The legislative supremacy of Parliament

SUMMARY
This chapter examines the constitutional significance of the doctrine of the legislative supremacy of Parliament. It considers the traditional view of this doctrine which holds that Parliament is legislatively omnicompetent. It also takes into account the new view of the doctrine. Adherents of this view argue that whilst there are no limits on Parliament as to subject matter, Parliament can bind itself in terms of the manner and form of legislating. The chapter also considers the effect on legislative supremacy of the following: the Parliament Acts 1911 and 1949; the Acts of Union; the UK’s membership of the EU; devolution; and the Human Rights Act 1998.

Sovereignty of Parliament

5.1 In many of the standard texts on constitutional and administrative law, there is likely to be a chapter entitled ‘The Sovereignty of Parliament’ or a variant thereof. ‘Sovereignty’ was the word which Dicey used to describe the concept of ‘the power of law-making unrestricted by any legal limit’. In short, he used it to describe a legal concept. However, as Dicey himself acknowledged, ‘sovereignty’ is also capable of bearing political meanings. It may be used, for example, to indicate where political power resides in a state. For the avoidance of doubt, the expression ‘legislative supremacy’ will be used throughout this chapter to signify the law-making power of Parliament.

The traditional view

5.2 The importance of the principle of the legislative supremacy of Parliament to an understanding of the UK constitution has meant that it has been much written about. Dicey, for example, described the principle as meaning:

[N]either more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatsoever; and, further,
that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

5.3 The Parliament which enjoyed this unlimited legislative authority consisted of the Queen, the HL, and the HC. For Dicey, therefore, the principle of legislative supremacy (or parliamentary sovereignty as he termed it) had both a positive and a negative aspect. On the positive side, it meant that all Acts of Parliament, whatever their purpose, would be obeyed by the courts. On the negative side, it meant that there was ‘no person or body of persons who can . . . make rules which override or derogate from an Act of Parliament’. Writing some 70 years later, Wade devoted his attention to the basis of legal sovereignty and concluded that it was to be found in the rule that the courts obey Acts of Parliament. Expanding on this theme more fully, he argued that:

The rule is above and beyond the reach of statute . . . because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense—which applies to no other rule of common law—it is the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.

5.4 Thus at the heart of the discussion of the supremacy of Parliament lies the relationship between Parliament and the courts. Parliament has unlimited legislative authority because the courts recognize this to be the case. H L A Hart considers that the rule of parliamentary supremacy is part of what he terms ‘the ultimate rule of recognition’. This is deployed by the courts as a means of identifying what are valid rules of law. An alternative means of describing the legislative supremacy of Parliament would be to say that it is, borrowing from the political theorist Hans Kelsen, the ‘grundnorm’ of the constitution. In other words, it is the fundamental rule upon which all other rules of the constitution are based.

The pre-1688 position

5.5 The notion that Parliament has unlimited legislative authority has not always been accepted by the courts. Thus in Dr Bonham’s Case (1610), Coke CJ was of the opinion that the common law had the power to control Acts of Parliament and to sometimes declare them to be void. The circumstances in which this might happen were where an Act was ‘against common right and reason, or repugnant, or impossible to be performed’. Similarly in Day v Savadge (1614), the view was expressed that if an Act was against ‘natural equity’ in that it made a man a ‘judge in his own case’, the Act would be ‘void in itself’. However, these cases need to be set in their appropriate historical context. They were decided prior to the ‘Glorious Revolution’ of 1688, from which date the legislative supremacy of Parliament has been recognized by the courts.
The Glorious Revolution 1688

5.6 ‘Revolution’ is an epithet frequently used to describe particular historical events. It implies that there has been some major upheaval within a state with the result that the old order has been replaced by the new. Whilst the events in England in 1688–9 had none of the bloodlust and terror of the events in France a century later, they did bring about a significant change in the relationship between the monarch and Parliament. James II, a Roman Catholic, had succeeded to the thrones of England and Scotland in February 1685 on the death of his brother, Charles II. During the course of the next three years, he clashed with Parliament and the Anglican church as a result of his attempts to use prerogative powers to dispense with laws which discriminated against Catholics (see, for example, Godden v Hales (1686), para 4.2).

5.7 Eventually, a number of prominent politicians signed a letter which invited William of Orange, the Protestant son-in-law of James II, to intervene. He landed at Torbay in Devon in November 1688 with a force of approximately 15,000 soldiers, most of whom were Dutch. They met with little resistance from the forces still loyal to James II en route to London. They entered the capital in the middle of December, at which point James II fled the country, taking refuge in France. A Convention ‘Parliament’ was summoned by William of Orange, and it issued a Declaration of Rights in which it condemned the actions of James II. The throne was offered jointly to William and his wife Mary (the elder daughter of James II) on the terms and conditions set out in the Bill of Rights 1689. The rights contained in this document were neither novel nor far-reaching. Thus, for example, art 10 declared ‘That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.’

5.8 The Bill of Rights 1689 did not therefore take the form of a conventional ‘rights’ document. Indeed, it might be argued that it was as much about the ‘wrongs’ of James II as it was about the ‘rights’ of the people. However, its constitutional significance lies in the fact that it asserted the supremacy of Parliament over the monarch. From that point onward, matters such as the levying of taxation or the raising or keeping of a standing army could not be done without the grant or consent of Parliament. It was Parliament which now held the purse strings. It was Parliament which now had responsibility for the security of the state. It was Parliament which now had legislative power. And it was to the Acts of Parliament that the courts now owed obedience.

Judicial obedience to Acts of Parliament

5.9 Numerous cases can be cited as proof of this judicial obedience to legislation enacted by Parliament. Thus in Ex p Canon Selwyn (1872), a case which raised the question of the validity of the monarch’s assent to the Irish Church Disestablishment Act 1869, Cockburn CJ stated that:

[T]here is no judicial body in the country by which the validity of an Act of Parliament could be questioned. An Act of the legislature is superior in authority to any court of
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law. We have only to administer the law as we find it, and no court could pronounce a judgment as to the validity of an Act of Parliament.

5.10 Similarly in Madzimbamuto v Lardner-Burke (1969), a case concerned with, inter alia, Southern Rhodesia’s Declaration of Independence in 1965 and the subsequent passage of the Southern Rhodesia Act 1965 by the UK Parliament in which it was declared that Southern Rhodesia remained part of Her Majesty’s dominions, Lord Reid stated that:

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

5.11 These examples of judicial obedience to Acts of Parliament have been gleaned from the law reports. It is worth noting, however, that whilst speaking in an extra-judicial capacity, the former LCJ, Lord Woolf, has argued that there may be circumstances in which the courts might no longer be required to obey an Act of Parliament. In his opinion, if Parliament did ‘the unthinkable’ and passed a law which abolished the court’s power of judicial review:

then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the Rule of Law to be preserved.

5.12 Thus in Lord Woolf’s analysis, an Act which contravened the requirements of the rule of law could be disobeyed by the courts. If this were to happen, what would be the consequences for the doctrine of the legislative supremacy of Parliament? Lord Woolf’s remarks can be contrasted with those of Lord Steyn. Whilst delivering a lecture in 1996, the latter observed that:

The relationship between the judiciary and the legislature is simple and straightforward. Parliament asserts sovereign legislative power. The courts acknowledge the sovereignty of Parliament. And in countless decisions the courts have declared the unqualified supremacy of Parliament. There are no exceptions.

5.13 Significantly, however, in one of the last cases which Lord Steyn heard prior to retiring as a Law Lord, Jackson v Attorney General (2005) (paras 5.35–5.41), his views appeared
to have shifted more towards those of Lord Woolf when he observed, albeit obiter, that:

_The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise when the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish._

Also in _Jackson_ Lord Hope observed:

_Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if ever it was, absolute. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackburn is being qualified._

These remarks are important. They suggest that, for at least some senior members of the judiciary, there are restrictions on Parliament’s ability to legislate, such as where Parliament sought to pass a statute which was contrary to the rule of law. In the opinion of Gordon, ‘the comments of Lord Steyn and Lord Hope may mark a crucial point in the development of the UK constitution’ in that they ‘seek to place substantive limitations on the legislative capacity of Parliament through the subject of legal sovereignty to superior immutable values emanating from the common law’. Whether they will signal a more widespread judicial rejection of the constitutional orthodoxy remains to be seen.

