

# Constitutional Law III

## The UK Parliament: law-making, democracy and sovereignty

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### 1 Introduction

In this supervision, our focus will be on the United Kingdom Parliament—the Westminster Parliament. (We will consider other legislatures, such as the Scottish Parliament, in the next supervision.) In particular, we will examine three issues concerning the UK Parliament:

- Parliament’s **legitimacy** as a law-making institution: to what extent, and in what sense, is Parliament a democratic institution?
- Parliament’s law-making **role**: how does Parliament make law, and how well does it discharge this function? (Parliament’s other main function—holding to account the executive branch of government—will be considered later in the course.)
- Parliament’s law-making **powers**: Parliament is said to be ‘sovereign’. What does this mean, and is the claim a defensible and accurate one?

In conceptual terms, the third of the above issues is the most challenging, and so that is what we will mainly focus on in the supervision (although there will, of course, be an opportunity to discuss and ask questions about the other areas).

### 2 Democracy and legitimacy

#### 2.1 Introduction

Parliament’s main, and most obvious, function is to make law (although we will see later that it is perhaps an exaggeration to say that Parliament *makes* law, as opposed to *scrutinising* and *approving* the executive’s proposals for law). And although Parliament has not always been a recognisably democratic body, the most obvious contemporary justification for its possession of law-making authority is its democratic mandate. The nature—and potency—of that democratic mandate turns upon a variety of factors, including:

- the way in which elections to the House of Commons work;
- the legitimacy (or otherwise) of the House of Lords;
- the relationship between the Commons and the Lords;
- legal restrictions upon the Lords’ powers;
- conventional restrictions upon the Lords’ powers.

Pay particular attention to the foregoing points as you do the reading. The *Jackson* case, mentioned below, is relevant both to this part of the supervision as well as to the topic, mentioned later in the supervision sheet, of parliamentary sovereignty. For this part of the supervision, concentrate on the implications of *Jackson* for the relationship between the House of Lords and the House of Commons,

and the extent to which, according to *Jackson*, the Parliament Acts constrain (or do not constrain) the capacity of the Commons unilaterally to make law. More detailed guidance on the *Jackson* case—and other things to look out for—are mentioned in the parliamentary sovereignty section below.

## 2.2 Essential reading

- Elliott and Thomas, pp 162-185
- Parliament Act 1911, ss 1 and 2
- House of Lords Act 1999, ss 1-3
- *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 (as a minimum, read the speeches of Lord Bingham, Lord Steyn, Lord Hope, Lady Hale and Lord Carswell)
- Barber, 'House of Lords Reform: A Look in the Long Grass' UK Const L Blog (12 July 2012) (<http://goo.gl/Hocdc>)
- Phillipson "'The greatest quango of them all", "a rival Chamber" or "a hybrid nonsense"? Solving the Second Chamber Paradox' [2004] PL 352

## 2.3 Further reading

- House of Lords Reform Bill (2012-13) (<http://goo.gl/6Fv8G>) (for a brief discussion of this Bill, which was *not* enacted, see Elliott, "Cambridge Law in Focus Video: The House of Lords Reform Bill" (<http://goo.gl/ZxC1E>))
- Phillipson, 'Lords Reform: why opponents of the Government Bill were wrong', UK Const L Blog (26th September 2012) (<http://goo.gl/o9D9k>)
- Oliver, 'Response to Gavin Phillipson on Lords Reform' UK Const L Blog (26th September 2012) (<http://goo.gl/Y4VG2>)
- Cm 8077, *House of Lords Reform—Draft Bill* (2011) (<http://goo.gl/bwN0l>), pp 10-29
- Cooke, 'A Constitutional Retreat' (2006) 112 LQR 224
- Cm 4534, Royal Commission on Reform of the House of Lords, *A House for the Future* (2000) (<http://goo.gl/lOQok>)

