



JUDICIARY OF  
ENGLAND AND WALES

**LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS**

**WHO ARE THE MASTERS NOW?**

**SECOND LORD ALEXANDER OF WEEDON LECTURE**

**6 APRIL 2011**

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**(1) Preamble**

1. It is an honour to have been asked to give this, the second, Lord Alexander of Weedon lecture<sup>1</sup>. I only saw Bob Alexander in action once: it was on my first and only visit to the European Court of Human Rights as an advocate. As a practitioner in the field of landlord and tenant law before the 1998 Human Rights Act, more used to the County Courts, Strasbourg was unfamiliar territory to me. Fortunately for me, the client and the court, I had a non-speaking part. I was the number three string in a team led by none other than Michael Beloff and Francis Jacobs, in a case which showed that even land-owning Dukes could have human rights – or at least could claim them. I marvelled at the authoritative and incisive advocacy of the imposing leader for the UK Government, while being charmed by him and Marie over dinner. This annual lecture is a fitting tribute to an outstandingly successful advocate in court and an ardent supporter of the rule of law out of court, demonstrated by his long chairmanship of JUSTICE. And he is a fitting reminder to all those who aspire to come to the Bar today, that your background is unimportant, and that what really matters is integrity, ability, commitment, and also good sense – for, as you, Mr Chairman, have so memorably put it, law is common sense with knobs on.
2. After being asked to give this evening's lecture, I spent some time wondering about a topic. For some reason which I now forget, probably last minute panic, I decided on the title "Who are the masters now?" It was a title which had the attraction of giving me some leeway, and it had the virtue of keeping the potential audience guessing. Unfortunately, it had me guessing as well. I considered whether to give biographical accounts of the present Queen's Bench and Chancery Masters, in the style of Lord Campbell's Lives of the Lord Chancellors. But then I wondered if that might run into Data Protection Act problems; also, mindful of Lord Phillips's masterly lecture last year, I recalled that it was not always right to adopt the literal meaning.

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<sup>1</sup> I should express my thanks to John Sorabji for all his help in the preparation of this lecture.

3. The origin of the title lies, of course, in a House of Commons debate which took place almost exactly sixty five years ago, on 2 April 1946. The debate concerned the repeal of the Trade Disputes Act 1927, which the Attorney-General was piloting through its second reading in the House of Commons. He was not having the easiest of times. Hansard records how Mr Quintin Hogg, for the Conservative opposition, remarked how the Attorney had come, *'down to the House with an ingratiating smile, a confident manner and a red tie—not too red, but red enough to dispel any doubts on his political orthodoxy . . .'*<sup>2</sup>
4. A flavour of the fraught atmosphere is conveyed by another observation from Mr Hogg – the future Lord Chancellor, Lord Hailsham. Seemingly fixated on the Attorney's tie, he concluded his attempted demolition of the Government's case by observing that he was, *'bound to say that the learned Attorney-General seems to have been infected with the virus of Nuremberg and to have come out with swastika spots all over his red tie.'*<sup>3</sup> By the time the Bill reached its third reading, rather than being accused of fascist leanings, the Government was taken to task by another Conservative MP, Mr Beverley Baxter, for being a *"caretaker" Government* because, the *'repeal Bill [was] getting ready for the incoming Communist administration of this Government.'*<sup>4</sup>
5. The Attorney took all this in his stride. The Bill was, he said going to pass and sweep away *'for ever from the law of this country'* the 1927 Act, which was the *'bastard product of narrow legalism and craven politics.'*<sup>5</sup> He noted how, twenty years earlier, Mr Winston Churchill, had written a letter to the Labour Party leader challenging him to submit the 1927 Act to *'the verdict of the people'*, to the intent that the verdict would *'govern the way'* the matter was dealt with by Parliament.
6. The Attorney continued (no doubt with the recent 1945 election in mind) by saying that Mr Churchill:
 

*'resembles Humpty-Dumpty. Humpty-Dumpty had a great fall. "When I use a word," said Humpty-Dumpty' – and this must be what hon. Members are saying about these words that [Mr Churchill] used in that letter when he said this matter should be submitted to the verdict of the people— 'it means just what I intended it to mean, and neither more nor less.'" But," said Alice, "the question is whether you can make a word mean different things." "Not so," said Humpty-Dumpty, "the question is which is to be the master. That's all".'*
7. Which is to be master? That was the question to which the Attorney, Sir Hartley Shawcross, supplied the answer, saying this,

<sup>2</sup> HC Deb 12 February 1946 vol 419 cc285 ([http://hansard.millbanksystems.com/commons/1946/feb/12/trade-disputes-and-trade-unions-bill#S5CV0419P0\\_19460212\\_HOC\\_361](http://hansard.millbanksystems.com/commons/1946/feb/12/trade-disputes-and-trade-unions-bill#S5CV0419P0_19460212_HOC_361)).

<sup>3</sup> *Ibid* at cc294.

<sup>4</sup> HC Deb 02 April 1946 vol 421 cc1151 ([http://hansard.millbanksystems.com/commons/1946/apr/02/trade-disputes-and-trade-unions-bill#S5CV0421P0\\_19460402\\_HOC\\_358](http://hansard.millbanksystems.com/commons/1946/apr/02/trade-disputes-and-trade-unions-bill#S5CV0421P0_19460402_HOC_358)).

<sup>5</sup> *Ibid* at cc1214.