**Non-legal limits on the legislative power of Parliament**

5.14 Lord Reid’s remarks in _Madzimbamuto_ (para 5.10) represent a classical formulation of the traditional view that there are no legal limits on the legislative power of Parliament. Under this view, Parliament has the power to make whatever laws it thinks fit, including repressive laws of the most barbarous kind. Thus to take an example deployed by Leslie Stephen, Parliament could, if it so wished, enact a law that all blue-eyed babies should be killed at birth. It possesses the legal power to do so even if the likelihood of such a law being passed is remote in the extreme. In practice, therefore, there is a clear distinction between what Parliament can do and what it will do. Its legislative power is subject to the type of non-legal limits to which Lord Reid referred.
considerations, for example, play a central role in the determination of a government’s legislative programme. Unpopular legislation can have a very damaging effect upon a government, particularly when a general election draws near. Governments may therefore seek to do that which makes them popular with the electorate, or at least refrain from doing that which makes them unpopular.

5.15 A further example of the traditional view of Parliament’s legislative power is evident in the writings of Sir Ivor Jennings. In addition to drawing attention to the fact that parliamentary supremacy means that Parliament has the legal power to legislate on whatever subject matter it likes, Jennings suggested that it also meant that ‘Parliament can legislate for all persons and all places’. This point was made with the aid of an example: that if Parliament enacted that smoking on the streets of Paris was illegal, it would therefore be an offence to do so. The French police and the French courts would, of course, not recognize such a piece of legislation. However, the English courts would recognize it and they would be able to try a person for the offence, assuming that they had been given the jurisdiction to do so by the Act.

Parliament and the courts

5.16 This example underlines the vastness of Parliament’s legislative power and that the doctrine of the supremacy of Parliament is concerned with the relationship between Parliament and the courts. In particular, it centres upon the obedience which the courts show to Acts of Parliament. In Manuel v A-G (1982), where the vires of a UK statute (the Canada Act 1982) was challenged, Sir Robert Megarry V-C observed that he had:

heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires. Of course there may be questions about what the Act means, and of course there is power to hold statutory instruments and other subordinate legislation ultra vires. But once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity.

5.17 From this passage it is evident that anything short of an Act of Parliament is not entitled to the same obedience. Thus a resolution of the HC will not be obeyed by the courts because it has not been made by Parliament but merely by one of the constituent parts of that body: see Stockdale v Hansard (1839) and Bowles v Bank of England (1913).

Enrolled Bill rule

5.18 On several occasions, it has been argued before the courts that a defect or irregularity in the manner in which an Act of Parliament has been passed means that it ought not to be applied. Thus in Edinburgh and Dalkeith Rly Co v Wauchope (1842), it was claimed that the provisions of a Private Act of Parliament should not be applied because it had
been passed without W having been given notice of it as was required by Standing Orders. The HL rejected the argument. Lord Campbell observed that:

all that a court of justice can look to is the parliamentary roll; they see that an Act has passed both Houses of Parliament, and that it has received the Royal Assent, and no court of justice can inquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament.

5.19 Although the comments of Lord Campbell were obiter, they have subsequently been relied upon as the correct statement of the constitutional position. Thus in *British Railways Board v Pickin* (1974), where P claimed that the Board had misled Parliament with a false recital in the preamble to a Private Act which deprived him of an interest in land, Lord Reid observed that:

The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its standing orders perform these functions.

5.20 It should be noted, however, as Lord Hope did in *Jackson v Attorney General* (2005) (paras 5.35–5.41), that ‘an Act passed under the 1911 Act does not measure up to that test’. In other words, the enrolled Bill rule does not apply to an Act passed using the Parliament Act 1911 procedure (paras 5.31–5.35) since by definition such a measure has not been passed by both Houses of Parliament.

### The doctrine of implied repeal

5.21 Since one aspect of the orthodox view of the supremacy of Parliament is that Parliament is unable to bind its successors, it follows that legislation enacted by one Parliament is not immune from amendment or repeal by legislation enacted by a later Parliament. In this sense, supremacy can be said to be a continuing attribute of Parliament. Where there is an inconsistency between Acts of Parliament or an earlier Act is no longer required because a new Act has been passed, provisions in the earlier Act or indeed the whole Act itself may be amended or repealed. The extent of the amendment or repeal will be stated in the later Act and will take legal effect once that Act or the relevant provision has come into force. This amounts to an express repeal of the earlier provision.

5.22 There may be occasions, however, when an inconsistency between Acts of Parliament has escaped the attention of the legislative draftsman (parliamentary counsel). In such circumstances, the doctrine of implied repeal holds that the later Act will impliedly repeal the earlier Act to the extent to which the two are inconsistent with one another.

*Vauxhall Estates Ltd v Liverpool Corp* (1932): Section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919 provided for the assessment of compensation
where land had been compulsorily purchased by a public authority. Section 7(1) of the same Act sought to preserve the provisions of the 1919 Act by declaring that provisions of other Acts had effect subject to the 1919 Act and that if they were inconsistent, they will cease to have or shall have no effect. Section 46 of the Housing Act 1925 also provided for the assessment of compensation, but in different terms. The question for the court, therefore, was whether the 1919 Act was able to protect itself from later repeal or amendment. DC held: the suggestion that the hands of Parliament could be tied so that it could not subsequently enact provisions inconsistent with the 1919 Act was contrary to the principle of the UK constitution. No Act of Parliament could effectively provide that no future Act shall interfere with its provisions.

5.23 The issue arose once again in respect of the same statutory provisions in *Ellen Street Estates Ltd v Minister of Health* (1934). In that case, where the CA reached the same conclusion as the DC had in the earlier case, Maugham LJ stated that:

*The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.*

5.24 If an Act of Parliament was able to prevent its future repeal by a later Act, then clearly there would be a restriction or limit on the supremacy of Parliament: Parliament would be able to legislate as it thought fit provided that it did not enact legislation inconsistent with earlier Acts. In this way, later Parliaments would be bound by the laws made by earlier Parliaments with the result that the scope for legislating would become progressively reduced. Eventually a point might be reached at which there was little need for further enactment because the statute book was full of unrepealable laws. This would be absurd. Accordingly, the doctrine of implied repeal prevents this from happening by holding that in the event of inconsistency between two Acts, that which is the most recent expression of Parliament’s will and legislative intent prevails.

**Implied repeal and the European Communities Act 1972**

5.25 A constitutionally important challenge to the doctrine of implied repeal is to be found in s 2(4) of the European Communities Act 1972. This provides that ‘any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section’. Section 2 of the 1972 Act makes provision for, inter alia, the supremacy of EU law over national law. Accordingly, s 2(4) seems to suggest that a later Act of Parliament must be construed and given effect in such a way as to be consistent with EU law. Does this mean, therefore, that we must confine the doctrine of implied repeal to matters of domestic law only? Issues such as this will be considered later in
this chapter when we turn our attention to the impact that the UK’s membership of the EU has had upon the legislative supremacy of Parliament (paras 5.46–5.51).

**Entrenchment**

5.26 To say that a provision has been entrenched signifies that the amendment or repeal of that provision has been made more difficult by the requirement that it must be accomplished in a particular manner or in conformity with a prescribed procedure. Thus, for example, a specified majority of the legislature may be required before a change can be effected, or the electorate may have to approve of the reform via a referendum. Since entrenchment affords a measure of protection for the provision in question, it is often reserved for a state’s fundamental laws. Constitutions and Bills of Rights are, as we saw in Chapter 1, often only capable of being altered in accordance with a prescribed special procedure.

5.27 Entrenchment therefore represents a restriction on the way in which a legislature can operate. Because one aspect of the traditional view of supremacy is that Parliament cannot bind its successors, it follows that for those who adhere to this view, entrenched provisions would have no binding effect. A later Parliament would be free to disregard the prescribed special procedure and legislate in the normal manner. However, an alternative view exists which recognizes that entrenched provisions would have to be complied with.

**The new view or the manner and form argument**

5.28 The traditional view of the legislative supremacy of Parliament continues to have, as we have seen, a number of adherents. However, a competing view has been put forward by several academics, including Professors Jennings, Heuston, and Marshall. This ‘new’ view or the ‘manner and form’ argument as it is sometimes called, holds that whilst there are no limits on the subject matter upon which Parliament may legislate, the manner and form in which Parliament may legislate may be circumscribed. Thus special procedures for making legislation may be established, such as requiring that a Bill on a particular subject is preceded by a referendum or that a specified majority of both Houses of the Legislature must have voted in its favour before it can be said that a Bill has been passed. If such procedures have not been complied with, the new view of supremacy holds that an injunction could be sought to prevent the further passage of the measure or that the monarch would be justified in refusing the Bill Royal Assent. Alternatively, if Royal Assent were given, the resulting ‘Act’ may be declared void by the courts. In support of this view, several cases are often cited.
**A-G for New South Wales v Trethowan (1932):** By virtue of s 5 of the Colonial Laws Validity Act 1865, the NSW legislature (the Legislative Assembly and the Legislative Council) was empowered to legislate for the state provided that any such laws were made in the correct manner and form. In 1929, an amendment was made to the Constitution Act 1902. This required that a Bill to abolish the Council could not be presented for Royal Assent unless it had first gained the approval of the majority of the electorate in a referendum. A change of government resulted in a change of policy with regard to the Council. Bills to abolish both it and the referendum requirement were passed by the legislature without a referendum having been held. Members of the Council sought a declaration that the Bills could not therefore be presented for Royal Assent and injunctions to prevent this from happening. PC held: the NSW legislature had the power to alter the Constitution Act 1902 so as to require specific kinds of legislation to be passed in a prescribed manner. A Bill to abolish the Council which received the Royal Assent without having been approved by the electorate in a referendum would not be a valid Act. It would be ultra vires s 5 of the 1865 Act.