## 2.4 Questions

1. What is (and what should be) the role of the House of Lords?
2. Who sits in the House of Lords? How does one become a peer entitled to sit in the House of Lords?
3. Would the enactment of the reforms contained in the House of Lords Reform Bill (2012-13) have been a good thing?
4. What powers does the House of Lords have? What powers should it have?
5. In the light of the decision of the Appellate Committee of the House of Lords in *Jackson*, which, if any, of the following could be enacted under the Parliament Acts 1911-49?
  - a. A Bill providing for the reduction in the House of Lords' delaying power from one year to one month
  - b. A Bill removing from s 2(1) the prohibition on extending the life of Parliament, followed by a Bill extending the life of Parliament
  - c. A Bill abolishing the House of Lords

- d. A Bill abolishing general elections and requiring the government to be formed of members of one particular political party

### 3 Law-making

#### 3.1 Introduction

It is the task of Parliament to enact laws (although this is not *uniquely* Parliament's task: others, including devolved legislatures, government ministers and local authorities, have law-making powers). As you do this part of the reading, consider the following issues:

- How well does Parliament discharge this function?
- What does the legislative process tell us about the true relationship between the executive and Parliament?
- How does this relate to the separation of powers principle considered in the last supervision?

#### 3.2 Essential reading

- Elliott and Thomas, pp 185-205

#### 3.3 Further reading

- Norton, 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' in Brazier (ed), *Parliament, Politics and Law-Making: Issues and Developments in the Legislative Process* (London 2004)
- Cabinet Office, *Guide to Making Legislation* (London 2010) (<http://goo.gl/NV8li>) (not something to read in its entirety, but a useful reference source if there are particular points on which you want more detail)

#### 3.4 Questions

1. It is sometimes said that Parliament is a *law-scrutinising* rather than a *law-making* legislature. What is meant by this, and do you agree?
2. What practical steps can Parliament take to scrutinise bills?
3. What features of the constitution inhibit effective parliamentary scrutiny of bills?
4. How might parliamentary scrutiny of bills be improved?

### 4 Parliamentary sovereignty

#### 4.1 Introduction

The doctrine of parliamentary sovereignty is a matter to which we will return on a number of occasions during this course. We will see later that British membership of the European Union, the devolution of governmental power to Scotland, Northern Ireland and Wales, and the enactment of the Human Rights Act 1998 all now influence how we think about parliamentary sovereignty – perhaps even prompting us to question the orthodox view of it. However, those matters are for later in the course; our first concern must be to understand what the orthodox view is.

The classic definition of parliamentary sovereignty was provided by Professor Albert Venn Dicey. His work exerted a profound influence on constitutional thought in Britain throughout the twentieth century, and his view continues to encapsulate orthodox thinking in this area. As you do the reading for this part of the supervision:

- Aim to understand Dicey's definition of sovereignty.
- Contrast the British constitution, which is generally considered to accord full legislative supremacy to Parliament, with those legal systems that have constitutional texts which limit legislative power (see, for example, the United States Constitution and the Supreme Court's historic decision in *Marbury v. Madison* which held that American courts could strike down legislation if it was incompatible with the values enshrined in the Constitution). Consider whether the United Kingdom would benefit from such an approach.
- Pay attention to the different conceptions of British parliamentary sovereignty which exist. (There are two traditional competing schools of thought: some writers believe that Parliament's sovereignty is "continuing", while others argue that, as to the "manner and form" of legislation, Parliament may bind its successors.)

The Appellate Committee of the House of Lords (now replaced by the Supreme Court) had cause to consider parliamentary sovereignty and related issues in *Jackson*. This is an important case – you will need to read it carefully, and you will need to look at all of the judgments. As you do so, try to note down what each of the judges thought about the following issues (although bear in mind that not all of the judges addressed all of the following):

- How should legislation enacted under the Parliament Acts be characterised? In particular, can it, or should it, be characterised as "delegated legislation"?
- Are there any limits on what can be done under the Parliament Acts?
- Are there any limits on what Parliament can do generally?
- More generally, do you think that any of the judgments provide any support, direct or indirect, for any particular theory – "continuing" or "manner and form" – of parliamentary sovereignty?