*'We are the masters at the moment, and not only at the moment, but for a very long time to come, and as hon. Members opposite are not prepared to implement the pledge which was given by their leader in regard to this matter at the General Election, we are going to implement it for them.'*<sup>6</sup>

8. That answer has gone down in history as the pithier *'We are the masters now.'* And it may well be that that is what he did actually say; as the longest surviving MP who witnessed that debate has recently attested. It is by no means unknown for Hansard to be amended, and even the ever confident Sir Hartley may subsequently have wished to sound a little less triumphalist or hubristic<sup>7</sup>.
9. This evening I intend to address Humpty Dumpty's question, as to who is to be master, in the context of our constitutional settlement, and in particular in relation to the legislature and the judiciary. The issue is self-evidently a matter of importance at any time. But it is, perhaps, of particular interest and significance now, for three interconnected reasons. First, there are suggestions in newspapers, articles, and even in one or two judgments, that the judiciary may, in some circumstances, be able to claim supremacy over Parliament. Secondly, some disquiet has been expressed in the press, and by others such as my erstwhile colleague, Lord Hoffmann, about the apparent creeping supremacy of the Strasbourg Court.
10. Thirdly, and most fundamentally, we live in a society governed by the rule of law, and there can be an inherent tension between the notion of the supremacy of a democratically elected legislature and the rule of law. The two concepts are, I suggest, sometimes confused by the Strasbourg court, which often justifies decisions by reference to what is required in a modern democratic society when it really means to rely on what is required in a modern society governed by the rule of law. The rule of law has been brought more into the general public consciousness in the past year by a deceptively simple, but characteristically impressive, incisive and readable, book with that very title, written by the great and sorely missed Lord Bingham<sup>8</sup>.
11. I am conscious that, as a serving judge speaking on such topics in public, I must follow the example of Agag, King of the Amalekites when summoned to meet the prophet Samuel. No doubt you all recall the passage from the First Book of Samuel, chapter 15, verse 32, which records that the King "approached delicately". So must I. But I hope that the outcome will be less disastrous for me

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<sup>6</sup> *Ibid* at cc1212 – 1214.

<sup>7</sup> The New Statesman, *The cover-up*, (28 July 2003), '. . . In 1946, Labour's attorney general, Sir Hartley Shawcross (who died this month as Lord Shawcross, aged 101), said in the Commons: "We are the masters now." Or did he? Not according to the Times obituary: he actually said: "We are the masters at the moment and shall be for some considerable time." Wrong, says Donald Bruce, then PPS to Aneurin Bevan, now Lord Bruce of Donington, aged 90. In an "emphatic modification" to the obit, he insists Shawcross did say "we are the masters now": "I was sitting immediately behind him." Hansard has a third version ("we are the masters at the moment . . . and for a very long time to come"). Hansard can be rewritten at a speaker's request. Lord Bruce's memory cannot be rewritten, and so an ancient tribal quarrel continues beyond the grave.' (<http://www.newstatesman.com/200307280001>).

<sup>8</sup> Bingham, *The Rule of Law*, (Allen Lane) (2010).

than it was for him; the following verse, of course, records that the prophet proceeded to “hew” the unfortunate monarch “to pieces”. I also reserve the right to change my mind if addressed in court on any of the issues I am talking about this evening to follow the example of Baron Bramwell, who when referred to an earlier decision of his, said: “The matter does not appear to me now as it appears to have appeared to me then”<sup>9</sup>.

12. In order to answer the question posed by the title to this talk, I intend to consider three related issues. First, I shall explain why I subscribe to the doctrine of Parliamentary sovereignty. Secondly, I will examine the *Jackson Hunting Act* case<sup>10</sup>, which raises some challenges to this view. Finally, I intend to look at the ever topical subject of Human Rights and Parliamentary sovereignty. I shall then try and draw some threads together. But before embarking on this exercise, I should like to pay tribute to a great and wise lawyer, who was for many years a colleague of Bob Alexander, and with whom I have had some correspondence about this evening’s talk, Sir Sydney Kentridge QC. It is daunting enough to give a lecture in honour of Bob Alexander, but it is all the more so to give it in the presence of one of the greatest and wisest of constitutional lawyers. Appropriately daunted, I turn to the first part of tonight’s lecture, Parliamentary sovereignty.

## **(2) Parliamentary Sovereignty or Judicial Supremacy: Introductory**

13. Subject to a few fragmentary exceptions, we famously have an unwritten constitution, which can be said to be something of a contradiction in terms. Without a written document, our constitution is at risk of finding itself a victim of the Humpty Dumpty approach of being what I say it is – a concept well known to all lawyers thanks to Lord Atkin in his great dissenting speech in *Liversidge v Anderson*<sup>11</sup>. Any judge and any academic can pronounce with great confidence on the nature and provisions of our constitution, and in particular whether or not Parliamentary sovereignty is absolute, because there is no conclusive document to contradict them. Parliament could claim absolute sovereignty, but that could be said to be pulling itself up by its own bootstraps – to adapt the phrase of that well-known authority, Mandy Rice-Davies<sup>12</sup>, they would say that wouldn’t they?. The courts could deny Parliamentary sovereignty, but such a denial could be said to suffer from the same problem.
14. Despite this, I suggest that it is clear that Parliamentary sovereignty is absolute for five reasons, which are not unconnected. First, albeit subject to the odd hiccough on the way, lawyers, academics and the public have long recognised it as the cornerstone of our constitutional settlement. In a country with no written constitution, and which has had no revolution for over 300 years, it would require a very powerful reason indeed for departing from what has been almost universally accepted.
15. Secondly, Parliament does not want the judges to have the power to overrule its statutes and the judges, at least in the main, neither want nor claim such a power.

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<sup>9</sup> *Andrews v Styrax* (1872) 26 LT 704, 706 per Bramwell B.

<sup>10</sup> *R (Jackson) v Her Majesty’s Attorney-General* [2006] 1 A.C. 262.

<sup>11</sup> [1942] AC 206, 244-245.

