership equals the number of Member States and there is one national from each state. The Court of First Instance also sits in Chambers of three or five judges which may delegate the power to hear a case to a single judge. Appeal on a point of law lies to the Court of Justice.

Article 220 [164] gives the Court of Justice the duty to ensure that in the interpretation and application of the Treaty the law is observed. The Court does this through two distinct heads of jurisdiction. Direct Actions are those in which the Court applies Community law to actions before it involving the Member States and the organs of the Community.[15] It is this type of jurisdiction alone which is possessed by the Court of First Instance.

6–009 Under Article 234 [177] the Court of Justice (but not the Court of First Instance) may give preliminary rulings on questions of community law referred

[12] The Commission also has a role in proceedings under Article 227 [170] where proceedings are instituted by a member state.

[13] A. Arnull, *The European Union and its Court of Justice* (Oxford, 1999); L. Neville Brown and T. Kennedy, *Brown and Jacobs. The Court of Justice of the European Communities* (5th ed., Sweet & Maxwell, 2000).

[14] See Brown and Kennedy, *op. cit.*, Chap. 4.

[15] *e.g.* Article 226 [169] (actions brought by Commission); Article 227 [170] (actions brought by member states); Article 236 [173] (judicial review of Community acts).

to it by municipal courts. This provision is designed to ensure uniformity of application of community law by municipal courts. It is not an appellate procedure. Thus in the *Factortame* litigation the *existence* of jurisdiction to award interim relief for an alleged breach of a community right was referred to the Court of Justice by the House of Lords.[16] The *exercise* of that jurisdiction, once the Court of Justice had found that it existed, was for the national Court, that is the House of Lords.[17] Similarly, the Court of Justice in a reference relating to the deportation of community nationals laid down the principle—that not every criminal conviction justified deportation: the conduct in question must constitute a genuine and serious threat to public order—but whether the facts of the particular case fell within that principle was for the national court to determine.[18] The full significance of Article 234 [177] will become obvious later in this Chapter.

The Treaty of Nice will make some important changes to the provisions of the EC Treaty which relate to the two Courts. Article 221[165] will be amended to provide that the Court of Justice will consist of one judge per Member State. The number of Advocates General may be increased from 8 on the request of the Court by a unanimous vote of the Council: Article 222[166]. The Court of First Instance will comprise at least one judge per Member State, the number of judges to be determined by the Statute of the Court of Justice. The Statute may also provide for the Court to be assisted by Advocates General: Article 225[168a]. An innovation, designed to deal with the increasing work load of the two courts is contained in the new Article 225a which provides for the creation of judicial panels to hear cases at first instance in specific areas, with a right of appeal on law only, if so provided, on law and fact, to the Court of First Instance. Finally Article 220 [164] is amended to include a reference to the Court of First Instance in respect of the obligation to ensure the observation of the law in the interpretation and application of the Treaty and to provide for the creation of judicial panels under the new Article 225a.

The Court of Auditors

The Court of Auditors has been included in Article 7[4] as one of the five Community Institutions since the Treaty of Maastricht although it had been established in 1975, succeeding to the role and duties of the Audit Board. At present the Court consists of 15 members: under the Treaty of Nice it will consist of one national from each Member State: Article 247 [1886]. The Court of Auditors is responsible for examining Community accounts and reporting to the European Parliament on them: Article 248 [188c]. **6–010**

The Sources of Community Law

Community Law is derived from a number of sources. First, obviously, the provisions of relevant treaties, as they are interpreted by the Court of Justice. **6–011**

[16] *R. v. Secretary of State for Transport ex p. Factortame Ltd* [1990] 2 A.C. 85, HL.

[17] *R. v. Secretary of State for Transport ex p. Factortame Ltd* [1990] E.C.R.I.-2433; [1990] 3 C.M.L.R. 375 (E.C.J.); [1991] 1 A.C. 603, HL.

[18] [1981] Q.B. 778, Div.Ct. and CA; [1980] 2 C.M.L.R. 308, ECJ Templeman L.J. commented, "The Divisional Court was obliged to turn its back on reality and to propound certain questions to the European Court of Justice. Immersed in the cloudy generality of its functions under article 177 of the EEC Treaty, the European Court was also obliged to ignore reality but furnished replies which enable this court now to approach the moment of truth"; [1981] Q.B. 778, 797. See A. Arnull, *The European Union and its Court of Justice* (Oxford, 1999) pp. 49–69.

Secondly, law made in accordance with the provisions of those treaties.[19] In particular Article 249 [189] of the Community Treaty provides for the making of regulations and directives which are, in effect, legislation and, as will be seen, may confer rights on individuals in municipal courts and result in liability on the part of Member States to litigants for breach of community law. The same Article recognises a power to make decisions which are binding on those to whom they are addressed. Decisions may, according to the Court of Justice, confer rights on third parties.[20] Thirdly, the Court of Justice, in discharging its duty to "ensure that in the interpretation and application of this Treaty the law is observed", (Article 220 [164]), has called upon general principles of law which it has identified as inherent in the Treaty or common to the laws of Member States.[21] Explicit references to this source can be found for example in Article 288 [215] of the EC Treaty which directs the Court to decide questions relating to the non-contractual liability of the Community "in accordance with the general principles common to the laws of the Member States" and Article 6[F] of Treaty on European Union which provides that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights . . . *and as they result* from the constitutional traditions common to the Member States as general principles of Community law. (It could be said that the Court had anticipated this statement by its own decisions in cases such as *Internationale Handelsgesellschaft*[22] and *Nold v. Commission*.[23])

Supremacy and Direct Applicability

6–012 In Chapter 4 we saw that the European Court regards community law as superior to any conflicting domestic legislation and that the House of Lords has applied this approach even to the terms of legislation enacted after the European Communities Act 1972.[24] Here it remains to consider another fundamental characteristic of the legal order developed by the Court of Justice, its capacity to create rights which individuals can enforce in municipal courts, without the need for municipal legislation, a characteristic referred to as direct effectiveness.[25] (Regulations are *directly applicable* in all Member States, in the language of Article 249 [189]; it will be in any particular case a matter of applying the tests outlined in the following paragraphs to establish whether a particular litigant can establish under a Regulation a directly effective right which can be protected in a municipal court.)

Direct effectiveness may be *vertical*, that is applicable between individual litigants and Member States and public bodies forming part of the state, or *horizontal* that is applicable between private litigants. Both types of effectiveness have been found applicable in the case of treaty provisions and regulations. In the case of directives, effective is limited to *vertical* effectiveness.

[19] "One of the most striking characteristics of the legal order established by the Treaty is the competence vested in the Community institutions to enact legislation for the purposes of carrying out the objectives of the Treaty;" Wyatt and Dashwood's European Union Law (4th ed., 2000, Sweet & Maxwell), p. 83.

[20] *Grad v. Finanzamt Traunstein* [1970] E.C.R. 825.

[21] J. A. Usher, *General Principles of EC Law* (Longman, 1998); T. Tridimas, *The General Principles of EC Law* (Oxford, 1999). See further, Pt V of this Chapter.

[22] [1970] E.C.R. 1125; [1972] C.M.L.R. 112.

[23] [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338. See Tridimas, *op.cit.*, Chap. 6 and *post* Chap. 22.

[24] *ante* para. 4–020 *et seq.*

[25] Chap. 4.