**Minister of the Interior v Harris (1952):** The South Africa Act 1909 created the Union of South Africa and established its Parliament. The UK Parliament, which passed the Act, wished to protect the voting rights of the ‘Cape Coloured’ voters. Therefore, by virtue of s 35(1) of the 1909 Act, the right to vote was not to be removed by the Union Parliament on the grounds of race or colour save where the Bill had been passed by both Houses of Parliament sitting together and where, at the third reading, it had been agreed by at least two-thirds of the total number of members of both Houses. This provision itself could only be repealed in the same manner (s 152). In 1948, by which time South Africa had become an independent state, the government introduced apartheid. As part of this policy, Cape Coloureds were deprived of their existing voting rights by legislation not passed in accordance with the provisions of ss 35(1) and 152. A number of the disqualified voters challenged the validity of the later Act. Appellate Division of the Supreme Court of SA held: that although the Union had acquired legislative sovereignty as a result of The Statute of Westminster 1931, the entrenched clauses of the 1909 Act remained in force. Accordingly, the courts had the power to declare an Act invalid where it was not passed in conformity with those provisions. The Separate Representation of Voters Act was therefore void.

**Bribery Comr v Ranasinghe (1965):** The Bribery Commission was responsible for bringing prosecutions before the Bribery Tribunal established under the Bribery Amendment Act 1958. R was convicted and sentenced to a term of imprisonment and a fine by the tribunal. An appeal to the Supreme Court was successful on the basis that the persons comprising the tribunal were appointed in a manner that was inconsistent with the Ceylon Constitution. Under s 29(4) of the Constitution, any amendments to it, such as those made by the 1958 Act, required a two-thirds majority in the House of Representatives and a Speaker’s certificate endorsing the Bill. The 1958 Act had not complied with either requirement. PC held: the English cases had taken a narrow view of the court’s power to look behind an Act to examine the manner in which it was passed. However, in the UK constitution there was
5.29 Collectively these cases demonstrate the manner and form argument in practice. However, they must be treated with caution. Their initial attraction should not be allowed to obscure the fact that they are Commonwealth cases and, as such, are not decisions that are binding on English courts. A more fundamental objection relates to the constitutional framework within which the cases arose. In each case, the procedure for legislating was prescribed by a higher law. Failure to comply with that procedure therefore amounted to an unconstitutional act, and hence justified the intervention by the courts. In none of the three examples, therefore, were the legislatures supreme in the way that the UK Parliament can be said to be legislatively supreme.

5.30 In the UK, as the decision in *Bribery Commissioner v Ranasinghe* confirmed, there is no written documentary constitution in which the procedures for legislating are stated. The nearest that we can get to this are the procedures laid down in the Parliament Acts 1911 and 1949.

**The Parliament Acts 1911 and 1949**

5.31 The collective effect of these two pieces of legislation has been the reduction of the legislative powers of the HL. The 1911 Act came about as a consequence of a constitutional struggle between the two Houses of Parliament. The Liberal Government of the day had secured the passage of its social welfare legislation through the HC only for it to be defeated by a Conservative-dominated HL. Matters came to a head with the peers’ rejection of the 1909 Finance Bill, in effect the budget. Two general elections followed in 1910, but with the threat of the creation of enough Liberal peers to secure the passage of the Bill through the upper chamber, the Lords ultimately relented and passed the Parliament Act 1911.

5.32 The preamble to the 1911 Act is significant in that it clearly states that it was the intention of its drafters to substitute for the HL ‘a Second Chamber constituted on a popular instead of hereditary basis’. This is worth remembering when we come to consider reform of the HL (see Chapter 6). However, in the present context, the importance of the Parliament Acts 1911 and 1949 lies in the fact that they have removed the Lords’ power of veto, save in respect of a Bill attempting to extend the life of Parliament beyond its five-year limit. Thus the HL has no power to amend or delay the passage of money Bills (Bills relating to taxation, debt, public money, or loans) for any longer than one month. Other public Bills may receive the Royal Assent, notwithstanding that they have been rejected by the HL, where they have been passed by the HC in two successive sessions and there is at least one year (the 1911 Act originally set the limit at two years) between
the second reading in the first session and the date on which the Bill passes the HC in the second session.

5.33 A Bill passed in accordance with the Parliament Acts 1911 and 1949 procedure can be identified by looking at the ‘enacting formula’ of the resulting Act. The standard formula makes reference to the measure having been enacted ‘by and with the advice and consent of the Lords Spiritual and Temporal, and Commons’. However, where the Lords have not consented to a Bill, as was the case with the War Crimes Act 1991, the enacting formula appears as follows:

*Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Commons, in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows.*

5.34 Ekins has contended that the absence of any reference to the HL in the enacting formula of an Act passed under the Parliament Acts procedure does not mean that it is only the Queen and the HC that enact such legislation. Rather, he argues that the reference to ‘in this present Parliament assembled’ signifies a larger body than just the HC. In other words, the HL has played a part in the legislative process which enacts laws under the Parliament Acts procedure. Thus he states:

*Parliament intended the 1911 Act to serve as a decision-making procedure, enabling the Queen, Lords and Commons to legislate even when the Lords disagreed. If the Act bypassed the Lords altogether, it would be a delegation of authority. The Act that we have, however, resolves the political crisis by enabling the institution to act without unanimity. Thus, the Lords do participate in legislative acts pursuant to the Parliament Acts. The authority they share is exercised to enact legislation and the Lords should understand the resulting Act to be in some sense their Act, in the same way that the minority in the House understands the vote of the majority to settle how the House acts.*

5.35 Acts passed under the Parliament Acts procedure are rare. In addition to the War Crimes Act 1991, the Government of Ireland Act 1914, the Welsh Church Disestablishment Act 1915, the Parliament Act 1949, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000, and the Hunting Act 2004 were passed in this manner. A challenge to the validity of this latter Act, the first to have arisen in respect of legislation made using the Parliament Acts procedure, thus provided the courts with an opportunity to determine an issue which had provoked much academic discussion.

*Jackson and others v Attorney General (2005):* The Hunting Act 2004 imposed a ban on hunting wild animals with dogs. The measure was opposed in the HL and it was therefore necessary for it to be passed without the consent of that body using the Parliament Acts procedure. J and others were actively involved in hunting. They brought a challenge against the 2004 Act in which they claimed that it was legally invalid on the basis that it was made
under the authority of the Parliament Act 1949 which, they contended, was also invalid. The DC held that the 1949 Act was a valid Act and that the 2004 Act was also therefore valid. In its judgment, the Parliament Acts procedure could be used to make any laws, save for those expressly excluded by s 2(1) of the 1911 Act. The claimants appealed. The CA dismissed their appeal. It did so, however, on different grounds to the DC. In its judgment, the power to make laws under the Parliament Acts procedure was subject to implied as well as express limits. Thus, where it was used to effect ‘fundamental constitutional changes’, the resultant legislation may be subject to challenge. The 1949 Act was however valid since the modifications which it had made to the 1911 Act were ‘of a modest nature’. The claimants appealed. HL held: that the distinction made by the CA between modest and fundamental constitutional changes could not be achieved by a process of interpreting the Act. The Bill which became the Parliament Act 1949 had been within the scope of the 1911 Act. The 1949 Act was therefore a valid Act, as was the 2004 Act.

5.36 The HL decision in *Jackson* is important for a number of reasons. It has made it clear that legislation passed under the authority of the Parliament Acts procedure is not to be regarded, as some had argued, as being delegated legislation because it has been enacted by only two of the three constituent parts of Parliament. Rather, it is primary legislation which has simply been made using a different procedure to that which is normally used to enact such legislation. It has also made it clear that the 1949 Act is a valid Act of Parliament, even though it effected changes to the limits set out in the Parliament Act 1911 which have made it easier for the HC to legislate in the face of opposition from the HL. There is, therefore, now no need for a Bill like that which the former Master of the Rolls, the late Lord Donaldson, introduced on 8 November 2000 which sought to confirm the validity of the 1949 Act and the Acts subsequently passed under its authority.