<sup>12</sup> In *R v Ward (Stephen)*, Old Bailey 26 June 1963.

Thirdly, the circumstances relied on by those who suggest that Parliamentary sovereignty is not absolute are so far removed from present reality that they undermine the very argument that they are invoked to support.

16. Fourthly, even the strongest advocate of limiting Parliamentary authority must accept that the courts could only overrule Parliament in wholly exceptional cases. Given the absence of a written constitution, it seems very hard to identify with clarity and consistency the circumstances in which the courts could take such a course. It is therefore difficult to see how there would be perceived legitimacy in the courts overruling Parliament; and perceived legitimacy is of the essence where there is no written constitution.
17. Fifthly, we live in a world where democratic accountability is of the essence. For appointed judges to claim the right to override the will of the democratically elected legislature, when they cannot claim to have been accorded that right by popular mandate, whether directly or through Parliament, seems to me to be unmaintainable unless they have been expressly given that right by the people acting through their democratically elected representatives.
18. I shall discuss the first reason, what has long been accepted, and the second, what the judges have said, as they are worth examining. So is the third reason, namely the unreality of the argument, which I shall consider when discussing *Jackson*. I shall touch on the fourth and fifth reasons, difficulty and democratic accountability, when dealing with Human Rights.

### **(3) Parliamentary authority: the academic and judicial view 1453-2003**

19. Parliamentary sovereignty has been widely recognised by politicians, academics and judges. In 1453, Sir John Fortescue, the great jurist and judge, said that '*this High Court of parliament ... is so high and mighty in its nature that it may make law and that that is law it make no law*<sup>13</sup>'. It is true that, in 1610, in *Dr Bonham's Case*<sup>14</sup>, Sir Edward Coke, then Chief Justice of the Court of Common Pleas, said:

*'In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.'*<sup>15</sup>

20. However, this was a case of Homer nodding, and, when Lord Chief Justice of the Court of King's Bench, Coke subsequently gave a judgment saying the opposite<sup>16</sup>, a view to which he adhered in his *Institutes*, where he stated that the '*power and jurisdiction of the Parliament for making of laws . . . is so transcendent and*

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<sup>13</sup> *Re Thomas Thorp, speaker-elect* (1453) Rot Parl vol V p 239.

<sup>14</sup> (1610) 8 Co Rep 113b.

<sup>15</sup> *ibid* at 118a.

<sup>16</sup> See Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, (Oxford ) (1999) at 111, where it is noted that Coke CJ gave a judgment shortly after that in *Dr Bonham's Case*, which set out the contrary view: *The Case of the City of London* (1610) 8 Co. Rep. 121b, 126a; 77 E.R. 658 at 664. And see Bingham, (2010) at 160ff for a summary.

*absolute, as it cannot be confined either for causes or persons within any bounds.*<sup>17</sup>

21. Transcendent and absolute powers do not brook subservience to the common law, and Coke's observation in *Bonham's Case* was repudiated by his successor as Lord Chief Justice, Lord Ellesmere<sup>18</sup>, and by Sir Francis Bacon, then Lord Chancellor<sup>19</sup>. By the 18<sup>th</sup> century, it was well-established that Parliamentary law was not enacted subject to the common law. On the contrary, the common law was subordinate to Statute.
22. For Bagehot, parliamentary sovereignty was demonstrated by the fact that '*the ultimate authority in the English Constitution is a newly-elected House of Commons.*<sup>20</sup> For Dicey, its most famous expositor, it was demonstrated by the fact that Parliament '*had the right to make or unmake any law whatever*' and that no person or body – in other words no court – had the right to override or set aside the legislation of Parliament<sup>21</sup>.
23. James Bryce, the constitutional expert, clearly summarised the stark and simple nature of Parliamentary sovereignty in 1886, when, as Member of Parliament for Aberdeen South, he said this in the House of Commons:

*"[There] is no principle more universally admitted by constitutional jurists than the absolute omnipotence of Parliament. This exists because there is nothing beyond Parliament or behind Parliament. . . [Parliament represents] the whole British nation, which has committed to us the plenitude of its authority, and has provided no method of national action except through the vote."*<sup>22</sup>
24. Parliament's legal omnipotence means that Parliament can retrospectively render lawful an action which was contrary to the law at the time it was done. As Dicey put it, such Acts of Parliament, Acts of Indemnity effected the 'legalisation of illegality', and were 'the highest exertion and crowning proof of sovereign power<sup>23</sup>'; that is the power to legislate in any way it desires.
25. Any judicial development of it through precedent, was, as Dicey put it, no more than '*(j)udicial legislation [which is] subordinate legislation.*<sup>24</sup>' The courts could develop the law, and the common law, by establishing precedent, but they did so subject to Parliament's right to legislate and override those developments. The

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<sup>17</sup> Coke, *Fourth Institute* cited in Goldsworthy at 113.

<sup>18</sup> Ellesmere, *Touching the Post-Nati* (1608) at 108, cited in Goldsworthy (1999) at 126.

<sup>19</sup> Bacon, *The works of Francis Bacon* (1858) (ed. Spedding) Vol. 6 at 160 and Vol. 7 at 370, cited in Goldsworthy (1999) at 126.

<sup>20</sup> Bagehot, *The English Constitution* (1867), (Oxford) (2009 reissue) at 160.

<sup>21</sup> Dicey, *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> edition, 1959) (Macmillan) at xxxiv – xxxv and 39 – 40, "*The principle of Parliamentary sovereignty means neither nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament.*"

<sup>22</sup> Hansard (3<sup>rd</sup> ser.), vol. 305, 1218 – 19 (1886) cited in Goldsworthy (1999) at 228.