To be directly effective, a rule of Community law—whether a provision of the EEC Treaty or of a Regulation or Directive or Decision made under the Treaty—must be clear and unconditional; capable of being implemented without legislative intervention by the Member States and by its nature indicate that it does not only concern the Member States in their relations *inter se*. In the *Van Gend en Loos* case[26] the European Court held that Article 12 of the Treaty which forbade the introduction of new customs duties or any increase in existing duties, had vertical direct effect so that an individual could rely on its terms in a natural court against a public body, the Dutch Inland Revenue Administration. In *Belgische Radio en Televisie* v. *SABAM*[27] the European Court gave horizontal direct effect to Articles 85 and 86 of the Treaty which forbid practices which unduly reduce competition or amount to an abuse of a dominant trading position. In *Defrenne* v. *Sabena (No. 2)*[28] the European court held that the principle of equal pay for equal work, laid down by Article 119 had vertical direct effect.[29] Regulations are explicitly recognised under Article 189 as being directly applicable. Direct vertical effectiveness was attributed by the European Court to two Regulations providing for the payment of premiums in respect of slaughtered dairy cows in *Orsolina Leonesio* v. *Minister for Agriculture and Forestry of the Italian Republic*.[30] The nature of Regulations, as explained by the Court,[31] is such that there can be no doubt that they are also capable of having vertical direct effect.

The distinction between vertical and horizontal effectiveness assumes a particular importance in the case of Directives since Article 249 [189] provides that directives are binding upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. At first sight it might be thought hard to argue that a directive could satisfy the tests of clarity, certainty and lack of necessity for municipal legislation laid down in *Van Gend en Loos*. **6–013**

The possibility of *vertical* direct effect was, however, recognised by the Court of Justice in *Van Duyn* v. *Home Office*.[32] The right to rely on a sufficiently clear and unequivocal term in a directive arises when a Member State has failed to implement the directive in its municipal law by the end of the period prescribed or has failed to implement it correctly.[33] The Court has refused, on the other hand, to recognise horizontal direct effect.[34] Nonetheless pressure continues to extend the effectiveness of directives at the instance of litigants to and in a

[26] [1963] E.C.R. 1.

[27] [1974] E.C.R. 51; cited by the Court of Appeal in *Application des Gaz S.A.* v. *Falks Veritas Ltd* [1974] Ch. 381.

[28] [1976] E.C.R. 455. See *Snoxell and Davies* v. *Vauxhall Motors* [1978] Q.B. 11.

[29] The Court ruled that direct effect was to be limited to the future so its decision could not open the floodgates to claims based on facts occurring before its judgment in that case.

[30] [1972] E.C.R. 287.

[31] *Hauptzollamt Bremen-Freihaten* v. *Waren-Import Gesellschaft Krohn & Co* [1970] E.C.R. 451; *Politi S.A.S.* v. *Italian Minister of Finance* [1971] E.C.R. 1039; *Fratelli Variola* v. *Italian Minister of Finance* [1973] E.C.R. 981.

[32] [1974] E.C.R. 1337; [1975] Ch. 338. (Directive on free movement of workers, implementing Art. 39[48] on the free movement of workers). A decision noteworthy also as the first reference by an English Court under Art. 234[177].

[33] *Co-operative Agricola Zootecrucia S. Antonio and Others* v. *Amministrazione delle finanze dello Stato* [1996] E.C.R. I-4373.

[34] *Ratti* [1979] E.C.R. 1629; *Marshall* v. *Southampton and South West Hampshire Area Health Authority* [1986] E.C.R. 723; *Foster* v. *British Gas* [1990] E.C.R. I- 3313; *Paola Faccini Dori* v. *Recreb Srl* [1994] E.C.R. I- 3325.

number of cases the Court has seemed to come close to allowing something very like horizontal effect.[35]

An indirect effect has been accorded by the Court of Justice to the provisions of directives even although not themselves directly effective by the adoption of the principle in a number of decisions that national courts must interpret national law—and in particular national law introduced to give effect to non-directly effective provisions of a directive—in the light of the wording and purpose of the directive. The principle applies to legislation whether the provisions in question were adopted before or after the directive. Since the principle is one of interpretation or construction it follows that in some cases the national legislations cannot be made to be consistent with the terms of the directive, in which case the principles explained in the following paragraph become relevant.[36] Despite dicta not always entirely consistent with *Marleasing* the House of Lords has probably moved to a position in accordance with that decision.[37]

6–014 The duty to interpret national law consistently with the provisions of directives is subject to the general principles of community law and thus in the area of criminal liability for breach of directive provisions the municipal courts must respect the principles of legal certainty and non-retroactivity.[38]

The principles so far discussed prevent national legal systems legislating in a way which is incompatible with community law: they do not, however, provide a remedy for a litigant whose community right has been initially infringed, or indeed merely ignored by a failure to legislate. That gap was filled by the decision in *Andrea Francovich v. Italian Republic*[39] which recognised a liability in damages on the part of states for failure to comply with their obligation to implement community law. In that case Italy had failed, within the time limit specified to implement the terms of a directive. In the later cases of *Brasserie du Pecheur S.A. v. Germany*, and *R. v. Secretary of State for Transport ex p. Factortame Ltd (No. 4)*[40] the Court applied the principle to the situation where a breach of Community law arose from the provisions of municipal law. Again the Court recognised a right to damages. In both situations the rule of Community law relied on must be intended to confer rights on individuals. There must be a direct causal link between the breach and the damage sustained. Where the Member State has a discretion in adopting national rules the alleged breach must arise from a manifest disregarding of the limits of its discretion. Although the

[35] Lackhoff and Nyssens, "Direct Effect of directives in triangular situations", (1998) 23 E.L.Rev. 397; C. Hilson and T.A. Downes, "Making Sense of Rights: Community Rights in E.C. Law" (1999) 24 E.L. Rev. 121; S. Prechal, "Does direct effect still matter?" (2000) 37(5) C.M.L. Rev. 1047.

[36] *Von Colson and Kamann v. Land Nordrhein-Westfahlen* [1984] E.C.R. 1891; [1986] 2 C.M.L.R. 430; *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. 4135; [1992] 1 C.M.L.R. 305; *Teodoro Wagner Miet v. Fondo de Garantia Salarial* [1993] E.C.R. 6911; [1995] 2 C.M.L.R. 49; *Paola Faccini Dori v. Recreb Srl* [1994] E.C.R. 3325; [1994] 1 C.M.L.R. 665; *Annalisa Carbonari v. Universita degli Studi di Bologna* [1999] E.C.R. 1103.

[37] *Duke v. Reliance Systems Ltd* [1988] A.C. 618; *Pickstone v. Freemans plc* [1989] A.C. 66; *Litster v. Forth Dry Dock & Engineering Co Ltd* [1990] 1 A.C. 546; *Finnegan v. Clowney Youth Training Programme Ltd* [1990] 2 A.C. 407; *Webb v. EMO Air Cargo (U.K.) Ltd* [1992] 4 All E.R. 929.

[38] *Officier van Justitie v. Kolpinghuis Nijmegen BV* [1987] E.C.R. 3639; [1989] 2 C.M.L.R. 18; *Pretore di Salò v. Persons Unknown* [1987] E.C.R. 2565; [1989] 1 C.M.L.R. 71.

[39] [1991] E.C.R. 5357; [1993] 2 C.M.L.R. 66.

[40] [1996] E.C.R. I-1929; J. Steiner, "From direct effects to *Francovich*: shifting means of enforcement of Community law", (1993) 18 E.L. Rev. 3. See further, T. Tridimas, *The General Principles of EC Law* (Oxford, 1999), Chap. 9.

right to damages arises under Community law the calculation of damages is a matter for the relevant legal system.[41]

The House of Lords considered these cases in *R. v. Secretary of State for Transport ex p. Factortame Ltd (No. 5)*[42] where it held that Spanish fishermen were entitled to damages for losses which they might be shown to have suffered as a consequence of the enactment of the Merchant Shipping Act 1988 which was in breach of their community rights. The House held that the breach of Community law was "sufficiently serious" to fall within the rule enunciated by the Court of Justice because the legislation was deliberately adopted. What was done by the Government was not done inadvertently. Although the Government had legal advice that it might not be in breach of Community law the legislation was clearly discriminatory on the grounds of nationality. The consequences to those affected were inevitably going to be extremely serious. The Commission had warned that the legislation was in its view, in breach of Community law. Although the view of the Commission is not binding, a government which disregards it does so at its own risk.