5.37 In another respect, however, the decision in *Jackson* may be said to have muddied the waters. Although their Lordships unanimously rejected the distinction which the CA had made between ‘modest’ and ‘fundamental’ constitutional change, a number of obiter comments were made during the course of the various opinions which suggest that there are implicit as well as explicit limits on the legislation which can be made using the Parliament Acts procedure. Thus, for example, several Law Lords expressed the view that the prohibition in s 2(1) of the 1911 Act on using the Parliament Acts to enact a Bill to extend the life of Parliament beyond five years would also apply to a Bill which attempted to use that same procedure to delete the relevant words from s 2(1) itself. In the words of Lord Nicholls:

*The Act setting up the new procedure expressly excludes its use for legislation extending the duration of Parliament. That express exclusion carries with it, by necessary implication, a like exclusion in respect of legislation aimed at achieving the same result by two steps rather than one.*

5.38 Thus for Lord Nicholls and a majority of the nine Law Lords who heard the appeal in *Jackson*, ‘this implied restriction is necessary in order to render the express restriction

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effectual’. Accordingly on this analysis, a Bill to remove the exclusion in s 2(1) on a Bill extending the life of Parliament from being subject to the Parliament Acts procedure would have to be passed in the normal way, ie with the consent of both the HC and the HL. This view may be contrasted, however, with that of the former Senior Law Lord, the late Lord Bingham, who observed on this point that:

> Once it is accepted, as I have accepted, that an Act passed pursuant to the procedures in s 2(1), as amended in 1949, is in every sense an Act of Parliament having effect and entitled to recognition as such, I see no basis in the language of s 2(1) or in principle for holding that the parenthesis in that subsection . . . are unamendable save with the consent of the Lords. It cannot have been contemplated that if, however improbably, the House of Lords found themselves in irreconcilable deadlock on this point, the government should have to resort to the creation of peers.

Which of these two views do you prefer? The traditional view as expressed by Lord Bingham, or the more radical view expressed by Lord Nicholls? Might it be argued that under Lord Nicholls’ view, the prohibition in s 2(1) of the 1911 Act on a Bill to extend the life of Parliament is in a sense entrenched (see paras 5.26–5.27) in that it cannot be repealed using the Parliament Acts procedure? If this is correct, can it be said that a manner and form limitation has been imposed on successor Parliaments by the Parliaments which made the 1911 and 1949 Acts?

5.39 A further point to note about the decision in *Jackson* concerns the views expressed on the question whether there are any further implied restrictions on the use of the Parliament Acts procedure. Thus, for example, could the Parliament Acts procedure be used to abolish the HL? The CA held that such a result could only be achieved by legislation made by Parliament as normally constituted. In apparent agreement with this view Lord Steyn observed:

> I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legalism and constitutional principle in the courts at the most fundamental level.

5.40 Other Law Lords who heard the appeal in *Jackson* were a little more guarded on the issue. Thus, for example, in considering whether the 1911 Act could be used to effect ‘a fundamental disturbance of the building blocks of the constitution’, Lord Carswell was of the view that whether a legal challenge to the Act in question could succeed was ‘a topic on which I should prefer to receive much more specifically directed argument and to give much more profound consideration before reaching a conclusion’. Similarly, Lord Brown was ‘not prepared to give such a ruling as would sanction in advance the use of the 1911 Act for all purposes, for example to abolish the House of Lords’.

5.41 In the light of these observations, therefore, it would seem that whether or not the Parliament Acts procedure could be used to effect major constitutional change remains
a moot point even though the HL rejected the CA’s distinction between it and modest constitutional change, which the latter felt could be effected using the procedure. Thus in the unlikely event that a government sought to abolish the HL without the consent of that body, it is perfectly clear that the relevant legislation may be subject to a legal challenge. What is less clear, however, in the light of Jackson, is what view the courts would take on the validity of that legislation.

The Union legislation

5.42 A number of Scottish lawyers have sought to argue that the Acts of Union between Scotland and England (which constituted the new state of Great Britain) contained a number of provisions which were intended to be entrenched by those who framed the legislation. Thus, for example, art 1 of the 1706 Act states that the Union between Scotland and England is to last ‘for ever after’. Although there are differences of opinion on this point, closer examination of the Union legislation reveals that many of its provisions have been subject to modification, amendment, and repeal by subsequent Acts of the UK Parliament. At face value, this would seem to suggest that any attempt which may have been made to bind the post-1706 Parliament has failed. Nevertheless, the Scots lawyers contend that restraints have been placed upon Parliament by the Acts of Union and that these restraints have been respected when proposals for changes to the 1706 Act have been considered. Moreover, where change has been effected, they contend that it has taken place at the request and with the consent of those affected by it and that it can therefore be accepted on this basis.

5.43 Two Scottish cases are often cited in support of the argument that parts of the Acts of Union are immutable: MacCormick v Lord Advocate (1953) and Gibson v Lord Advocate (1975). The former was concerned with an objection raised by several Scottish Nationalists to the designation of the new monarch as Queen Elizabeth the Second when as a matter of fact, the first Queen Elizabeth had been queen of England not of Scotland. This, they contended, amounted to a contravention of art I of the Act of Union. The latter case involved the argument that EEC fishing regulations, which had been made part of UK law by virtue of s 2(1) of the European Communities Act 1972, were contrary to art XVIII of the Act of Union. In both cases, the actions failed on the ground of relevancy. The Act of Union did not make provision for royal titles and the control of fishing in territorial waters was a public law rather than a private law matter. Nevertheless, the cases have been seized upon due to the fact that in certain obiter remarks, several Scottish judges appeared to suggest that there may be provisions in the Acts of Union which could not be repealed by the UK Parliament. If this view is correct, then parts of the Union legislation are binding and thus they amount to a limitation on what Parliament can do.
Such arguments raise interesting issues, but they have a tendency to leave many questions unanswered. Thus, for example, as Professor Munro has noted, whilst the proponents of the view argue that the repeal of provisions of the Acts of Union can be explained on the basis that they have been consented to, they fail to explain by whom the consent has been given: the electorate, the elected representatives, or the courts? Moreover, it ought to be borne in mind that the judicial remarks in MacCormick and Gibson were obiter and that in the years that have followed, no Scottish court has declared an Act of Parliament to be invalid on the basis that it is inconsistent with the Act of Union.

In a later Scottish case, Sillars v Smith (1982), it was argued by four defendants charged with an offence of vandalism contrary to s 78(1) of the Criminal Justice (Scotland) Act 1980 that the Act was invalid on the basis that the power to legislate for Scotland had been transferred to the Scottish Assembly by virtue of the Scotland Act 1978 (see Chapter 8 on devolution). Applying Edinburgh and Dalkeith Rly Co and MacCormick, the Lord Justice-Clerk rejected the argument that the vires of an Act of Parliament could be challenged in a Scottish court. Nevertheless, in Jackson v Attorney General (2005) (paras 5.35–5.41), Lord Hope remarked, as previously noted, that ‘the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified’. Having regard to the Scottish cases he further observed: ‘So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.’ Although these comments were obiter, they do suggest that the argument regarding the Acts of Union continues to have important adherents and that it therefore ought not to be lightly dismissed.

The UK’s membership of the EU raises important constitutional questions as to how that membership can be reconciled with the legislative supremacy of Parliament. Later we will see how English courts have responded to the task of interpreting national law in the light of EU law (paras 10.50–10.65). For the time being, however, we will focus our attention on a case involving some Spanish fishermen.
ownership because their vessels were managed and controlled from Spain. F and the others sought judicial review of the Act and Regulations as being contrary to the EEC Treaty. The DC sought a preliminary ruling from the ECJ on the substantive questions of EC law. In the meantime, it granted the applicants interim relief and disappplied the relevant part of the 1988 Act and the Regulations. The CA set aside that order. The applicants appealed to the HL which held that, as a matter of English law, the courts did not have the jurisdiction to grant relief disapplying the Act. The HL referred to the ECJ the question whether, as a matter of Community law, the relief could be granted. The ECJ held that it could. If all that prevented interim relief being granted was a national law, that law should be set aside. HL held: that the relief would be granted.