<sup>23</sup> Dicey, *ibid* at 50.

<sup>24</sup> Dicey, *ibid* 60.

account of Parliamentary sovereignty which Dicey described and articulated has been acknowledged on numerous occasions by the courts.

26. Thus, as that great constitutional authority, Mr Justice Stephen, recognised in *Bradlaugh v Gossett* in 1884, '*[t]here is no legal remedy . . . for oppressive legislation, though it may reduce men practically to slavery.*<sup>25</sup>' Mr Justice Willes endorsed that view in *Lee v Bude & Torrington Junction Railway Co* in 1871, when he stated that the courts were bound to obey an Act of Parliament until it is repealed by Parliament. The courts administered the laws, they did not make them.<sup>26</sup> Lord Simon repeated the point in 1974 in *British Railways Board v Pickin*, when he stated that no court has the power to "*power to declare enacted law to be invalid*"<sup>27</sup>.

27. Lord Diplock affirmed the position unequivocally in 1980 in *Duport Ltd v Sirs* thus:

*Parliament makes the laws, the judiciary interpret them. When Parliament legislates ..., the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. ... Under our constitution it is Parliament's opinion on these matters that is paramount.*<sup>28</sup>

28. Fifteen years later, in another House of Lords case, Lord Mustill gave a powerful statement of Parliamentary sovereignty, when he said that "*Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.*"<sup>29</sup>.

29. And Lord Millett put it this way in a judgment in 2003:

*" . . . the doctrine of Parliamentary supremacy is [not] sacrosanct, but . . . any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.*<sup>30</sup>"

30. It is not sacrosanct because just like any other aspect of our constitutional settlement, Parliament or the people could decide to alter it. The crucial point here is that it is for Parliament and the people to make that decision; it is not for the courts to do so.

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<sup>25</sup> (1884) 12 QBD 271 at 285.

<sup>26</sup> (1871) LR 6 CP 576.

<sup>27</sup> [1974] AC 765 at 798.

<sup>28</sup> [1980] 1 W.LR 142 at 157.

<sup>29</sup> *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 AC 513 at 597.

<sup>30</sup> *Ghaidon v Godin Mendoza* [2004] 2 AC 557 at [57].

31. Parliament's authority may be limited by its own choice, for instance, by delegating an aspect of its power to another body, such as the judiciary or the executive, or through the internal relationship between the two Houses of Parliament, or by the work of Parliamentary select committees scrutinising and revising legislation. Most importantly in a representative, liberal democracy, it will be limited by the electorate. Here the limits are to its political, not legal, sovereignty.
32. There is however a view that the constitutional significance of Parliamentary sovereignty has, in recent years, diminished; that it is no longer the cornerstone of our constitution. This view has led some to argue that Parliament needs to reassert its legal sovereignty; as it has been diminished by our membership of the European Union, by the enactment of the Human Rights Act 1998, by devolution of powers to Scotland, Wales and Northern Ireland, and by the growth of judicial review. In some quarters there has been a suggestion that the judiciary – the “unelected judges” - have somehow usurped Parliament's role and have set about placing impermissible limits on parliamentary sovereignty. As Adam Wagner asked in *The Guardian* earlier this year, ‘*Does Parliamentary sovereignty still reign supreme?*’<sup>31</sup>.
33. While our constitutional settlement has been in one of its periodic reform phases over the last two decades, the idea that Parliament is no longer legally sovereign and that the judiciary, whether at home or in Strasbourg, are the masters now is quite simply wrong.

#### **(4) *R (Jackson) v Her Majesty's Attorney-General***

34. There have been judicial observations of high authority in one recent case which suggest that Parliamentary sovereignty is a thing of the past. The case is, of course, *R (Jackson) v Her Majesty's Attorney-General*<sup>32</sup>, the case in which the Hunting Act 2004 was first challenged.
35. The issue was whether the Hunting Act, and the Act under which it was made, the Parliament Act 1949, were valid Acts of Parliament. The courts ordinarily have a very limited role to play in deciding such questions. As Lord Campbell LC put it in a case in 1842, ‘. . . *all that a Court of Justice can do is look to the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament . . . or what passed in Parliament . . .*’<sup>33</sup> The validity of the Hunting Act and the 1949 Act depended on an inquiry into whether the manner in which they were enacted was permitted by the Parliament Act 1911.
36. The courts were being invited to conduct an exercise in legislative scrutiny which was, as Lord Woolf CJ put it in the Court of Appeal, unprecedented in modern

<sup>31</sup> *The Guardian* (27 January 2011) (<http://www.guardian.co.uk/law/2011/jan/27/supreme-court-parliamentary-sovereignty>).

<sup>32</sup> [2006] 1 A.C. 262.

<sup>33</sup> *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 CL 7 F 710 at 725, cited in *R (Jackson) v Her Majesty's Attorney-General* [2005] Q.B. 579 at [3].



times<sup>34</sup>. It appeared to some commentators that the courts were being asked to consider whether the two Acts of Parliament were *ultra vires*, which is hard to reconcile with the idea of Parliamentary sovereignty. Thus, Roger Masterman has recently said<sup>35</sup> that the case involved the court being asked to set aside legislation enacted by Parliament. However, that is not right, and there are two reasons why *Jackson* cannot be seen as a judicial encroachment on Parliamentary authority.

