

# Self-Limitation by the United Kingdom Parliament

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## I Three Topical Issues

While it would be an exaggeration to say that the British Constitution does not exist at all, the fundamental principles of that Constitution become more elusive the more one searches for them. The problem to which this article is addressed is usually put in the form of the question: Can the United Kingdom Parliament bind itself or its successors for the future? It will be submitted that, if the inquiry is to have practical value, the concept of "sovereignty" should be avoided and the question should be discussed in relation to the concept of "self-limitation." Until recently students of law in Britain have been asked to discuss the doctrine of the "sovereignty" of Parliament in relation to the Union between England and Scotland (which has not been a significant practical issue in modern times, although it may become so if English nationalism develops in reaction to Scottish and Welsh nationalism) and the Statute of Westminster 1931<sup>1</sup> (the repeal or disregard of which by Parliament has never been a practical issue). But at the present day there are three topical issues, none of them merely academic in the pejorative sense; (1) membership of the European Communities or "Common Market," (2) declarations in several acts of Parliament since the last war concerning the status of Northern Ireland as part of the United Kingdom, and (3) whether the United Kingdom ought to have a declaration of individual rights and, if so, how (if at all) such a declaration could be protected against the legislature. This last question is not a topical issue on the same plane as the other two, but an increasing number of responsible people in Britain are advocating some kind of "new Bill of Rights."

The British Constitution is described variously as "unwritten,"

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1. Statute of Westminster 1931, 22 & 23 Geo. 5, c. 4.

“part-written,” “uncodified” or “evolutionary,”<sup>2</sup> along with those of New Zealand and Israel. The written elements in the British Constitution, in relation to the unwritten, are liable to be exaggerated,<sup>3</sup> because statutes affecting such fundamental institutions as the monarchy and Parliament tend to regulate specific aspects of institutions that would exist anyway at common law or by custom. It is not certain, for example, whether the existence (as distinct from the composition) of Parliament and the two Houses at the present day is the product of the Union with Scotland Act<sup>4</sup> and/or the Union with Ireland Act<sup>5</sup> or common law. Similarly with regard to relations between the two Houses. Subject to the Parliament Acts, which Parliament could repeal or amend, these relations are based on common law, that is in this context parliamentary custom and privilege—a part of the common law not derived from the decisions of the courts.

The controversy over continued membership in the Common Market has arisen in this way. Adherence to the European Community is implicitly intended to be permanent. On joining the Community, member states are under an obligation to bring their internal law into line with the existing Community law, and thereafter they are expected not to enact laws inconsistent with Community laws, which relate mainly to customs duties, agriculture, movement of labour and capital, transport, restrictive trade practices and the regulation of the coal, steel and nuclear energy industries. In addition to the treaties themselves certain kinds of Community laws (regulations), existing and future, take effect automatically in member states; other Community laws (directives, etc.) are to be implemented by member states themselves. Self-executing regulations are a new kind of secondary legislation. Courts of member states are to apply the interpretation put on the treaties and other Community laws by the Court of Justice of the Communities (“European Court”). By a *volte-face* on the part of the Labour party, which when in office in 1968-70 tried to negotiate entry into the Common Market, they announced at the general election of 1970 (which the Conservatives won) that their official policy was opposition to membership. The Conservative government signed at Brussels in January 1972 a treaty of accession to the European Eco-

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2. See Wolf-Phillips, *Post-Independence Constitutional Change in the Commonwealth*, 18 POL. STUDIES 18 (1970).

3. See, e.g., CONSTITUTIONS OF MODERN STATES 182-201 (L. Wolf-Phillips ed. 1968).

4. Union with Scotland Act 1706, 6 Anne, c. 11.

5. Union with Ireland Act 1800, 39 & 40 Geo. 3, c. 67.

conomic Community and certain related Communities (Treaty of Rome, etc.),<sup>6</sup> and thereby became engaged also by certain other treaties. Parliament implemented the treaties so far as concerns the law in the United Kingdom by the European Communities Act 1972,<sup>7</sup> which came into force on 1 January 1973. After the act was passed the Labour party said it was now their policy if returned to power to “renegotiate the terms of entry”<sup>8</sup> (*semble*, the terms of continued membership), with the necessary implication that if a Labour government—perhaps holding a unique referendum—were not satisfied with the result of such renegotiation then Britain would withdraw from the Community. Mr. Wilson confirmed this policy at the general election in February 1974 (after which the Labour party returned to office), stating that if the renegotiation did not succeed, the existing treaty obligations would not be regarded as binding. International lawyers, as well as the special breed of Community lawyers, would no doubt take the view that such withdrawal without good cause and without the agreement of all the other member states would be a serious breach of treaty obligations. For constitutional lawyers the questions arise: Could Parliament under a Conservative government effectively entrench membership of the Common Market by requiring (say) a special majority in the House of Commons for repeal of the European Communities Act? Can Parliament while the United Kingdom is a member of the Community effectively pass statutes which expressly or impliedly conflict with existing Community law in force in the United Kingdom? Could Parliament under a Labour government repeal the European Communities Act? Could Parliament go on to provide effectively that the United Kingdom should not rejoin the Common Market unless a bill to that effect were, for example, approved at a referendum? All these are practical politico-legal questions at the present time.