It is also important to bear in mind that some writers—and, apparently, some *judges*—challenge the idea of parliamentary sovereignty itself, questioning whether it is defensible or accurate to ascribe unlimited law-making power to Parliament.

Finally, bear in mind that the issue of parliamentary sovereignty is further complicated by issues arising from UK membership of the European Union. We will consider EU-related issues in Supervision IV.

#### 4.2 Essential reading

- Elliott and Thomas, pp 205-231
- Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172 (this is a difficult read; but persevere with it, because it's important; and focus on understanding the main thrust of his argument, rather than getting too bogged down in details)
- Laws, 'Law and Democracy' [1995] PL 72
- Neuberger, 'Who are the Masters Now?' (<http://goo.gl/z3wIV>)
- *British Railways Board v Pickin* [1974] AC 765, 780-788

- *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 593-598
- *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262
- *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 167-175, 206-214

#### 4.3 Further reading

- Bradley, 'The sovereignty of Parliament - form or substance?' in Jowell and Oliver (eds), *The Changing Constitution* (Oxford 2011)
- Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' [2009] PL 519
- Le Sueur, 'Three Strikes and It's Out?' [2004] PL 225, 231-233
- Munro, *Studies in Constitutional Law* (Oxford 1999), ch 5 (showing its age, so treat with caution—but still a valuable resource)
- Young, 'Hunting Sovereignty' [2006] PL 187

#### 4.4 Questions

1. What does Dicey mean by 'parliamentary sovereignty'?
2. Is Parliament 'sovereign'? Explain the points of difference between Laws's and Neuberger's views on this matter. Which view do you prefer?
3. Consider the 'continuing theory' of parliamentary sovereignty described by Wade.
  - a. What is meant by the 'continuing theory'?
  - b. Can Parliament bind its successors under this theory? Why (not)?
  - c. Under this theory it is said that the competence of Parliament can be limited by a 'revolution'. In this context, what is a revolution and why can Parliament's powers be limited only by a revolution?
4. Consider the following questions concerning the *new view* (sometimes called the *manner and form view*) of sovereignty:
  - a. What is the central idea in the 'new view' (or 'manner and form view')?
  - b. Is that central idea a good idea? What are its advantages and disadvantages?
  - c. Why does this theory distinguish between 'manner and form' limitations and 'substantive' limitations? Can a distinction be clearly drawn?
  - d. Does the *Ellen Street Estates* case definitively establish that the new view is 'wrong'?
5. What is the significance of the *Jackson* case? Does it help us to decide which (if either) of the 'continuing' and 'new' views is right?
6. Consider the *Anisminic* case:
  - a. What was *Anisminic* about? What was the claimant aggrieved about?
  - b. The central issue in *Anisminic* concerned s 4(4) of the Foreign Compensation Act 1950: what was significant about that provision?
  - c. How did the House of Lords interpret s 4(4)?
  - d. What, in your view, does the *Anisminic* case tell us about the traditional relationship between parliamentary sovereignty and the rule of law?

## 5 Essay

Please write an answer to the following question and submit it before the supervision. In writing the essay, you should bear in mind the practical points about word limits etc mentioned in the introductory handout that you received at the start of the year.

‘[I]f Parliament did the inconceivable [by legislating contrary to a fundamental constitutional principle], we [the judges] might do the inconceivable as well.’ (LORD PHILLIPS OF WORTH MATRAVERS)

If a United Kingdom court refused to recognise the validity of an Act of Parliament in the sort of circumstances contemplated by Lord Phillips, would it be acting unconstitutionally?  
Would the Queen in Parliament be acting unconstitutionally in passing such an Act?