5.47 In giving judgment in *Factortame (No 2)*, Lord Bridge directly addressed the question of the effect of the decision on the supremacy of Parliament. His remarks are worth stating in their entirety:

Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based upon a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

5.48 The decision in *Factortame (No 2)* has provoked much academic discussion. To those who have consistently espoused the traditional view of the supremacy of Parliament, *Factortame (No 2)* has come to be regarded as a denial of the orthodoxy that Parliament cannot bind its successors. Since provisions in the 1988 Act were ‘disapplied’ under the terms of s 2(4) of the European Communities Act 1972, the 1972 Parliament had, in the words of Sir William Wade, ‘succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be constitutionally impossible’.
Accordingly, Sir William suggested that this amounts to a ‘revolutionary’ development and that if it cannot be so described, then ‘constitutional lawyers are Dutchmen’. More recently, in *Jackson v Attorney General* (2005) ( paras 5.35–5.41), in considering the qualifications on the ‘English principle’ of the absolute legislative supremacy of Parliament, Lord Hope suggested that ‘Part I of the European Communities Act 1972 is perhaps the prime example’. In seeking to explain the point, Lord Hope observed:

*Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect of s 2(1) when read with s 2(4) of that Act. The direction in s 2(1) that Community law is to be recognised and available in law and is to be given legal effect without further enactment, which is the method by which the Community Treaties have been implemented, concedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area.*

5.49 An alternative, less radical, explanation of the decision is that it is not so much a revolution as the application of a rule of construction laid down in s 2(4) of the 1972 Act. As we have already seen (para 5.25), this provides that:

*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.*

5.50 The effect of this provision has been summed up by Sir John Laws in his extra-judicial writings. He contends that it establishes ‘a rule of construction for later statutes, so that any such statute has to be read (whatever its words) as compatible with rights accorded by European law’. In his view, therefore, *Factortame (No 2)* demonstrates the rule being applied by a HL that accepted that it must be followed unless or until it had been expressly repealed.

5.51 While this argument recognizes that membership of the EU has to some extent curtailed the legislative supremacy of the UK Parliament, it also acknowledges that this is so because Parliament has said that it shall be the case in s 2(4) of the 1972 Act. In this sense, therefore, it could be argued that the principle of the legislative supremacy of Parliament is being upheld.

5.52 Section 18 of the European Union Act 2011 states that:

*Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act. This declaratory provision seeks to make clear the exiting legal position, i.e. that EU law enjoys primacy over national law because the 1972 Act (and other Acts or subordinate legislation) so provide. Its purpose, therefore, is to counter suggestions that the supremacy of Parliament may be further*
Legislative supremacy and devolution

5.53 The devolution legislation will be considered more fully in Chapter 8. For present purposes, it must be noted that devolution raises a number of important questions, not least of which is what effect does it have upon the legislative supremacy of the UK Parliament? In answering this question, it is first necessary to be clear as to what the devolution legislation entitles the assemblies to do. Despite the fact that all the devolved legislatures now have primary law-making powers, the UK Parliament retains the power to legislate for each country: see s 107(5) of the Government of Wales Act 2006, s 28(7) of the Scotland Act 1998, and s 5(6) of the Northern Ireland Act 1998. The legislative supremacy of the UK Parliament is also underlined in the Memorandum of Understanding between the UK Government and the devolved administrations (paras 8.75–8.80). Moreover, the subordinate nature of the devolved legislatures is further evidenced by the fact that Acts made by them may be held to be invalid by the courts where they exceed the legislative competence of the relevant legislature.

5.54 In the Scottish case of Whalley v Lord Watson of Invergowrie (2000), the petitioners (individuals in hunting-related occupations) sought interdict (an injunction) to prevent an MSP from presenting a Bill to the Scottish Parliament seeking to ban hunting with dogs. They did so on the basis that he had received legal, administrative, and other assistance in preparing the Bill from an anti-hunting group in alleged contravention of art 6 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members’ Interests) Order 1999. In hearing the case, the Lord President drew attention to ‘the fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute’. His Lordship continued:

As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.

Legislative supremacy and the Human Rights Act

5.55 The Human Rights Act 1998 received Royal Assent on 9 November 1998. Many of its provisions did not enter into force, however, until 2 October 2000. For present purposes,
it should be noted that the Act was passed in the same manner according to the same procedures as the other Public General Acts passed during the 1998–9 Parliamentary session. Since it is not entrenched, it follows that its provisions may be amended or repealed in the normal manner. Nevertheless, Professor Feldman argued:

*Although the Act is not entrenched, it will have a special status. As a matter of practical politics, it will progressively achieve a symbolic (even iconic) status which will make amendments to it politically more controversial than amendments to ordinary legislation. This will become an increasingly significant constraint on those who want to restrict the rights as a generation of citizens is educated in its provisions and grows to maturity under its influence.*

5.56 The ‘special status’ of the HRA 1998 has not protected it against calls for its repeal, most notably from the present Home Secretary, Theresa May MP. However, assuming that this does not happen, what effect will the Act’s status have upon the possibility of the implied repeal of any of its provisions? In other words, is the HRA 1998 immune from implied repeal or does it fall within the scope of that doctrine?

5.57 In view of the fact that the legislative supremacy of Parliament is concerned with the relationship between Parliament and the courts, it is necessary to have regard to what the courts have said either expressly or by implication on this matter. If we were to recall the decision in *Factortame (No 2)* (paras 5.46–5.51) it is clear from that case that the conflict between the European Communities Act 1972 and the Merchant Shipping Act 1988 was resolved by the HL in favour of the former. In other words, although the point was not argued, s 2(4) of the European Communities Act 1972 was not impliedly repealed by the later Act. A similar conclusion was reached by the DC in four appeals relating to offences committed under weights and measures legislation: see *Thoburn v Sunderland City Council* (2002). In reaching the conclusion that the 1972 Act could not be impliedly repealed by the Weights and Measures Act 1985, s 1, Laws LJ acknowledged that in recent years the common law had created a class or type of legislative provision which could not be repealed by mere implication. In the light of the recognition by the courts of certain fundamental rights (see, for example, *R v Secretary of State for the Home Department, ex p Pierson* (1998), *R v Secretary of State for the Home Department, ex p Leech* (1994), and *R v Lord Chancellor, ex p Witham* (1998)), Laws LJ contended that the courts should also recognize ‘a hierarchy of Acts of Parliament’. That hierarchy involved making a distinction between what he termed ‘ordinary statutes’ and ‘constitutional statutes’. In Laws LJ’s opinion, a constitutional statute was a statute which:

(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

5.58 Applying these criteria, Laws LJ cited the following as examples of constitutional statutes: Magna Carta; the Bill of Rights 1689; the Acts of Union; the Reform Acts; the

5.59 The legal significance of being classified as a constitutional statute is that whereas ordinary statutes may be impliedly repealed, constitutional statutes may not. For the repeal of a constitutional statute (or the abrogation of a fundamental right) to be effected, Laws LJ observed that:

the court would apply this test: is it shown that the legislature’s actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think that the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.

5.60 This development of the common law was described by Laws LJ as being both ‘benign’ and ‘highly beneficial’. In his opinion:

It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand.

Thus it would seem that in the light of the decision in *Thoburn*, constitutional statutes such as the European Communities Act 1972 and the Human Rights Act 1998 are not immune from express repeal, but that they are, contrary to the constitutional orthodoxy in respect of ordinary statutes, immune from implied repeal.

5.61 Sir John Laws has returned to the issue of designating statutes as being either ‘constitutional’ or ‘ordinary’ in an extra-judicial capacity. He has argued that since the common law already recognizes certain basic or fundamental constitutional rights as ‘part of the legal furniture’, eg the right of free expression, with the consequence that such rights cannot be abrogated or overridden by Parliament save by the clear and unambiguous words of a statute, the same principle can be applied to the laws made by Parliament by the ‘disapplication of implied repeal in the case of constitutional statutes’. Sir John explains the impact of this new rule of construction on the legislative supremacy of Parliament thus:

It would not mean the loss of sovereignty. It would merely specify the conditions in which Parliament could change the constitutional law. And the conditions would be just the same as those which presently apply if Parliament seeks to change constitutional principles established by the common law. So we can see that this adjustment of the doctrine of implied repeal really does no more than replicate an approach already taken
by the courts to common law constitutional principles. And that approach is taken without apparent offence to any aspect of the doctrine of Parliamentary sovereignty.

5.62 As Sir John Laws himself acknowledges, the establishment of such a principle ‘requires much more than a judgment of the Divisional Court’, i.e. the decision in Thoburn (para. 5.57). At the very least, it requires acceptance by the higher courts, in particular the new Supreme Court. Moreover, even if the doctrine of implied repeal ought to be modified in the way in which he proposes, there are issues which need to be addressed, such as devising a clearer and more comprehensive test for the identification of a constitutional statute, and determining who is to apply the test, Parliament or the courts?

Judicial interpretation

5.63 Section 3(1) of the HRA 1998 provides that:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

In effect, therefore, this section imposes an interpretative obligation on the courts, and an obligation on all public authorities to give effect to Convention rights: see R (on the application of GC) v Commissioner of Police of the Metropolis (Liberty and another intervening) (2011). The obligations are, however, subject to qualification. The courts will only be required to interpret primary and secondary legislation as being compatible with Convention rights ‘so far as it is possible to do so’. In other words, if it is not possible to interpret the relevant legislation in a way which is compatible with a Convention right, a judge should not do so and should instead make a declaration of incompatibility (see paras 5.80–5.85). Thus in R v DPP, ex p Kebilene (1999), Lord Steyn observed:

It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3(1), the courts may not disapply the legislation. The court may merely issue a declaration of incompatibility which then gives rise to a power to take remedial action: see section 10.