II. The United Kingdom Legislation

6–015 Effect has been given inside the United Kingdom to the treaties establishing and regulating the European Communities and European Union by the European Communities Act 1972 and a series of later Acts.[43] The difficulties surrounding the passing of the European Communities (Amendment) Act 1993, to give effect to certain provisions of the Treaty on European Union (the Maastricht Treaty) almost brought down Mr Major's government and raised in stark terms the contrast between ratification by the royal prerogative and Parliamentary approval by legislation.[44] Ultimately the Government secured the passage of the tortuously worded Act after resorting to a vote of confidence. Elections to the European Assembly were provided for by the European Assembly Act 1978 and to the European Parliament by the European Parliamentary Elections Act 1999.

European Communities Act 1972

6–016 *Section 1* is a deceptive section which appears to do no more than provide a short title for the Act (sub s.1) and define certain terms such as "the Communities" and "the Treaties" which are used later in the Act (subsection 2). "The

[41] P. P. Craig, "The Community, The State and Damages Liability" (1997) 113 L.Q.R. 67; T. A. Downes, "Trawling for a remedy: State liability under Community law", (1997) 17 L.S. 286.

[42] [2000] 1 A.C. 524.

[43] e.g. European Communities (Greek Accession) Act 1979; European Communities (Spanish and Portuguese Accession) Act 1985; European Communities (Amendment) Act 1986, (to give effect to the Single European Act); European Communities (Amendment) Act 1993, (consequent on the Treaty of Maastricht); European Communities (Amendment) Act 1998 (consequent on the Treaty of Amsterdam).

[44] For an attempt to prevent ratification in the courts: *R. v. Foreign Secretary ex p. Rees-Mogg* [1994] Q.B. 552. See G. Marshall, "The Maastricht Proceedings", [1993] P.L. 402; R. Rawlings, "Legal Politics: The United Kingdom and Ratification of the Treaty on European Union", [1994] P.L. 254 and 367.

Treaties" include various specifically named treaties[45] and *inter alia* any treaty ancillary to any of "the Treaties" entered into by the United Kingdom. Additions to "the Treaties", as defined, may be made by Order in Council, subject to the approval by resolution of both Houses of Parliament, if the treaty was entered into by the United Kingdom after January 22, 1972. (subsection 3) The significance of that subsection became clear in *R. v. H.M. Treasury, ex p. Smedley*,[46] where the applicant sought to challenge the legality of a draft Order in Council which purported to recognise as an ancillary treaty an agreement to make payments to cover expenditure required under the budget which had been agreed by the Community. The importance of such recognition is to be found in section 2(3) of the 1972 Act which provides the Treasury with authority to charge on and issue out of the Consolidated Fund or, as the case may be, the National Loans Fund, the amounts required to meet any obligation created or arising under "the Treaties". From which it follows that once an international agreement has been declared to be one of the Community Treaties the Treasury is, without further authority, entitled to make any payments called for by that agreement. Although the Court of Appeal could not express a view on a draft Order in Council, it indicated that an Order in Council in the terms of the draft would have been *intra vires*. Sir John Donaldson M.R. thought that the concept of one treaty being "ancillary" to another was not one of precision and it was no doubt for that reason, amongst others, that Parliament has provided in section 1(3) of the 1972 Act for a system whereby an Order in Council should be conclusive of what treaties were to be regarded as Community treaties. The Master of the Rolls added that in his view nothing could be more ancillary to the Community treaties than the provision of funds to enable the Community to fulfil its essential functions. Slade L.J. similarly thought that the phrase was deliberately "an imprecise expression of wide and somewhat uncertain import".

6–017 *Section 2(1)* provides that all such rights and obligations from time-to-time created or arising 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 be available in law, and be enforced, and followed accordingly; and the expression "enforceable community right" shall refer to one to which this subsection applies. This subsection provides for the recognition and enforcement in the United Kingdom of directly effective Community rights and obligations enjoyed by or imposed on Member States or private individuals. This means Community law as interpreted in accordance with the Treaties. It covers rights and obligations created by the Treaties themselves, by existing and future Community *Regulations* and by *Directives*. It is a constitutional innovation to give effect to *future* Community Regulations and Directives which thus constitute a new source of law in this country. The expression "remedies and procedures" appears to provide for references under Article 234[177] to the European Court of Justice. Community law that is not directly applicable is dealt with elsewhere in the Act, notably in section 2(2) and Schedule 2, or in other Acts such as the Value Added Tax Act 1994.

[45] Including those introduced by subsequent legislation included in note 43 above.

[46] [1985] Q.B. 657. CA. For statutory provisions relating to the United Kingdom's financial obligations to the Community see the European Communities (Finance) Act 1985 and the European Communities (Finance) Act 1995.

Section 2(2) confers power by Order in Council or ministerial regulation (subject to Schedule 2) to give effect to existing and future community laws that are not directly effective or applicable, especially Community *Directives* (which set out the objects to be achieved while leaving it to each member state to choose the method of achieving them). This power includes power to deal with supplementary matters, probably including references to the European Court of Justice. The person exercising any statutory power or duty is empowered to have regard to the objects of the Community and to any rights and obligations of the United Kingdom under the Treaties.[47] **6–018**

Schedule 2 provides that the power to make subordinate legislation under section 2(2) does not include power:

(a) to impose of increase taxation; or

(b) to legislate with retroactive effect; or

(c) to confer power of sub-delegation,[48] except rules of court; or

(d) to create any new criminal offence punishable with imprisonment for more than two years or (on summary conviction) three months, or with a fine up to the maximum figure on level 5 or *per* day at level 3.[49]

The power of subordinate legislation conferred is to be exercised by statutory instrument; and any such statutory instrument, if made without a draft having been approved by each House, is subject to annulment by resolution of either House.

Section 3, which was discussed in Chapter 4, provides for the reference to the European Court of questions relating to Community law and directs the courts of the United Kingdom to determine disputes involving Community law according to the principles laid down by the European Court. Any question of the meaning of a provision of European law is to be treated as a question of law, that is it is to be determined by the judge, not the jury, and in the light of argument from counsel not on the basis of evidence by expert witnesses.[50]

European Elections

The first legislative provision for elections necessitated by membership of the Communities took the form of the European Assembly Election Act 1978. Although it has largely been overtaken by events it remains of interest because of the unsuccessful litigation which it provoked and the provisions of section 6. **6–019**

Apart from Northern Ireland where three members representing one constituency were to be returned by the single transferable vote system, the method of voting in England, Wales and Scotland was the traditional British simple majority—or first past the post system.

[47] In practice delegated legislation giving effect to Community law is often made under general enabling provisions in other statutes.

[48] Sub-paragraph (c) does not apply to a power to legislate conferred otherwise than under s.2(2), or to a power to give administrative directions.

[49] Criminal Justice Act 1982.

[50] See *R. v. Goldstein* [1982] 1 W.L.R. 804, CA.