37. First, the courts in *Jackson* were not considering whether to exercise a jurisdiction to set aside an Act of Parliament. They were determining whether, as a matter of statutory interpretation, as legislation enacted under the Parliament Act 1911, the 1949 Act and the Hunting Act were statutes. Lord Woolf CJ said in the Court of Appeal, that it was not an '*ordinary case turning on a point of statutory interpretation*<sup>36</sup>', but it was nevertheless a case which turned on statutory interpretation. The issue in the case was very unusual, but it was ultimately one which required the court to perform its familiar function of interpreting a statute, not invalidating a statute.
38. If the court had held the 1949 Act and the Hunting Act were not statutes, but secondary legislation, and consequently *ultra vires* the power conferred by the 1911 Act, it would not have been infringing Parliamentary sovereignty. The court would have been clarifying the effect of the 1911 Act, and, if the 1949 Act and the Hunting Act had been *ultra vires* the power granted by the 1911 Act, the court would have set aside secondary legislation, which is not and never has been treated as representing the solemn will of Parliament like statute law.
39. Secondly, the form of review which the courts carried out in *Jackson* was not the exercise of a free-standing power, but it was one granted to the courts by Parliament in sections 2 and 3 of the 1911 Act. By these two sections, Parliament created a mechanism under which the courts could review whether legislation had been passed consistently with the 1911 Act. In other words, it was because Parliament provided the courts with the power to review; and it did so even in circumstances, were as the court held, the enactment power was one which enabled the House of Commons to pass Acts of Parliament rather than simply delegated legislation<sup>37</sup>.
40. What therefore the 1911 Act does is exactly what the European Communities Act 1972 also does: it provides the courts with a limited power to carry out what in other countries would be called constitutional review of legislation. When the courts scrutinise the validity of Acts of Parliament, and refuse to apply them where they are in conflict with European Union law, as happened in *Factortame (No 2)*<sup>38</sup>, they do not so in the teeth of Parliament. They do so precisely because that is what Parliament has chosen to give the courts the power to do. As Baroness Hale put it in *Jackson*, '*Parliament has . . . for the time being at least,*

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<sup>34</sup> [2005] Q.B. 579 at [11].

<sup>35</sup> Masterman, *The Separation of Powers in the Contemporary Constitution*, (CUP) (2011) at 106.

<sup>36</sup> [2005] Q.B. 579 at [3].

<sup>37</sup> [2005] Q.B. 579 at [12] & [33].

<sup>38</sup> [1991] 1 AC 603.

*limited its own powers by the European Communities Act 1972 . . .*<sup>39</sup> The courts supervise that limitation, not as of right, but pursuant to Parliament's permission or direction, just as they do in respect of the 1911 Act. Such permission or direction could be removed, if Parliament amended or repealed either Act. The fact that the courts can review legislation, and set it aside, under these the 1911 Act and the 1972 Act is thus not in any way a refutation of Parliamentary sovereignty: on the contrary, it is an instance of its operation.

41. The House of Lords' decision in *Jackson*, Lord Steyn, in a passage which was obiter and had not been the subject of argument, said this:

*'The classic account given by Dicey of the doctrine of the supremacy of Parliament ... 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 where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the ... 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.'*<sup>40</sup>

42. I cannot accept the accuracy of the claim that Parliamentary sovereignty is a product of the common law, or that, because common law existed prior to Parliament's 'legislative supremacy', as Professor Allan put it, 'it defines and regulates it'<sup>41</sup>. The error is that of *post hoc ergo propter hoc*. And, with the exception of Coke's fleeting attraction to common law fundamentalism, I am not aware of any authority which supports, let alone establishes, the proposition that the common law created Parliamentary sovereignty. Nor am I aware of any significant authority which suggests that the common law can justify the courts lawfully setting aside or invalidating a statute. An obscure case decided in 1861, *Green v Mortimer*<sup>42</sup>, is the nearest I can find to a judicial decision refusing to apply a statutory provision. That case involved a private Act of Parliament, Carew's Estate Act 1857, relating to the powers of trustees of a particular private trust. Lord Campbell LC said that section 46 of that Act '*must have been passed per incuriam*' as it "*did something that was most absurd*" in that it purported to '*g[i]ve the court power to do that which was quite impossible*'. Judges can do many things; but the impossible is not one of them. I doubt that Lord Steyn would suggest that that provides much of a foundation for his doubts about Parliamentary sovereignty.

43. Ultimately, it might be said that Lord Steyn's point that the courts had invented Parliamentary sovereignty and could therefore remove or qualify it involves an

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<sup>39</sup> [2006] 1 AC 262 at [159].

<sup>40</sup> [2006] 1 AC 262 at [101] – [102].

<sup>41</sup> Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, (OUP) (2001) at 271.

<sup>42</sup> (1861) 3 LT 642, 643 (noted in Sir Robert Megarry's *A Second Miscellany at Law* pp 107-8)

intellectual sleight of hand: Parliamentary sovereignty was acknowledged rather than bestowed by the courts. They acknowledged what had been clearly established by civil war, the Glorious Revolution of 1688, the Bill of Rights 1689 and the Act of Settlement 1701.

44. The examples given by Lord Steyn of the types of case where the courts would effectively overrule Parliament were “attempt[s] to abolish judicial review or the ordinary role of the courts”. If that is the sort of extreme example which those who challenge the absolute nature of Parliamentary authority have in mind, then I suggest that their argument is unreal. It involves postulating a wholly different Parliament from that which we have ever known, and, if that arose, there would presumably be a very different judiciary from that which we have ever known. Further, a Parliament which was prepared to prevent citizens having access to the courts would presumably be unconcerned about the rule of law, in which case questions of constitutional sovereignty would be of no real significance in practice.

45. In *Jackson*, Lord Hope expressed the view that ‘*Parliamentary sovereignty is no longer, if it ever 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 Blackstone is being qualified.*’ He went on to say, this

*‘. . . we overlook the fact that one of the guiding principles that were identified by Dicey... was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon [made] the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.’<sup>43</sup>*

46. For Lord Hope then, Parliamentary sovereignty was limited in two specific ways. The courts could, as he said define its limits, by reference (i) to the European Convention and the Human Rights Act 1998, and (ii) to the rule of law. I examine the European Convention and Human Rights Act in the next part of this lecture, but it is appropriate to deal with his point on the rule of law.