5.64 Subsequent cases decided after s 3 came into force illustrate how the courts have responded to the interpretative obligation contained in that section.

R v Offen (2001): Section 2 of the Crime (Sentences) Act 1997 (now s 109 of the Powers of Criminal Courts (Sentencing) Act 2000) provided that where a person had previously been convicted of a serious offence and was subsequently convicted of another serious offence after the commencement of s 2, then if that person was over 18 at the time of the commission of the second offence, a court must impose a life sentence unless it was of the view
that there were exceptional circumstances relating to either of the offences or to the offender which justified it not doing so. In each of the five appeals before the CA, D had either pleaded guilty to or had been convicted of a second serious offence within the meaning of s 2 of the 1997 Act. In four of the cases, a life sentence had been imposed on the basis that there were no exceptional circumstances justifying a failure to do so. In the fifth case, the A-G challenged the trial judge’s decision not to impose a life sentence on the grounds of exceptional circumstances. The appellants contended that either: (i) the interpretation of s 2 of the 1997 Act was affected by s 3 of the HRA 1998; or (ii) s 2 was incompatible with their rights under arts 3, 5, and 7 of the ECHR. CA held: dismissing four of the appeals and imposing a life sentence in respect of the A-G’s appeal, that s 2 of the 1997 Act established a norm, ie that those who commit two serious offences are a danger or risk to the public. Construing s 2 in accordance with the duty imposed by s 3 of the HRA 1998, that section did not contravene Convention rights (arts 3 and 5) if the courts applied it so that it did not result in offenders being sentenced to life imprisonment when they did not constitute a significant risk to the public. As regards art 7, the imposition of the automatic life sentence did not contravene the prohibition on imposing a penalty heavier than one that was applicable when an offence had been committed because the life sentence related to the second not the first serious offence.

5.65 In reaching this conclusion in *Offen*, Lord Woolf CJ described the effect of s 3 of the HRA 1998 on s 2 of the 1997 Act thus:

The objective of the legislature . . . will be achieved, because it will be mandatory to impose a life sentence in situations where the offender constitutes a significant risk to the public. Section 2 of the 1997 Act therefore provides a good example of how the HRA 1998 can have a beneficial effect on the administration of justice, without defeating the policy which Parliament was seeking to implement.

5.66 It is clear from the foregoing passage that the CA in *Offen* considered that s 3 of the HRA 1998 enabled the court to interpret s 2 of the 1997 Act in a way that was Convention-compatible and which gave effect to the underlying purpose of the section. The fine line which exists between interpretation and legislating had not therefore been transgressed. The importance of this distinction was considered by Lord Woolf in certain obiter remarks made in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (2001). In that case his Lordship observed:

The most difficult task which courts face is distinguishing between legislation and interpretation. Here practical experience of seeking to apply s 3 will provide the best guide. However, if it is necessary in order to obtain compliance to radically alter the effect of legislation this will be an indication that more than interpretation is involved.

5.67 These remarks in *Poplar* were preceded by a consideration of the importance of s 3 which Lord Woolf felt was ‘difficult to overestimate’. Although these remarks were also
obiter, they merit attention due to the insight that they provide on the interpretative obligation imposed on the courts by that section. In the words of Lord Woolf:

When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when s 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in s 3. It is as though legislation which predates the HRA 1998 and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of s 3.

Lord Woolf then proceeded to identify the following ‘probably self-evident’ points in respect of the interpretative obligation:

- unless the legislation would otherwise be in breach of the ECHR, s 3 can be ignored;
- where a court has to rely on s 3, it should limit the extent of the modified meaning to that which is necessary to achieve compatibility;
- s 3 does not entitle the court to legislate;
- the views of the parties and of the Crown with regard to a ‘constructive’ interpretation cannot modify the task of the court; and
- where it is not possible to use s 3 to achieve a result which is compatible with the Convention, the court has a discretion as to whether or not to grant a declaration of incompatibility.

5.68 The HL response to the interpretative obligation in s 3 has been evidenced in several cases.

*R v A (No 2) (2001)*: A was charged with rape. His defence was that sexual intercourse had taken place with the complainant’s consent, or, alternatively, he believed that she had consented. At a preparatory hearing pursuant to s 29 of the Criminal Procedure and Investigations Act 1996, counsel for A applied for leave to cross-examine the complainant about an alleged previous sexual relationship between her and A in the three weeks prior to the alleged rape. In reliance on s 41 of the Youth Justice and Criminal Evidence Act 1999, the trial judge ruled, inter alia, that an act of consensual sexual intercourse with a friend of A could be put to the complainant in cross-examination, but that the complainant could not be cross-examined about her alleged sexual relationship with A. Since the trial judge considered that such a ruling constituted a prima facie breach of art 6 of the ECHR, he gave A leave to appeal. The CA allowed the appeal on the basis that: the trial judge had been in error to give leave to cross-examine the complainant about sexual intercourse with A’s friend; and, because although the questioning and evidence in relation to the alleged prior sexual relationship between A and the defendant was admissible under s 41(3)(a) of the 1999 Act in relation to A’s belief that the complainant had consented, it was inadmissible on the issue whether the complainant in fact consented. To direct a jury in such a way might, the CA felt,
lead to an unfair trial. The Crown was granted leave to appeal. HL held: dismissing the appeal, that under s 41(3)(c) of the 1999 Act construed where necessary in the light of s 3 of the HRA 1998, the test of admissibility was whether the evidence and the questioning relating to it was so relevant to the issue of consent as to make its exclusion endanger the fairness of the trial contrary to art 6. If such a test were satisfied, the evidence should not be excluded.

5.69 In reaching such a conclusion in R v A (No 2) (2001), Lord Steyn sought to provide a general explanation as to the potential effect of s 3 on the words of a statute. In his Lordship’s opinion:

In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. [emphasis added]

Applying such an approach to the particular case before the HL, Lord Steyn opined:

In my view s 3 of the HRA 1998 requires the court to subordinate the niceties of the language of s 41(3)(c) of the 1999 Act . . . to broader considerations of relevance judged by logical and commonsense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under s 3 . . . to read s 41 of the 1999 Act, and in particular s 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under art 6 of the convention should not be regarded as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances . . . On this basis a declaration of incompatibility can be avoided. If this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the HRA 1998. [emphasis added]

5.70 Thus in recognition of the fact that the then Lord Chancellor, Lord Irvine, had asserted during the progress of the Human Rights Bill through Parliament that ‘in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility’, the HL in R v A (No 2) (2001) demonstrated an extremely creative approach to the interpretation of s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999. It is questionable, however, whether implying provisions into a section in order to achieve compatibility with a Convention right can appropriately be described as interpretation rather than legislating. Might it not be argued that R v A (No 2) (2001) is an example of their Lordships legislating, albeit on the basis that it was with the implicit approval of
Parliament? It should be noted in this context that while Lord Hope approved of the test of admissibility laid down by Lord Steyn, his Lordship did remark (echoing the views of Lord Woolf in *Poplar*) that he:

*would find it very difficult to accept that it was permissible under s 3 of the HRA 1998 to read into s 41(3)(c) of the 1999 Act a provision to the effect that evidence or questioning which was required to ensure a fair trial under art 6 of the convention should not be treated as inadmissible. The rule of construction which s 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to acts as legislators.* [emphasis added]

5.71 The interpretative methodology which was adopted in *R v A* has been criticized in some academic quarters. However, as the subsequent case law has shown, the senior judiciary have endorsed the approach which a unanimous HL applied. Thus in *Ghaidan v Godin-Mendoza* (2004) (para 5.74), although Lord Millett dissented on the question whether s 3(1) could be applied in that case, he nevertheless commented in relation to *R v A* that he had ‘no difficulty with the conclusion which the House reached in that case’. Might it be argued, therefore, as Kavanagh has done, that the criticisms of *R v A* owe more to the subject matter and outcome of the decision than to the HL’s approach to the use of s 3(1)? In other words, do they relate to matters such as the controversial issue of sexual history evidence in rape cases where there are concerns about the civil liberties of both the victim and the defendant, or the fact that unlike earlier cases, the HL in *R v A* was dealing with legislation which had been enacted post the HRA 1998?