The legality of this system under Community law was challenged in *Prince v. Secretary of State for Scotland*[51] in which a group of S.D.P. Liberal Alliance voters applied to the Court of Session for a declarator "that the pursuers had an 'enforceable Community right' in terms of section 2 of the European Communities Act 1972, to a system of election which is not discriminatory and which gives equal weight to all votes cast so far as practicable in the forthcoming election for members of the European Parliament." The pursuers' argument was that the European Elections Act 1978, in so far as it did not provide for proportional representation, was *ultra vires* the Treaty of Rome. While Article 190(4) [138(3)] of the Treaty had envisaged that the Council would lay down a uniform system of voting throughout the Community, no scheme had been adopted as a result of the United Kingdom's veto. However, Article 138(3) had nevertheless provided that direct elections were to be "by universal suffrage". Like other provisions of the Treaty, Article 190[138] fell to be interpreted in accordance with fundamental principles of Community law which included the right of equality or non-discrimination. The right to equality of voting was thus "an enforceable community right" in terms of the European Communities Act 1972: this had been infringed by the 1978 Act, which, by endorsing the first-past-the-post system, was unequal and discriminating. As important issues of Community law were inevitably involved in their declaratory conclusions, the pursuers maintained that a reference to the European Court of Justice was necessary under Article 234[177]. In refusing the reference, Lord Cameron held that on the pleadings as they stood, a reference would be premature because no attempt had been made to formulate with sufficient precision the questions which were to be put to the European Court of Justice, which, in his Lordship's view did *not* exist "for the purpose of determining academic questions". Moreover, there were serious issues in the case which were still uncertain and had to be clarified before a reference could be made. For example, there were doubts whether the pursuers had title to sue merely because they were on the electoral lists, whether Article 190[138]—which *prima facie* gives no rights to individuals—could be the basis of enforceable Community rights and, finally, whether the principle of equality in Community law could be invoked outside commercial matters.

6–020 Section 6 provided that no treaty which was intended to increase the powers of the Assembly should be ratified by the United Kingdom unless it had been approved by an Act of Parliament. Normally treaties are ratified by the Crown (or executive) although legislation is required subsequently if they are to have effect within the United Kingdom. In this instance the Executive is precluded from even concluding an agreement without legislative approval.[52]

Thus, following section 6, the European Communities (Amendment) Act 1998 contains, in section 2, a provision that, for the purposes of section 6, the Treaty of Amsterdam is approved.

The method of election of United Kingdom representatives to the European Parliament is currently governed by the European Parliamentary Elections Act 1999 which, having failed to secure the consent of the House of Lords, was enacted under the Parliament Act 1949.[53] The United Kingdom is divided into electoral regions. In Northern Ireland, which constitutes one region, voting is by the single transferable vote system but in the regions of Scotland, Wales and

[51] [1985] S.L.T. 74.
[52] See further, *post* para. 15–030.
[53] See *ante* para. 1–036.

England, voting is by a list system which, in effect, puts the choice of representatives in the hands of the party apparatchiks who drew up each party list.

III. Community Law as a Source of Domestic Law

Community law is a direct source of law in this country in the case of matters having a "European element",[54] if it is "directly applicable" to individuals, and if such law is either self-executing or implemented under section 2(2) of the European Communities Act 1972 or by any other Act of Parliament. **6–021**

Enforceable Community rights

Section 2(1) of the 1972 Act gives effect in British courts to rights and obligations which, under Community law, are to have effect within Member States without further enactment. Provisions which are not directly applicable or effective are not part of the law of the United Kingdom until legislation has made them so under section 2(2). Hence it is not true to say that Community law is part of domestic law "lock, stock and barrel" as Lord Denning M.R. said in *Re Westinghouse Uranium Contract*.[55] Whether a rule of Community law requires domestic legislation to become part of the law of the Member States or is law *proprio vigore* is itself a matter of Community law. In the case of the litigant seeking to rely on Community law in a British court, it is necessary to show that the rule in question creates a directly enforceable individual right (direct effect). Rules of Community law may, however, be directly applicable within Member States without creating individual rights. **6–022**

Reference to the European Court of Justice[56]

As we saw earlier, Article 234 [177] of the EC Treaty gives the European Court of Justice jurisdiction to give preliminary rulings on Community law at the request of the courts of Member States. This Article provides that: **6–023**

(1) The European Court has jurisdiction to give preliminary rulings concerning:

  (a) the interpretation of the Treaty;
  (b) the validity and interpretation of acts of Community institutions;
  (c) the interpretation of the statutes [*i.e.* constitutions] of bodies established by the Council.

(2) Any court or tribunal of a Member State *may*, if it considers that a decision thereon is necessary to enable it to give judgment, request the Court to give a ruling.

[54] *R. v. Saunders* [1980] Q.B. 72, E.C.J. (Freedom of movement of workers: Art. 39 [48] inapplicable to purely domestic provisions of criminal law which do not involve discrimination between nationals of different Member States). *R. v. Secretary of State for the Home Dept. ex p. Sahota* [1999] Q.B. 597, CA. See also *Gough v. Chief Constable of Derbyshire, The Times* July 19, 2001, CA. (Banning order under Football Spectators Act 1989 not in breach of E.C. law: Member State entitled to restrict citizens from leaving its territory on public policy grounds). See Arnull *op cit.* pp. 321–324.

[55] [1978] A.C. 547, 564.

[56] *Wyatt and Dashwood, op. cit.* Chap. 11.

(3) A court or tribunal of a Member State [in which such a question arises] against those whose decision there is no judicial remedy under national law, *shall* bring the matter before the European Court.[57]

Where the national court has a discretion under (2), the principles on which a British court should exercise that discretion were indicated by Lord Denning M.R. in *Bulmer v. Bollinger*.[58] The question was whether English firms might continue to describe their products as "champagne cider" and "champagne perry," or whether under Community law the word "champagne" might be used only for wine produced in the Champagne district of France. The French company wanted the English judge to refer the question to the European Court for preliminary rulings, but the Court of Appeal held that an English judge or court below the House of Lords has a complete discretion whether to refer to the European Court a question of the interpretation of the Treaty. Lord Denning M.R. said that:

(a) the decision of the question must be *necessary* to enable the English court to give judgment;

(b) the decision of the question must be *conclusive* of the case;

(c) if the court decides a decision is *necessary* it must still in the exercise of its discretion consider such circumstances as the delay involved, the difficulty and importance of the point, the expense, and the burden on the European Court. In order to exercise its discretion properly the court should decide the facts before considering whether to make a reference to the European court.

Lord Denning M.R.'s guidelines have been criticised as unduly restrictive, in particular his requirement that the point in question is conclusive of the case only if whichever way it is decided by the European Court, it will determine the outcome of the case. It may be that a point decided in one way would be conclusive of a case: judges should surely be entitled to seek a ruling from the European Court in such circumstances. Doubts were also expressed about Lord Denning M.R.'s suggestion that it is not necessary to refer a question where the law is clear and the national court has merely to apply the law (the *acte clair* doctrine).[59]

More recently, in *R. v. Stock Exchange ex p. Else (1982) Ltd*[60] Sir Thomas Bingham M.R. suggested domestic courts should refer questions for preliminary rulings unless they were completely confident that they could resolve the issue themselves and went on to caution against such confidence in an unfamiliar fields. "If the national court has any real doubt it should ordinarily refer."

[57] Schedule 1 to the Civil Procedure Rules continues in effect the provisions of the former R.S.C., Ord. 114 which deals with references by the High Court to the European Court and appeals from the High Court in such cases to the Court of Appeal. Rules of Court have also been made with regard to references to the European Court in criminal appeals, and from the Crown Court and County Courts.

[58] *H.P. Bulmer v. J. Bollinger SA* [1974] Ch. 401.

[59] A. Dashwood and A. M. Arnull, "English Courts and Art. 177 of the E.E.C. Treaty", (1984) 4 Y.E.L. 255, 263.

[60] [1993] 2 W.L.R. 70, 76; [1993] 1 All E.R. 420, 426, CA.