47. On one view, a constitutional commitment to the rule of law is not entirely consistent with the doctrine of Parliamentary sovereignty. Professor Bogdanor

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<sup>43</sup> [2006] 1 AC 262 at [104].

has, as noted by Lord Bingham, stated that it is '*clear that there is a conflict between the two constitutional principles, the sovereignty of parliament and the rule of law.*<sup>44</sup>' Might this conflict justify or require the courts to place limits on Parliamentary sovereignty?

48. Of course, it depends on what one means by the rule of law. If it is given a relatively formal or narrow meaning, so that it simply extends to observing rights and obligations as they are laid down according to the law, then the rule of law adds nothing to the debate. If the law is whatever Parliament says that it is, or what the court declares it to be, subject to Parliament's ultimate power to reverse or overrule, it takes matters no further.

49. However, the position gets more difficult if one treats the rule of law as having substance, i.e. if one uses the expression in the same way as Lord Bingham used it in his book, so that it extends to substantive rights and obligations, along the lines of the Human Rights Convention. Such rights may seem to many people to be fundamental in a modern liberal society. It was, I think, this concern which underpinned Lord Hope's reliance on the rule of law in his judgment in *Jackson*. For Lord Hope, and perhaps for Baroness Hale, who also suggested that the courts might reject legislation if it contravened it<sup>45</sup>, the rule of law played a similar role as the common law did for Lord Steyn. It is a fundamental principle which, it is suggested, limits Parliamentary sovereignty, and would enable the courts to strike down legislation which contravened the rule of law. It undoubtedly does insofar as Parliament's political sovereignty is concerned, as our Parliament and our society are committed to the rule of law in this substantive sense.

50. This argument appears to me to present even more difficulties than that of Lord Steyn insofar as Parliament's legal sovereignty is concerned: it cannot be the case that any aspect of a statute which is contrary to an aspect of the rule of law to be overruled by the courts. Quite apart from anything else, before they could accept such an argument, the courts would have to overcome the acceptance by Lord Hoffmann in the House of Lords in 2000 of the proposition that Parliament can 'if it chooses, legislate contrary to fundamental principles of human rights.'<sup>46</sup> It can, if it chooses, and clearly and expressly states that it is so doing, enact legislation which is contrary to the rule of law.

51. But there is another problem for the argument, which arises from the Human Rights Act itself. The Act demonstrates that, far from being limited, Parliamentary sovereignty remains as it did for Dicey.

### **(5) Human Rights Act, Strasbourg and Parliamentary sovereignty**

52. In the years immediately following the Second World War, the western European powers set about drafting a document, which would enshrine their 'ardent belief

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<sup>44</sup> Bogdanor, cited in Bingham, (2010) at 161.

<sup>45</sup> [2006] 1 AC 262 at [159], '*The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.*'

<sup>46</sup> *R v Secretary of State for the Home Department, ex part Simms* [2000] 2 A.C. 115 at 131.

in human rights and democracy.<sup>47</sup> That document was, of course, the European Convention on Human Rights. It was to be, as Sir David Maxwell-Fyfe, the Convention's British founding father, put it, a '*beacon to those at the moment in totalitarian darkness . . . [one which would] give them hope of return to freedom.*<sup>48</sup>

53. On this view the Convention enshrined a commitment to long-established British constitutional norms which protected the individual from state tyranny, such as that famously articulated by Lord Camden in 1765 in *Entick v Carrington*<sup>49</sup>. Equally, it was to be an 'alarm bell' warning the European powers of any incremental steps that might be taken in any signatory to the Convention towards totalitarianism<sup>50</sup>. Another, more expansive view, expressed by Pierre-Henri Teitgen, the Convention's other founding father, was that it was to be, and would in time become, a European Bill of Rights<sup>51</sup>.
54. The Convention has developed significantly over its sixty years of life, sometimes in ways which have caused its signatories concern. Its development was cause for concern here in the 1970s, as Ed Bates has recently, shown in his study of the Convention's development. Those concerns have come to the fore again recently. Notwithstanding the concerns which arose in the 1970s, the UK remained a signatory to the Convention then and continually renewed its acceptance of the right of individual petition. It did so despite it having been pointed out in 1968 that our membership of the Convention, 'theoretically at least, [posed] "a considerable limitation upon the notion of the sovereignty of Parliament."<sup>52</sup> In 1998 we incorporated the Convention into our domestic law through the Human Rights Act. If it was right to say in 1968 that membership of the Convention posed a limit on Parliamentary sovereignty, is not then the 1998 Act the *a fortiori* case?
55. The answer to that neither the Convention nor the Human Rights Act goes nowhere near to imposing a limit on Parliamentary legal sovereignty.
56. It is true that membership of the Convention imposes obligations on the state to ensure that judgments of the Strasbourg court are implemented, but those obligations are in international law, not domestic law. And, ultimately, the implementation of a Strasbourg, or indeed a domestic court judgment is a matter for Parliament. If it chose not to implement a Strasbourg judgment, it might place the United Kingdom in breach of its treaty obligations, but as a matter of domestic law there would be nothing objectionable in such a course. It would be a political decision, with which the courts could not interfere.

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<sup>47</sup> Bates, *The Evolution of the European Convention on Human Rights*, (OUP) (2010) at 5.

<sup>48</sup> Speech given at the signing of the Convention on 4 November 1950, cited in Bates (2010) at 5.