5.72 In several cases since *R v A*, the HL has sought to further clarify the limits of the interpretative obligation under s 3 of the HRA 1998. Thus in *Re S (children: care plan)* (2002), Lord Nicholls observed that:

*Section 3 is concerned with interpretation. This is apparent from the opening words of s 3(1) . . . The side heading of the section is ‘Interpretation of Legislation’. Section 4 (power to make a declaration of incompatibility) and, indeed, s 3(2)(b) presuppose that not all provisions in primary legislation can be rendered convention compliant by the application of s 3(1) . . . In applying s 3 courts must be ever mindful of this outer limit. The HRA 1998 reserves the amendment of primary legislation to Parliament. By this means the HRA 1998 seeks to preserve Parliamentary sovereignty. The HRA 1998 maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.*

5.73 In the later case of *R (on the application of Anderson) v Secretary of State for the Home Department* (2002) (see para 5.81) where the HL was invited to construe s 29 of the Crime (Sentences) Act 1997 in a manner that was compatible with the ECHR by reading
it as precluding participation by the Secretary of State in the fixing of a tariff for a convicted murderer, Lord Bingham observed:

To read s 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by s 3 of the HRA 1998.

And Lord Steyn opined:

It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary . . . Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute.

5.74 In a further recent case, the HL demonstrated what may be accomplished by complying with the interpretative obligation contained in s 3(1).

Ghaidan v Godin-Mendoza (2004): The defendant lived with his same-sex partner for many years prior to the partner’s death. In 1983 the couple moved into a flat owned by the claimant. D’s partner was the statutory tenant under the Rent Act 1977. Following the partner’s death, the claimant brought possession proceedings against D in the county court. The judge held that D had succeeded to an assured rather than a statutory tenancy because he had not been his partner’s spouse. That type of tenancy was less advantageous to D. D appealed. CA held that he was entitled to succeed to a statutory tenancy. The claimant appealed. HL held: by a majority of four to one, that the word ‘spouse’ in para 2 of Sch 1 to the 1977 Act which allowed the spouse of a protected tenant to succeed to the tenancy on the tenant’s death was to be read so that ‘spouse’ included the survivor of a same-sex relationship.

In delivering his judgment in Ghaidan, Lord Nicholls sought to explain the effect of s 3 as follows:

It is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning . . . From this it follows that the interpretive obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.
Although Lord Millett dissented in relation to the application of the relevant principles to the facts of the case, his comments on the effect of s 3 would appear to reflect those of other senior judges. Thus for Lord Millett:

*even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, s 3 may require it to be given a different meaning.*

It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point.

In the later case of *Sheldrake v DPP* (2005), Lord Bingham referred to the ‘illuminating discussion’ which had occurred in *Ghaidan* concerning the import of s 3. In his judgment, although the opinions expressed therein could not be briefly summarized, they did ‘leave no room for doubt on four important points’:

*First, the interpretation obligation under s 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under s 3 is the primary remedial measure and a declaration of incompatibility under s 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by Anderson … and Bellinger v Bellinger.*

Ministerial statement

In interpreting legislation passed after the HRA 1998, the courts are further assisted by the terms of s 19. This requires that a minister in charge of a Bill must make a statement prior to its second reading that, in his opinion, its provisions are either compatible with Convention rights or, if they are not, that the Government nevertheless wishes to proceed. Clearly a statement that a Bill is compatible with Convention rights will provide the courts with a further justification to be creative in the way that they carry out their interpretative function. However, s 19 statements of compatibility do not predetermine that a provision is Convention-compliant. As Lord Hope pointed out in *R v A*, such statements are ‘no more than expressions of opinion by the Minister’. Thus they do not necessarily protect legislative provisions from subsequent declarations of incompatibility under s 4 of the HRA 1998: see the decisions of the DC and CA in *R (International Transport Roth GmbH) v Secretary of State for the Home Department* (2001) in respect of the Immigration and Asylum Act 1999.

An interesting question with regard to s 19 is whether or not it is judicially enforceable. In considering this matter, Bamforth has argued that it might be enforceable
if it were regarded as a constraint on the manner in which Parliament can legislate. Applying the manner and form argument (paras 5.28–5.29), a Bill could not become a valid Act of Parliament in the absence of a ministerial statement. However, he suggests two possible ways in which the argument that s 19 is enforceable might be defeated. The first of these is to reject the manner and form argument as being in error, and instead to rely upon the traditional Diceyan notion of legislative supremacy. The problem with this account, however, is that whilst it explains the nature of the relationship between Parliament and the courts, it also recognizes that the relationship may change. If a revolution were to take the form of the judicial recognition of procedural restrictions on Parliament’s ability to legislate, s 19 would be enforceable. Therefore, Bamforth prefers an alternative way of demonstrating that s 19 is judicially unenforceable.

5.79 This regards the s 19 requirement as a proceeding in Parliament which the courts would be prevented from examining due to parliamentary privilege in the form of art 9 of the Bill of Rights 1689. In support of this argument, Bamforth cites Prebble v Television New Zealand (1995) (para 6.85) and R v Parliamentary Comr for Standards, ex p Al Fayed (1998) (para 15.106) as evidence of the English courts’ continued unwillingness to interfere with the proceedings in Parliament. Moreover, he refers to the New Zealand case of Mangawaro Enterprises v A-G (1994) where it was held that the equivalent of s 19, s 7 of the New Zealand Bill of Rights Act 1990, was an obligation which fell within the term ‘proceedings in Parliament’. In Bamforth’s opinion, therefore, if an English court was asked to enforce the s 19 requirement, it is unlikely that it would depart from the ‘self-denying ordinance in relation to interfering with the proceedings of Parliament’ (per Lord Woolf in ex p Al Fayed).

**Declaration of incompatibility**

5.80 Despite ss 3 and 19 of the HRA 1998, if a court reaches the conclusion that either primary or subordinate legislation is incompatible with a Convention right and that a Convention-compliant interpretation is not possible, s 4 of the Act empowers it to issue a declaration to that effect. Such a declaration ‘does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given’ (s 4(6)(a)). It is, therefore, in the words of Professor Gearty, ‘politically potent but legally irrelevant’. The HRA 1998 thus preserves the legislative supremacy of Parliament by choosing not to confer on the courts a power to strike down primary legislation.

5.81 In R v A, Lord Steyn remarked that a ‘declaration of incompatibility is a measure of last resort’ which ‘must be avoided unless it is plainly impossible to do so’. In other words, it is only to be used when inconsistencies between legislative provisions and Convention rights cannot be reconciled by means of interpretation. Since October 2000, declarations of incompatibility have been made by the highest court in a number of contexts.
R (on the application of Anderson) v Secretary of State for the Home Department (2002): A was serving a mandatory life sentence for murder. Both the trial judge and the Lord Chief Justice recommended that he serve a minimum of 15 years in prison, but the SoS set the tariff at 20 years. A could not be considered for release on life licence by the Parole Board until the tariff had been served. The power to release A was exercisable by the SoS, on the Board’s recommendation, under s 29 of the Crime (Sentences) Act 1997. A applied for judicial review of the SoS’s decision. The DC dismissed his application and the CA confirmed that decision. A appealed to the HL. He contended that the SoS’s power to fix the tariff for a convicted murderer was incompatible with the right under art 6(1) of the ECHR to have a sentence imposed by an independent and impartial tribunal. The SoS contended that, rather than imposing a sentence, he was administering a sentence already imposed. HL held: allowing the appeal, that the role of the SoS in fixing the sentence was objectionable because he was not independent of the executive. The rule of law depended upon a functional separation between these two branches of government. A declaration of incompatibility would be made in respect of s 29 of the 1997 Act since it was not possible to interpret that provision as being compatible with A’s right under art 6(1) of the ECHR without doing violence to the language of the statute.

Bellinger v Bellinger (2003): Mrs B was, at birth, classified and registered as male. However, since 1975 she had lived and dressed as a woman. In 1981, she underwent gender reassignment surgery. In May of that year, she went through a ceremony of marriage with Mr B. Section 11(c) of the Matrimonial Causes Act 1973 provides that a marriage is void unless the parties are ‘respectively male and female’. In the proceedings, Mrs B sought a declaration that the marriage was valid at its inception and that it was subsisting. The trial judge refused to make the declaration, as did the CA. Before the HL, Mrs B advanced an alternative claim; that s 11(c) was incompatible with arts 8 and 12 of the ECHR. HL held: that a person whose sex had been correctly classified at birth could not later become a person of the opposite sex for the purposes of s 11(c). It followed that the marriage ceremony had been invalid. However, in the light of the ECtHR decision in Goodwin v United Kingdom (2002), the non-recognition of gender reassignment for the purposes of marriage was not compatible with arts 8 and 12 of the ECHR. Accordingly, a declaration of incompatibility would be made in respect of s 11(c) of the 1973 Act.

5.82 A further example of the HL issuing a declaration of incompatibility pursuant to s 4 is to be found in A v Secretary of State for the Home Department (2005) (paras 3.35–3.36). In Ghaidan, Lord Steyn returned to the issue of declarations of incompatibility. In his Lordship’s opinion, the frequency of such declarations suggested that there had been ‘a misunderstanding of the remedial scheme of the 1998 Act’. That scheme was such that ‘interpretation under s 3(1) is the prime remedial remedy and that resort to s 4 must always be an exceptional course’.