6–024 The European Court itself had the opportunity to consider the meaning of Article 234 [177] in *C.I.L.F.I.T. v. Italian Ministry of Health*.[61] where it was asked to consider the meaning of the third paragraph of the Article (which relates to a national court against whose decision there is no judicial remedy under national law). The European Court concluded that there is no duty to refer a question where the question is irrelevant, that is if the answer to that question, regardless of what it may be, cannot affect the outcome of the case. Secondly, there is no duty to refer a question which is materially similar to one already decided by the Court.[62] Thirdly, there is no need to refer where there is no real doubt about the law. (The *acte clair* doctrine.) Before, however, a national court comes to the conclusion that such is the case, it must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.[63] A *fortiori*, it might be thought, a court with a discretion to refer questions to the European Court will be entitled not to do so in these three cases.

The third paragraph of Article 177 applies not only to the House of Lords, from whose decisions there can never be an appeal, but to any court in the United Kingdom against whose decision in particular proceedings there is no further judicial remedy. There may be doubt as to what constitutes a judicial remedy. Thus a tribunal against whose decision there is no appeal may be said to fall within the third paragraph although in certain circumstances its decision could be set aside on an application for judicial review.[64] Similarly the Court of Appeal should perhaps be included within the third paragraph if, for any reason, no further appeal is available.[65]

The desirability of establishing the facts of a case before referring a question to the European Court is, as a matter of general principle, obvious and has been emphasised in *R. v. Henn*.[66] It is not, however, an invariable rule: *R. v. Plymouth Justices ex p. Rogers*.[67] In both cases, too, emphasis was placed on the need for caution on the part of magistrates and judges at first instance in referring cases to the European Court.[68] Appellate courts are better placed to assess the need for a reference and to formulate questions.

References by United Kingdom courts and tribunals

6–025 The first reference from the House of Lords was in *R. v. Henn*[69] where the appellants had been convicted of offences in connection with importing obscene or indecent articles. The House asked the European Court whether a statutory prohibition on the importing of a type of article constituted a "quantative restriction on imports" within Article 28 [30] and, if so, whether it could none the less be justifiable within Article 30 [36] as a restriction imposed on the "grounds of public morality, public policy or public security." In *Garland v. British Rail*

[61] [1983] 1 C.M.L.R. 472.
[62] See, for example, *R. v. Secretary of State for Social Services, ex p. Bosmore Medical Supplies Ltd.*, *The Times*, December 16, 1985.
[63] See, for example, *Re Sandhu The Times*, May 10, 1985, HL.
[64] *post*, Chaps 31 and 32.
[65] *Hagen v. Fratelli D. and G. Morreits S.N.C.* [1980] 3 C.M.L.R. 253, 255 *per* Buckley L.J.
[66] [1981] A.C. 580, HC. See too, *Church of Scientology of California v. Customs and Excise Cmrs.* [1981] 1 All E.R. 1035, CA.
[67] [1982] Q.B. 863.
[68] A caution demonstrated, for example, by Dillon J. in *MacMahon v. Department of Education and Science* [1983] Ch. 227.
[69] [1981] A.C. 580; *post*, para. 6–036.

Engineering[70] the House of Lords sought the opinion of the European Court on the meaning of "pay" in Article 141 [119], before construing the Sex Discrimination Act 1975. References from the Court of Appeal (Civil Division) have also often been concerned with equal pay and sex discrimination: *e.g. Macarthys v. Smith*[71]; *Worringham v. Lloyds Bank Ltd*[72] The Court of Appeal (Criminal Division) in *R. v. Thompson*[73] inquired whether the prohibition on the quantitative restriction of imports under Article 28 [30] applied to gold and silver coins; and, if it did, whether a restriction on the importing of such coins might be justified on the grounds of public policy under Article 30 [36].

The deportation of EC nationals convicted of criminal offences gave rise to a reference by the Divisional Court in *R. v. Secretary of State for Home Affairs, ex p. Santillo.*[74] In *R. v. National Insurance Commissioner, ex p. Warry*[75] the Divisional Court in proceedings for judicial review of a decision of the National Insurance Commissioner referred a question relating to entitlement to social security benefits to the European Court.

Reference to the European Court of Justice from the High Court is illustrated by *Van Duyn v. Home Office.*[76] Miss D, of Dutch nationality, had been offered employment as secretary with the Church of Scientology at a college in England, but the immigration officer refused her leave to enter under the Immigration Act 1971 (exclusion conducive to the public good), and the question arose whether this infringed Article 39 [48] of the EC Treaty (freedom of movement of workers). The Vice-Chancellor held:

(i) that issues of fact and of national law should in general be determined before reference is made to the European Court; and

(ii) that the question of whether Article 39[48] of the Treaty of Rome confers on individuals *rights* enforceable in the courts of Member States should properly be determined by reference to the European Court before trial of the action. His Lordship therefore stayed the proceedings and requested a preliminary ruling from the European Court which ruled that:

(a) Article 39 [48] and the Council Directive on the movement and residence of foreign nationals confer on individuals rights (qualified by the Directive) which national courts must protect; but

(b) a member state may impose restrictions justified on grounds of public policy, and may take into account the conduct of the individual concerned and his association with some organisation considered by the State as socially harmful, even though it is not an unlawful association and no similar restriction is placed on its own nationals against taking employment with that organisation.

[70] [1983] 2 A.C. 751; *ante*, para. 4–021. Patent law was the subject of the reference in *R. v. Comptroller Patents ex p. Gist-Brocades* [1986] 1 W.L.R. 51, HL.
[71] [1981] Q.B. 180.
[72] [1981] 1 W.L.R. 950; [1982] 1 W.L.R. 841.
[73] [1980] Q.B. 229; 69 Cr.App.R. 22.
[74] [1981] Q.B. 778. DC and CA; [1980] 2 C.M.L.R. 308; *supra* para. 6–009.
[75] [1978] Q.B. 607.
[76] [1974] 1 W.L.R. 1107; subsequent proceedings [1975] Ch. 385; [1975] 1 C.M.L.R. 1.

The Employment Appeal Tribunal has referred various questions to the European Court relating to pay and discrimination.[77] 6–026

The application of the criminal law in magistrates' courts may have a European element and require reference being made to the European Court, for instance with regard to the deportation of EEC nationals (*R. v. Bouchereau*,[78]) offences under the Immigration Act 1971 (*R. v. Pieck*[79]) or the enforcement of United Kingdom fishing legislation (*R. v. Plymouth Justices, ex p. Rogers*[80]).

Tribunals, as well as courts, are within the terms of Article 234 [177].[81] References have been made by the National Insurance Commissioner[82] and the Special Commissioners for Income Tax.[83]

The jurisdiction of the European Court to give preliminary rulings on points of Community law at the request of national courts and tribunals must not be confused with its jurisdiction directly to enforce Community law. The Commission or a member state may bring an action in the Court against any state which is alleged to be in breach of its Treaty obligations (EC Treaty Articles 226 [169] and 227 [170]). A State which is found to be in breach of Treaty obligation is under a duty to take the necessary measures to comply with the judgment of the Court. The Commission, for example, after lengthy negotiations with the United Kingdom about the latter's failure to implement a Regulation relating to the use of tachographs in lorries finally brought proceedings in the European Court. A judgment against the United Kingdom[84] resulted in domestic legislation to give effect to Community law. Similarly the United Kingdom only took steps to reduce the discriminatory levels of excise duty on imported wines after the Commission had successfully brought proceedings in the European Court.[85]

It is difficult to calculate exactly the number of cases brought against individual Member States, and figures may be misleading unless it is remembered different states have joined the Communities at different times. Nonetheless, the figure for the United Kingdom of 47 compares favourably with 384 for Italy, 238 for Belgium and 220 for France.[86]

Secondary legislation

The European Communities Act 1972 did not give effect to a static body of rules—as is usually the case when a statute makes a treaty part of the law of the United Kingdom. The law of the Community continues to grow, through decisions of the European Court and legislation in the form of Regulations, Decisions and Directives. Much of this law, indeed, may correctly be regarded as too fundamental and broad in scope to be fairly described as secondary.[87] Accession 6–027