<sup>49</sup> (1765) 19 Howell's State Trials 1029

<sup>50</sup> Tietgen, cited in Bates (2010) at 72.

<sup>51</sup> Bates (2010) at 6 – 8.

<sup>52</sup> Gilmour, *The Sovereignty of Parliament and the European Convention of Human Rights*, (1968) Public Law 62 at 73 cited in Bates (2010) at 13 – 14.

57. While, in a sense, legal sovereignty is fettered so long as Parliament is required to implement a decision of the Strasbourg court, the fetter is however akin to that imposed by the European Communities Act 1972: neither is permanent. Any such fetter remains only so long as the Treaty obligation itself remains valid, but any country can withdraw from the Treaty, and that demonstrates that whatever limit membership imposes on legal sovereignty, it is a fetter which endures only whilst our membership endures – i.e. only while Parliament wants it to endure.
58. Secondly, under the 1998 Act the courts' role is to try and interpret every statute so as to comply with the Convention, and, if that is impossible, to warn Parliament that the statute does not comply – reflecting the alarm bell just mentioned. It is then for Parliament to decide whether to amend the legislation. If it chooses not to do so, that is an end to the matter from a legal point of view.
59. The court's limited privilege to review, not strike down, legislation cannot therefore impinge on Parliamentary sovereignty. First, the court's power only arises because it has been bestowed by Parliament through the 1998 Act, and what Parliament gives it can take away. That is well demonstrated by the fact that the English courts had no power to apply the Convention for the first fifty years of its life – i.e. until the 1998. Secondly, where legislation does not comply with the Convention, the ultimate decision as to what to do about it is in the hands of Parliament, not the courts.
60. Having said that, there is no doubt but that the Human Rights Act has empowered the judiciary both in reality and in perception, in a number of respects. First, as just discussed, it has enabled judges to do what they previously could not – to review legislation in order to assess whether it infringes fundamental rights. Secondly, it has required the judges to develop the common law so as to ensure that our courts dispense justice which accords with human rights. For instance, the domestic law of confidentiality has had to be expanded to encompass respect for private and family life as contained in Article 8 of the Convention<sup>53</sup>. Thirdly, the courts, which had already expanded their judicial review role enormously over the past forty years, have been required to examine the decisions and actions of public authorities more critically than before; such an examination is however an examination of executive act and not Parliamentary will.
61. There is nothing wrong or surprising about this. If the laws which Parliament has enacted are transgressed, it is for the courts to uphold those laws, not least when it is the executive itself which has transgressed them. In this we see the balance, or distribution, of power between the three branches of State; as Professor Martin Loughlin has recently put it, Parliament makes the rules, the government executes the rules, and the courts adjudicate on questions whether the rules have been applied properly<sup>54</sup>.

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<sup>53</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>54</sup> Loughlin, *Foundations of Public Law*, (Oxford) (2010) at 453.

62. Over the past forty years, the role of the Judges in this country has become more and more concerned with issues of public and even social policy. That is partly because of the welter of poorly drafted legislation, which the courts have had to interpret as best they can. It is also attributable to the need to have a counterweight to a very powerful executive, at a time when Parliament has suffered from successive Governments with large majorities. I suspect that it is also due to a change in judicial temperament: yesterday's judges were children of the conventional and respectful 40s and 50s, whereas today's judges are children of the questioning and sceptical 60s and 70s. But, above all, it is due to the introduction of Human Rights, the rule of law, into our law for the first time.
63. All these factors have substantially and inevitably increased not only the power, but also the profile, of the Judges. Bearing in mind its purpose, the Human Rights Act inevitably has a very broad sweep, and it is inevitable that it will occasionally produce a surprising result, even an apparently absurd result, in a particular case. It is all too easy to attack the Act or the Convention by concentrating on a questionable decision, and ignoring the many beneficial decisions which it has enabled. It is all too easy to attack it as a foreign import, but it was largely drafted by UK lawyers to reflect well-established English principles. Its noble aim is to protect individuals against an over-mighty state, reflecting the philosophy of Mill, by telling the state what it cannot do.
64. Of course, the media have concentrated much fire power on the Strasbourg court, whose decisions our domestic courts normally follow. The Strasbourg court is in the unenviable position of having to decide human rights law across over 45 countries, ranging from mature free societies to the not so free. It is important that the court ensures that there is consistency across all countries. However, it is sometimes hard for one country, with its different standards and conditions, to accept a decision which is plainly right for another country. We may think that it is inappropriate that Strasbourg pokes its nose into the votes for prisoners issue on the basis that it should be left to our Parliament to decide. However, if Strasbourg said votes for criminals was a matter for national legislatures, it may be that a dictator might see this as a green light to depriving his enemies of the vote by trumping up charges to bring against them. It may be thought to be a small price to pay for a civilised Europe that we sometimes have to adapt our laws a little.
65. Nonetheless, many people, including some Judges, think that there is something in the view that Strasbourg is getting rather too interventionist in some areas; that it has strayed too far from the alarm bell intention behind the Convention and too far towards the European Bill of Rights end of the spectrum. However, it is fair to say that Strasbourg is prepared to listen to domestic courts and to change its mind. For instance, having reached the controversial conclusion that our courts could not strike out a hopeless claim in a case called *Osman v UK*<sup>55</sup> in 1999, the Strasbourg court changed its view three years later in *Z v UK*<sup>56</sup>. It did so

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<sup>55</sup> [1998] ECR 101.

<sup>56</sup> [2001] ECR 333.

expressly “*in the light of clarifications subsequently made by domestic courts and notably by the House of Lords*”<sup>57</sup>.