5.83 Declarations of incompatibility have not been the sole preserve of the HL. Thus in R (on the application of H) v Mental Health Review Tribunal for North and East London Region
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(2001), the CA declared that s 73 of the Mental Health Act 1983 was incompatible with the applicant’s rights under art 5(1) and (4) of the ECHR. Moreover, in International Transport Roth GmbH v Home Office (2001) QBD (2002) CA, both courts were in agreement that a civil penalty regime under the Immigration and Asylum Act 1999 which made carriers liable for clandestine entrants arriving in the UK, was incompatible with art 6 and art 1 of Protocol No 1 to the ECHR. As of 8 August 2011, 27 declarations of incompatibility have been made. Of these, eight have been overturned on appeal and 19 have become final in whole or in part: see Responding to human rights judgments (2011) Cm 8162.

5.84 The jurisprudence on s 4 of the HRA 1998 reveals a number of important points, not least of which is the willingness of the courts to grant a declaration of incompatibility even where the government has sought to argue that such a course of action would serve no useful purpose. Thus in Bellinger v Bellinger (2003), Lord Nicholls stressed that the decision whether or not to make a s 4 declaration involved an exercise of discretion on the part of a court having regard to all the circumstances of the case. While he acknowledged that the Government had not questioned the decision in Goodwin v United Kingdom (2002), and that it was committed to giving effect to that decision, he was nevertheless of the view that: ‘when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the convention’. In R (on the application of M) v Secretary of State for Health (2003), Maurice Kay J rejected various submissions advanced on behalf of the Government as to why he ought not to make a s 4 declaration. These included: that the Government had already publicly acknowledged that the relevant legislation was incompatible with art 8 of the ECHR; that the Strasbourg court had been content for the matter to be resolved by way of a friendly settlement; and that a proposed Mental Health Bill would resolve the problem.

5.85 A further point to note from the jurisprudence on s 4 is that judicial views as to the appropriateness of making a declaration of incompatibility have not always converged.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions (2001): It was contended in conjoined applications that powers of the Secretary of State relating to planning matters, compulsory purchase, railways, and highways were incompatible with art 6(1) of the ECHR. The essence of the applicant’s argument was that when a decision was taken by the SoS himself rather than by an inspector appointed by him, the role of the SoS in determining government policy meant that he had an interest in the decision which prevented him from being an independent and impartial tribunal. The DC accepted the force of these submissions as well as those which contended that the availability of judicial review in respect of an impugned decision was not sufficient to render the procedure compatible with art 6(1) of the ECHR. Accordingly, the DC granted a declaration of incompatibility. The SoS appealed. HL held: allowing the appeal, that there was no incompatibility between the various powers of the
SoS and art 6(1). In the opinion of their Lordships, although the SoS did not himself amount to an independent and impartial tribunal for the purposes of art 6(1), the judicial review jurisdiction of the HCt was such as to provide a sufficient review of the legality of the decisions and the procedures followed. Their Lordships found support for such a finding in the jurisprudence of the Strasbourg institutions which had held on more than one occasion that the requirements of art 6 were satisfied by the availability of judicial review in respect of an impugned decision: see, for example, *Bryan v United Kingdom* (1995) and *Chapman v United Kingdom* (2001).

In *Wilson v First County Trust Ltd* (2003), the HL reversed a decision of the CA that s 127(3) of the Consumer Credit Act 1974 was incompatible with art 6(1) and art 1 of Protocol No 1 to the ECHR. Moreover, in *R (on the application of H) v Secretary of State for Health* (2005), the HL reversed an earlier CA ruling when it held that it was possible for s 29(4) of the Mental Health Act 1983 (which provides for the indefinite detention of a patient) to be operated so as to be compatible with a patient’s rights under art 5 of the ECHR via the mechanism of referring the case to a mental health review tribunal or challenging the lawfulness of the detention in judicial review proceedings.

### Does the Human Rights Act have retrospective effect?

5.86 It is a principle of English law that statutory provisions are presumed not to have retrospective effect, unless the relevant Act provides otherwise: see, for example, the remarks of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* (1991). Following the enactment of the HRA, whether or not it applied retrospectively was therefore an issue of some practical importance. The Act itself was not as clear as it might have been. Thus by virtue of s 7(1)(b), a person who claims that a public authority has acted (or proposes to act) in a way which is incompatible with a Convention right may rely on the Convention right(s) concerned in any legal proceedings, provided that that person either is or would be the victim of the unlawful act. However, s 22(4) of the Act provides:

*Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.*

5.87 In *R v Lambert* (2001), the issue for the HL to consider was whether an appellant could rely on the HRA at the time of his appeal, when the Act was in force, despite the fact that at the time of his conviction for an offence contrary to s 5 of the Misuse of Drugs Act 1971, where it was alleged that the trial judge’s direction to the jury had violated the presumption of innocence in art 6(2) of the ECHR, the HRA had not been in force. Their Lordships concluded by a majority (four to one) that the appellant was not able to rely on the alleged breach of his Convention rights at his trial. However, in the later
case of R v Kansal (No 2) (2002), the HL held by a majority (three to two) that Lambert had been erroneously decided with regard to the meaning of s 22(4). Nevertheless, due to the fact that the earlier case was very recent, and because it had been a clear-cut decision, their Lordships declined to overrule it.

5.88 More recently, in Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank (2003) (para 16.84), Lord Hope remarked that ‘the question whether, and if so in what circumstances, effect should be given to the HRA 1998 where relevant events occurred before it came into force is far from easy’. Lord Nicholls seemed to have provided some clarification in Wilson v First County Trust Ltd (2003), when he observed that ‘in general the principle of interpretation set out in s 3(1) does not apply to causes of action accruing before the section came into force’. Later, in Re McKerr (2004), he commented:

*It is now settled, as a general proposition, that the HRA 1998 is not retrospective. The Act itself treats s 22(4) as an exception.*

5.89 The decision in Re McKerr was not applied, however, in Re McCaughey’s Application for Judicial Review (2011). In this case, the SC accepted that although the HRA did not apply retrospectively in relation to a state’s procedural obligation to investigate a death which occurred before the Act came into force, where the decision had already been taken to hold an inquest, the judgment of the ECtHR in Silih v Slovenia (2009) confirmed that a freestanding obligation arose to ensure that the requirements of art 2 of the ECHR were complied with.

**FURTHER READING**


SELF-TEST QUESTIONS

1 In British Railways Board v Pickin (1974), Lord Reid commented that: ‘The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution’. To what extent, if any, do these remarks still reflect the attitude of the courts towards laws made by Parliament?

2 Does it follow that if Parliament can make it easier to legislate, ie legislation made in accordance with the Parliament Acts 1911 and 1949, it can also make it harder to legislate as de Smith and Brazier have contended?

3 In a comment on the Jackson case Elliott has argued that it ‘graphically illustrates the fluidity of the British Constitution and the contested nature of its fundamental aspects’. With reference to the opinions delivered in the HL, what do you think he meant by this?

4 To what extent, if any, do you agree with the view expressed by Professor Bogdanor that the referendum in the UK has become ‘an instrument of entrenchment since it prevents the powers of Parliament from being transferred without the approval of the people’?

5 Are you convinced by the manner and form argument? Why?

6 Does the Act of Union 1706 impose limitations on what future Parliaments can do?

7 How far has the UK’s membership of the EU altered the traditional understanding of the legislative supremacy of Parliament?

8 Having regard to the characteristics of a ‘constitutional statute’ identified by Laws LJ in Thoburn v Sunderland City Council, can you think of an instance of (a) that is not also an instance of (b)?

9 To what extent, if any, does the Human Rights Act 1998 impose practical limitations on the legislative supremacy of Parliament?

10 Although the jurisprudence in relation to s 3 of the Human Rights Act 1998 suggests that the judiciary are mindful that they must interpret rather than legislate under the provision, to what extent, if any, might it be argued that the ‘real area of difficulty lies in identifying the limits of interpretation in a particular case’ (per Lord Nicholls in Re S (children: care plan))?
11 What do you think Lord Steyn meant when he observed extra-judicially in relation to the decisions in Anderson and Bellinger that: ‘Both may be regarded as examples falling in the forbidden territory’?

12 Writing extra-judicially about the Human Rights Act 1998, Sir Stephen Sedley has commented: ‘But if a conservative use of the s 4 power is harnessed to an equally conservative use of the s 3 power, Parliament’s great scheme of permeating the statute book with human rights values may start to falter.’ Does the case law evidence a ‘conservative use’ of either s 3 or s 4?