[77] See *Jenkins v. Kingsgate (Clothing Productions) Ltd* [1981] 1 W.L.R. 972; [1981] 1 W.L.R. 1485; *Burton v. British Railways Board* [1981] I.R.L.R. 17; [1982] Q.B. 1080; [1983] I.C.R. 544.
[78] [1978] Q.B. 732.
[79] [1981] E.C.R. 2171 (Reference from Pontypridd Magistrates' Court).
[80] [1982] Q.B. 863.
[81] The Court of Justice has held Art. 234 [177] applies to tribunals established by law, *e.g. Vaassen-Göbbels v. Beambtenfonds voor het Mijnbedrijf* [1966] E.C.R. 261 (Dutch Social Security Tribunal) but not to an arbitrator, appointed by parties to a contract: *Nordsee v. Reederei Mond* [1982] E.C.R. 1095.
[82] (Since 1980, the Social Security Commissioners). See *Kenny v. National Insurance Officer* [1978] E.C.R. 1489; *Re Search for Work in Ireland* [1978] 2 C.M.L.R. 174.
[83] *Lord Bruce of Donnington v. G. Aspden* [1981] E.C.R. 2205.
[84] *Commission v. United Kingdom* [1979] E.C.R. 419.
[85] *Commission v. United Kingdom* [1983] E.C.R. 2265.
[86] Based on figures up to the end of 1999, as calculated by Brown and Kennedy, *op. cit.*, p. 424.
[87] Brown and Kennedy, *op. cit.* p. 7.

to the Treaties and their enactment in the European Communities Act 1972 means that bodies outside the United Kingdom may by their decisions and legislation affect domestic law. Both Houses of Parliament have responded to the issues raised by this new situation in ways discussed in the following section while the Treaty on European Union attempted to deal more generally with the issue of enhancing the role of national legislatures as part of an attempt to address what is coyly described as the problem of the democratic deficit in the structure of the Communities and Union.

IV. Parliament and Community Law

Parliament's role in the making of secondary Community legislation by Community institutions is, at best, indirect. To provide a more effective method of scrutinising proposals for new Community legislation than debates and questions to Ministers, both Houses established specialist committees. Political, institutional and economic developments in the Communities since 1972, in particular the establishment of the European Union which created the potential for new categories of document in addition to proposals for legislation, have resulted in both Houses reforming and extending their systems of scrutiny of European business by committee.

Reforms to enhance the role of national parliaments were also provided by the TEU, but this did not become effective until a new Protocol[88] was agreed in the Treaty of Amsterdam 1998. This required a six week period to elapse between a legislative proposal under Title VI of the TEU being made available to the Commission, Parliament and Council and a decision by the Council to adopt an act of common position on the basis of that proposal. This was to allow time for national parliaments to scrutinise European business. The opening of a National Parliament Office in Brussels has enabled national parliaments to find out in advance of formal proposals what is happening, it should also assist collaboration with other national parliaments.

The Scrutiny Reserve

6–028 Underpinning the provisions to be discussed for parliamentary scrutiny of proposed European legislation and other types of proposal provided for under the TEU, is the understanding, found in resolutions of both Houses,[89] that Ministers will not agree to such proposals while they are still being considered by Parliament. The purpose of these resolutions is to enable Parliament to attempt to influence the position the Government will take in negotiations with the other Member States. The current resolutions are those of November 17, 1998 in the House of Commons,[90] and December 6, 1999 in the House of Lords.[91] These resolutions take account of the increased use of the co-decision procedure provided in the TEU and consequent use of Conciliation Committees to deal with

[88] The Protocol on National Parliaments (Protocol 13).

[89] The first resolution was passed in 1980, before that date the understanding was based on undertakings given by successive Governments.

[90] H.C.Deb. Vol. 319, cols. 778–779, November 17, 1998.

[91] H.L.Deb. Vol. 607, cols. 1019–1020. This is similar, but not identical to the House of Commons resolution; until this resolution the Lord had relied on an informal understanding to the same effect as the Commons' resolution.

disputes between the Council and the European Parliament (Article 251). Ministers should not agree to any compromise proposal that may emerge from the Conciliation Committee while that agreement is still subject to scrutiny or awaiting consideration by the House. The Scrutiny Reserve also applies to agreements under Titles V (Common Foreign and Security Policy) or VI (Co-operation in Justice and Home Affairs) of the TEU.

The Scrutiny Reserve may apply during parliamentary recesses when the Scrutiny Committee does not meet. Ministers may give agreement to a proposal still awaiting scrutiny or consideration by the House in certain circumstances:

(i) if the proposal is confidential, routine, trivial or is substantially the same as a proposal on which scrutiny has been completed;

(ii) if the Scrutiny Committee indicates that the Minister can do so;

(iii) if the Minister has special reasons for doing so.

In the latter case the Minister is required to explain his reasons to the Committee and the House as soon as possible. The Scrutiny Reserve could be made more authoritative by putting it in statutory form.

Scrutiny by committees

The two Houses have slightly different types of committee which complement each other: the Lords' committee conducts in depth analysis of a few significant European proposals, while the Commons' committee assesses all proposals. There is provision for concurrent meetings of the committees, but this power is rarely formally exercised. **6–029**

The House of Commons

The system of scrutiny by a specialist committee on European legislation devised after accession was reformed in 1990 and again in 1998.[92] Originally the Committee in the House of Commons was concerned only with specific proposals for European legislation. The TEU gave rise to new categories of documents to be agreed under the two new "pillars" of the E.U., which did not fall within the Committee's original terms of reference. **6–030**

The European Scrutiny Committee[93] is a Select Committee of 16 members entitled to appoint specialist advisers and call for witnesses and evidence. Its terms of reference allow it to examine E.U. documents and:

(i) report its opinion on the legal and political importance of such documents;

(ii) make recommendations for further consideration of any such document by one of the European Standing Committees[94];

(iii) to consider any issue arising upon such document or related matters.

[92] Following recommendations by the Select Committee on Modernisation, H.C. 791 (1997–98); see also H.C. 51 (1995–96), H.C. 77 (1996–97).

[93] Originally known as the European Legislation Committee.

[94] *post* para. 6–031.

The term European document is widely defined to include: proposals under the Community treaties, documents published for submission to the European Council, the Council, the European Central Bank; proposals further to Titles V and VI of the Treaty of European Union for submission to the Council. As well as the E.U. documents the committee receives explanatory memorandum prepared by the relevant Government Department and can seek further information from Departments.

6–031 *European Standing Committee* There are three European Standing Committees[95] each consisting of 13 members; any MP may take part in the proceedings of one of these Committees, but may not take part in any vote in the Committee. Each Standing Committee is responsible for several government departments, and when recommending that a European document requires further consideration, the European Scrutiny Committee specifies the Standing Committee to which a document should be referred. Government Ministers appear before these committees to answer questions for a maximum of one and a half hours, and the committee will debate the matter for a further one and a half hours and if appropriate agree on a motion, e.g. that the Minister does not agree to the proposed legislation. A motion in similar, but not necessarily identical terms, will be moved without debate in the House a few days later.[96]

The House of Lords

6–032 *The European Union Committee* has a membership of 20, but works through subcommittees which co-opt Lords not on the Committee. In consequence around 70 Lords are involved in the work of the Committee and its six subcommittees. The sub-committees deal with: economic and financial affairs, trade and external relations; energy, industry and transport; environment, public health and consumer protection; agriculture, fisheries and food; law and institutions[97]; social affairs, education and home affairs. The terms of reference of the committee are to consider E.U. documents[98] and other matters relating to the E.U. Although the committee and its sub-committees examine some E.U. documents, their more frequent role is to make detailed enquiries into subjects chosen by the sub-committee from within their field of activity, e.g. the Euro, reforming E.C. competition procedures, fraud, e-Commerce. This is a very active committee, whose reports are highly regarded throughout Europe, and are capable of influencing European policy development.[99]

Debates

6–033 The Government publishes White Papers every six months on Community developments which can form the basis for debates in either House. Since 1989 debates on European documents have been held in the European Standing Committees rather than on the floor of the House.