66. The notion of a dialogue between our court and the Strasbourg court is to be welcomed. Indeed, it is fundamental to the whole relationship between national courts and the Strasbourg court. More recently, in *Al-Khawarja v UK*<sup>58</sup>, the Strasbourg court held that a defendant in an English criminal case could not be convicted on the basis of hearsay evidence, which caused a degree of consternation in the English criminal law world. In *R v Horncastle*<sup>59</sup>, the Supreme Court took a different view from Strasbourg, and explained its concerns about the Strasbourg court jurisprudence on the topic in some detail. That case has gone to the Grand Chamber in Strasbourg, and it will be interesting to see the outcome.
67. The fact remains though that when Strasbourg speaks, it is ultimately for Parliament to consider what action needs to be taken. The courts can only take account of its decisions insofar as they inform its consideration of legislation or the common law. This brings into sharp focus an important asset of our Parliamentary democracy. Because implementation lies in the hands of Parliament, the debate about fundamental rights, a debate on which vehement and legitimate disagreement can ensue, is conducted in Parliament. It's there that the ultimate decision lies – not with the judges. This requires Parliament to work effectively, it requires there to be effective scrutiny and debate of such issues; and that the public also engaged in an informed way in that debate. Placing such decisions in the hands of the judicial branch of the state poses a danger for the judiciary and for liberal democracy, because it removes the debate from the public and their elected representatives.
68. If the ultimate decision lay with the judiciary, the debate would be removed from the public and from Parliament there is the additional danger of judicial politicisation. . It is ironic that the country that sees itself as the beacon of democracy, the United States, is prepared to leave entire fundamental political issues such as gun control, abortion, and capital punishment, to unelected judges rather than to democratically elected representatives. It is inevitable that their judiciary has become politicised.
69. In this country, W S Gilbert famously suggested that when entering the House of Commons, MPs had ‘to leave their brains outside and vote just as their leaders tell them to’<sup>60</sup>. That was the 19<sup>th</sup> century, and things are, of course, very different now. However, in our system, when they go into court. Judges have to leave their political views outside, and decide cases just as the law tells them to. There has been no suggestion in recent times that judicial promotion, even when it was in the hands of the Lord Chancellor, was influenced by, let alone based on, an appointee's political views. The judiciary's apolitical nature has helped to ensure the respect and confidence which the Judges generally enjoy in this country.

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<sup>57</sup> [2001] ECR 333 at [101].

<sup>58</sup> [2009] ECHR 110.

<sup>59</sup> [2010] UKHRR 1.

<sup>60</sup> *Iolanthe*, Act II (1882).



## **(6) Concluding remarks**

70. This is not meant to be a plea for judicial passivism. Far from it. I mentioned earlier the conflict between democratic government, the rule of the majority, and the substantive rule of law, one of whose most important features is the protection of the individual and minorities, against oppression by the executive by the state. While it is for Parliament to set the general limits and principles applicable to such cases, it is only the courts which can decide the individual disputes. In doing so, the courts which develop the law on a case by case basis. But the point remains that if the law is developed by the courts in such a way as is unacceptable to the people as a whole, then Parliament has the power to intervene so as to change the law.
71. That is right and proper, as it is the MPs who are the democratically elected representatives of the people, and the Judges are unelected. But Parliament no doubt appreciates that the unelected Judges sometimes are more easily able to do what is right, but temporarily unpopular, than politicians who need to submit themselves at least every five years to the electorate.
72. In our present complex fast-moving society, the judges have a vital role to play. First, we must not just interpret the law enacted by Parliament in a blinkered unimaginative way. With the welter of legislation, much of it ill-drafted, we should interpret statutes in a practical way, as Lord Phillips explained in last year's lecture. Secondly, we must develop the common law so it reflects the changing needs and standards of society. That sometimes means moving the law on when Parliament has not got the legislative time, or even sometimes when it has not got the political will to do so. Thirdly, we must be vigilant to protect individuals against any abuses or excesses of an increasingly powerful executive. That by no means only involves human rights: the development of the judicial review jurisdiction in the thirty years before the Human Rights Act came into force is testament to the value of controlled judicial activism.
73. But in carrying out these three vital functions, we should never overlook our primary duty in every case, which is to decide each case according to the law, and we should never forget that, however we develop or apply the law, we cannot go against Parliament's will when it is expressed through a statute. It may be that my perceptive and far-thinking colleague, Lord Justice Laws, will one day turn out to be right when he argued that, through judicial development of the common law, '*a gradual reordering of our constitutional priorities [may] bring alive the nascent idea that a democratic legislature cannot be above the law.*<sup>61</sup>' But we are not there yet.
74. It seems to me though that a fundamental reordering of the constitution, one which would limit Parliamentary sovereignty, would be a matter for a written constitution. We are not, I think, currently enjoying what has been called a 'constitutional moment', as Germany enjoyed after the last World War and South

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<sup>61</sup> Laws, *Illegality and the Problem of Jurisdiction*, in Supperstone & Goudie (eds), *Judicial Review*, (Butterworths) (1997) 4.17 cited in Goldworthy, *The Myth of the Common Law Constitution* in Edlin (ed), *Common Law Theory* (CUP) (2007) at 204.

Africa enjoyed with the end of apartheid. However, whether and when we should move to a written constitution is, for the reasons I have been discussing, a matter for the public, and their representatives in Parliament. The answer to Sir Hartley Shawcross's question is that in a true democracy, Parliamentary sovereignty is absolute, because the only true master is the electorate. Only they can properly decide if we should have a written constitution, which provides for limited Parliamentary sovereignty, that is for its legal sovereignty to be limited, and the power of constitutional review. Only they can enact such a 'fundamental change' in our 'unwritten constitution.'<sup>62</sup>

75. Thank you.

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<sup>62</sup> Goldsworthy, *ibid* at 236.