[95] Increased from two to three in November 1998.
[96] It is for the government to decide the wording of the motion to be moved.
[97] This committee is always chaired by a Law Lord.
[98] This is widely defined in virtually the same terms as in the House of Commons, see para. 6–030.
[99] See the evidence published by the Select Committee on the Committee Work of the House H.L. 35 (1991–92).

V. The Impact of Community Law

6–034 In earlier parts of this chapter the relationship between Community law and the laws of the United Kingdom was discussed with particular reference to the ways in which Community law becomes enforceable as part of domestic law. In this part it is intended to look, in outline, at the substantive effect of Community law in those areas where it has already played a particularly important role and where it may be important in the future.[1]

From *Van Duyn v. The Home Office*[2] onwards, the right of freedom of movement of workers (Article 39 [48]) has been involved in many cases before the domestic courts. EEC workers may not be refused admission to the United Kingdom except within the limits laid down by Directive 64/221, which allows states to exclude an individual on grounds of public policy or of public security but only on the basis of the individual's personal conduct. In *R. v. Bouchereau*[3] the European Court considered the circumstances in which an EC national could be deported after a criminal conviction, and concluded that deportation was only justified where the infringement of the law posed a genuine and sufficiently serious threat affecting one of the fundamental interests of society which went beyond the threat to public order which is inherent in any crime.

In *R. v. Secretary of State for the Home Department, ex. p. Dannenberg*[4] the Court of Appeal pointed out that Community law now requires that reasons must be given when a judge recommends that an EEC national should be deported. To attempt to impose on an EC national who is entitled to enter the United Kingdom a time limit on his stay under the Immigration Act 1971 is a breach of Community law: *R. v. Pieck*.[5] Rules requiring a qualifying period of residence before an EC national is eligible to apply for a local education award were held to constitute discrimination in breach of Article 39 [48] in *MacMahon v. Department of Education and Science*.[6]

6–035 Serious impediments to the free movement of goods, in the sense of the normal range of imports and exports, are likely to be challenged directly in the European Court. Thus restrictions by the United Kingdom on the importing of potatoes[7] and poultry[8] were referred to the Court by the Commission, as were restrictions by France on imports of lamb from the United Kingdom.[9] A rather different example of the United Kingdom being found to be in breach of Article 28 [30]

[1] Other examples, of course, can be found in the discussion of the conflict between community law and U.K. law in Chap. 4.

[2] [1974] E.C.R. 187; [1975] Ch. 358. See further A. Arnull, *The European Union and its Court of Justice* (Oxford, 1999), Chaps 8 and 10. Non-workers, such as students, have progressively been given rights by a series of directives and citizenship of the Union (Art. 18(1)[8a], created by the Maastricht Treaty) involves a general right to move and reside within the territories of Member States: Wyatt and Dashwood's European Union Law (4th ed., 2000, Sweet & Maxwell), Chap. 16.

[3] [1978] Q.B. 732. *cf. R. v. Secchi* [1975] 1 C.M.L.R. 383 (Met. Magistrate): (Italian in London not a worker; even if he were, convictions for theft and indecency justified recommendation for deportation).

[4] [1984] Q.B. 766. See further on the compatibility of U.K. deportation law with EEC law, *R. v. Secretary of State for the Home Department, ex p. Santillo* [1981] Q.B. 778.

[5] [1981] E.C.R. 2171.

[6] [1983] Ch. 227. See also *R. v. ILEA, ex p. Hinde, The Times*, November 19, 1984.

[7] *Re Imports of Potatoes, E.C. Commission v. U.K.* [1979] 2 C.M.L.R. 427, E.C.J.

[8] *Re Imports of Poultry Meat: E.C. Commission v. France* [1982] 3 C.M.L.R. 497, E.C.J.

[9] *Re Restrictions on Imports of Lamb: E.C. Commission v. France* [1980] 1 C.M.L.R. 418, E.C.J.

is provided by *Commission v. U.K.*[10] where the Court held that a Statutory Instrument which required certain categories of goods sold by retailers to be marked with an indication of the countries of origin was a quantitative restriction on the movement of goods. It is not entirely surprising that resort to Article 28 [30] in domestic courts should be made in cases where, at first sight, Community law has little relevance. In *R. v. Henn*,[11] for example, the only hope of the accused importers was to argue that the United Kingdom's prohibition on the importing of obscene or indecent articles was contrary to Community law. The European Court held that such a prohibition could be justified in the light of Article 30 [36] which refers to "public morality, public policy or public security," and that the question of public morality was to be determined by each state in accordance with its own scale of values. The Court did not discuss the fact that the test of obscenity or indecency applied to imported books[12] was wider than the test applied for example, under the Obscene Publications Act 1959, to books published in England, although Advocate General Mr J. P. Warner referred to the complexities of the laws of the United Kingdom which arise: first because the laws of the different parts of the United Kingdom, namely England and Wales, Scotland, Northern Ireland, and the Isle of Man, are different, and, in each case, derived from a variety of sources rather than from any coherent scheme; and secondly because nowhere in the United Kingdom is pornography treated quite as strictly internally as on its importation.

The importers of various articles of an erotic nature were however more successful in *Conegate Ltd v. Customs and Excise Commissioners*.[13] The European Court held that the United Kingdom was not entitled to prohibit the import of goods under Article 30 [36] where the manufacture of such goods was not prohibited in its own territory under its domestic law.

Article 28 [30] has also been invoked in cases challenging the compatibility of Sunday trading laws with community law[14] and the licensing provisions imposed on sex shops.[15]

In *R. v. Chief constable of Sussex ex p. International Trader's Ferry Ltd*[16] it was unsuccessfully argued that the failure of the Sussex Police to provide sufficient resources to enable the applicants to carry on their trade in the face of protests by animal rights groups was in breach of Article 28 [30] as constituting a measure amounting to a restriction on the freedom of movement of goods. The House of Lords expressed doubt whether a decision by a police force constituted a "measure" within the terms of the Article but concluded that if it did it was within the terms of the proviso contained in Article 30 [36].

6–036 The first judicial consideration of the effect of the EC Treaty on English law involved Articles 81 [85] and 82 [86] which are designed to ensure free competition: *Application des Gaz S.A. v. Falks Veritas*.[17] Later cases in which these Articles have been relied on have shown the difficulties that may arise in finding

[10] [1985] 2 C.M.L.R. 259, E.C.J.
[11] [1981] A.C. 580.
[12] Customs Consolidation Act 1876, s.42, Customs and Excise Act 1952, s.304.
[13] [1987] 2 W.L.R. 39. *Conegate* was distinguished and *Henn* applied in *R. v. Bow Street Metropolitan Stipendiary Magistrate ex p. Noncy p Ltd* [1990] 1 Q.B. 123; 89 Cr. App. R. 121, C.A.
[14] *Stoke on Trent City Council v. B & Q* [1993] A.C. 900; [1992] E.C.R.I–6635; [1993] 1 C.M.L.R. 426. See further, Arnull, *op. cit.* p. 282 *et seq.*
[15] *Quietlynn Ltd v. Southend B.C.* [1990] E.C.P.I.–3059; [1990] 3 C.M.L.R. 55; [1990] 3 All E.R. 207.
[16] [1999] 2 A.C. 418, HL.
[17] [1974] Ch. 381, C.A.

the appropriate domestic remedy to protect a Community right. In *Garden Cottage Foods Ltd v. Milk Marketing Board*[18] the appellants sought an injunction to prevent the Board from acting in a way which constituted a breach of Article 82 [86]. The House of Lords took the view that an injunction ought not to have been granted on the facts and also, contrary to the view expressed in the Court of Appeal, indicated that contravention of Article 82 [86] could be remedied by an award of damages by analogy to a breach of statutory duty. It has, however, been argued that there is considerable doubt about the appropriate remedy under Community law for a breach of Article 82 [86] and that the House of Lords should have referred the issue to the European Court.[19]

In *Bourgoin S.A. v. Ministry of Agriculture Fisheries and Food*[20] the Court of Appeal was concerned with the remedies available where a ministerial order had been held by the European Court to be in breach of Article 28 [30] of the Treaty. Parker L.J., who delivered the judgment of the majority, held that a *mere* breach of the Treaty was remediable by judicial review, declaring the minister's order to be invalid and ordering the officials concerned to permit the landing of the goods. The *Golden Cottage Foods* case, in the opinion of the learned Lord Justice, established that there is a right to damages where there has been a breach of law which also amounts to an abuse of power. In *An Bord Bainne Co-operative Ltd (Irish Dairy Board) v. Milk Marketing Board*[21] the English Courts had to decide whether rights arising under competition provisions of the EEC Treaty fell within the sphere of private law or public law for the purpose of determining the appropriate forms of procedure and remedies[22]: the Court of Appeal decided that the rights were private law rights and the plaintiff could, by writ, seek damages for their breach. (The desirability of seeking the view of the European Court was, again, not raised).

6–037 Dicta in these cases in relation to the availability of damages for breach of community rights by domestic law must, of course, now be read in the light of the decisions of the Court of Justice discussed earlier, *Francovich and Brasserie du Pecheur*[23] and the application of those decisions by the House of Lords in *R. v. Secretary of State for Transport ex p. Factortame Ltd (No. 5)*.[24]

Article 141 [119], as was obvious from the earlier discussion of references to the European Court under Article 234 [177], has been a fruitful source of litigation. In a number of cases initiated by the Commission the United Kingdom has been held by the Court to be in breach of its obligations under Community law relating to equality between the sexes. Following the decision of the Court in *E.C. Commission v. U.K.*[25] that the provisions of the Equal Pay Act 1970 failed to comply with the EEC Equal Pay Directive (75)/117), the United Kingdom Statute was amended by the Equal Pay (Amendment) Regulations, under section 2(2) of the European Communities Act 1972.[26] That is the procedure which in

[18] [1984] 3 W.L.R. 143, HL.
[19] M. Friend and J. Shaw, "Damages for Abuse of Dominant Position" (1984) 100 L.Q.R. 188.
[20] [1986] Q.B. 716.
[21] [1984] 2 C.M.L.R. 584. The Competition Act 1998 was passed to bring domestic law into accord with EC law.
[22] *post*, Chap. 33.
[23] *ante*, para. 6–014.
[24] [2000] 1 A.C. 524; *ante*, para. 6–014.
[25] [1982] I.R.L.R. 33, [1982] I.C.R. 578. See too *Drake v. Chief Adjudication Officer* [1986] 3 All E.R. 65, E.C.J.; *Johnston v. Chief Constable of the R.U.C.* [1986] 3 All E.R. 135, E.C.J.
[26] Equal Pay (Amendment) Regulations 1983, (S.I. 1983 No. 1794).

practice is likely generally to be followed where there is a discrepancy or conflict between domestic and Community law.

A problem peculiar to Scots law was raised in *Gibson v. Lord Advocate*.[27] G. sought a declaration that section 2(1) of the European Communities Act 1972 was contrary to Article XVIII of the Union Act, and therefore null and void, so far as it purported to enact as part of the law of Scotland certain Community Regulations providing for equal treatment of member states with regard to fishing in maritime waters. He argued that immediately before the Act of Union, Scottish subjects had exclusive fishing rights in Scottish coastal waters; that the laws conferring these rights "concerned private right," and that the Community Regulations were not "for the evident utility of the subjects within Scotland." Lord Keith dismissed the action, not only on the ground that action was incompetent in seeking consideration of the utility of an Act of Parliament[28] but also on the ground that Community Regulations operate in the field of public law and not private law.

6–038 In assessing the possible future significance of Community law it must be remembered that apart from the provisions of the Treaties and subsequent secondary legislation, the European Court has developed a concept of general principles of Community law with which it supplements and completes the written texts which it has to interpret and apply.[29] Thus the principles known in common law countries as "natural justice" have been applied by the European Court as general principles of law.[30] From the provisions of Article 141 [119] and other Articles the Court has fashioned a general concept of "equality." The principle of "proportionality" which has been referred to by the Court on a number of occasions has been cited by Lord Diplock in *Council of Civil Service Unions v. Minister for Civil Service*[31] as a possible new ground on which ministerial and administrative decisions may be subject to review under domestic law. The recognition by the Court that the general principles of law include respect for fundamental human rights[32] provides a point of contact between the EC and the European Convention on Human Rights.[33]

It remains to be seen to what extent the Court will be encouraged in this approach by the adoption at the Intergovernmental Conference at Nice of a Charter of Fundamental Rights. The Charter's legal standing is unclear. It is not part of the Treaty of Nice or attached to it in any way. Article 51 of the Charter states, however, that the institutions of the EU shall respect the rights, observe the principle and promote the application of the Charter in accordance with their respective powers.

An attempt to make use of this link was unsuccessful. In *Allgemeine Gold und Silberscheideanstalt v. Cmrs. of Customs & Excise*[34] where the German plaintiffs

[27] [1975] 1 C.M.L.R. 563; 1975 S.L.T. 136.

[28] *ante*, para. 4–007.

[29] *ante*, para. 6–011.

[30] *Transocean Marine Paint Association v. E.C. Commission* [1974] E.C.R. 1063.

[31] [1985] A.C. 374; *post*, para. 31–002. *cf. R. v. Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 1 W.L.R. 1052 where Lord Denning M.R. suggested that judicial review was applicable on the ground of natural justice where an administrative body had imposed a punishment out of proportion to the offence.

[32] *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, 1134; *Nold v. E.C. Commission* [1973] E.C.R. 491.

[33] *ante*, para. 6–011 and *post*, para. 22–014.

[34] [1978] 2 C.M.L.R. 292; [1980] 1 C.M.L.R. 488, C.A. This case was the sequel to *R. v. Thompson* [1980] Q.B. 229; *ante*, para. 6–025.

claimed that the forfeiture of smuggled krugerrands was contrary to the European Convention and therefore contrary to Community law. Donaldson J. held that, while the EEC Treaty might have been drafted against a background of the recognition of human rights, it did not incorporate them by unwritten, implied Articles. The proper remedy, if the plaintiffs thought that the United Kingdom legislation infringed the European Convention on Human Rights, was to complain to the European Court of Human Rights. The Court of Appeal affirmed Donaldson J., without adverting to the matter of the European Convention, although Lord Denning M.R. remarked briskly that there is no rule of International law which prohibits the forfeiture of smuggled goods.

6–039 In *Johnston v. Chief Constable of the R.U.C.*,[35] however, the applicant, on a reference to the Court of Justice, by an Employment Tribunal, was successful in challenging the legality of a conclusive certificate issued by the Secretary of State which purported to exclude her statutory right of access to a tribunal on the ground of national security. The right of access to a judicial body was a general principle of law which underlies the constitutional traditions common to member states. The Court referred to Articles 6 and 13 of the European Convention on Human Rights and stated that the principles on which that Convention is based must be taken into consideration in Community law.

[35] [1987] Q.B. 129, ECJ.