The second topical issue is whether the United Kingdom Parliament is bound by section 1 of the Northern Ireland Constitution Act 1973 which states that:

It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom *without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section . . .*<sup>9</sup>

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6. CMD. No. 4862.

7. European Communities Act 1972, c. 68.

8. The Times (London), Feb. 13, 1974.

9. Northern Ireland Constitution Act 1973, c. 36, § 1 (emphasis added).

This act repealed section 1(2) of the Ireland Act 1949 which provided that:

It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom *without the consent of the Parliament of Northern Ireland*.<sup>10</sup>

Is the United Kingdom Parliament prevented by the declaration in the 1973 act, confirmed by the Northern Ireland Act 1974,<sup>11</sup> from providing for the inclusion of Northern Ireland or any part of it in the Republic of Ireland, or for the separate independence of Northern Ireland, without the consent of the people of Northern Ireland in a referendum? These questions are significant not only for the protestant majority and the catholic minority in Northern Ireland, but also for the people in the remaining parts of the United Kingdom, many of whom would now be only too glad to be rid of responsibility for the peace and government of the unruly province.

It is not surprising that "liberal" associations whose members take an anti-authoritarian attitude towards the rights of the individual should advocate the enactment of a Bill or Declaration of Rights, even if they have not paid much attention to the juristic problems involved; but the matter deserves to be taken more seriously when senior members of the judiciary in their extra-judicial capacity make similar proposals.<sup>12</sup> There is no need here to recapitulate the familiar controversies concerning the desirability and methods of drafting of a Declaration of Rights in a country that has not already got one. The Bill of Rights of 1689<sup>13</sup> was not a comprehensive document of this character, for apart from such matters as the right of petitioning, excessive bail or fines, cruel and unusual punishments and the due impanelling of jurors, its declarations were confined to certain specific grievances of Parliament against the later Stuart monarchs.<sup>14</sup> The aspect to which attention will be drawn later is that of entrenchment against the legislature, involving self-limitation by the United Kingdom Parliament, although no more than a handful of politicians harassed by socio-economic problems are likely to foster public interest in the juristic puzzles involved.

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10. Ireland Act 1949, 12, 13 & 14 Geo. 6, c. 41, § 1(2) (emphasis added).

11. Northern Ireland Act 1974, c. 28.

12. See text accompanying notes 153 and 156 *infra*.

13. Bill of Rights, 1 W. & M. sess. 2, c. 2, (1688).

14. *E.g.*, Dispensing and suspending power; taxation and maintenance of an army within the kingdom without consent of Parliament; freedom of parliamentary elections, and of speech, debate and proceedings in Parliament.

## What is Parliament?

It must be asked: What is Parliament? And what is an act of Parliament? "Parliament" means the Queen, the Lords and the Commons in Parliament assembled. It has had this meaning ever since its infancy nearly seven hundred years ago. During the brief Commonwealth period in the seventeenth century both the monarchy and the House of Lords disappeared, but both were revived at the Restoration in 1660. That was a counter-revolution. The unions with Scotland and Ireland may possibly impose a few limitations on Parliament. There are statutory and customary rules for the summoning of the various elements composing Parliament.<sup>15</sup> One Parliament lasts until it is dissolved by the Queen on the advice of the prime minister or until it expires by effluxion of time under the Parliament Act 1911.<sup>16</sup> An act of Parliament is a measure enacted by these three elements acting together in the way customarily prescribed by themselves, namely, by a simple majority of the members present and voting in each House sitting separately,<sup>17</sup> and assented to by the Queen.<sup>18</sup> Every enactment contains the customary formula that it is enacted by the Queen, by and with the advice and consent of the Lords and Commons in the present Parliament assembled, and by authority of the same. Modified enacting formulae are used in finance acts and appropriation acts in the passing of which the predominant part is taken by the Commons, and in acts (very few in number) passed without consent of the Lords under the provisions of the Parliament Acts 1911 and 1949.<sup>19</sup> Such recital in what purports to be an act of Parliament is generally taken to be conclusive so far as litigants are concerned.<sup>20</sup> The question of the authentication of acts of Parliament, which has arisen on rare occasions in the past, is sometimes brought into discussions about the possible limitations on the "sovereignty" of Parliament, but authentication

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15. E. MAY, *PARLIAMENTARY PRACTICE* chs. 1, 2, 14 (18th ed. 1971).

16. Parliament Act 1911, 1 & 2 Geo. 5, c. 13, § 7.

17. The Commons have sat separately from the Lords since the reign of Edward III, in order that they might discuss grievances and taxation without being overawed by the great men of the realm. It has been questioned whether the Lords and Commons could pass a bill at a joint sitting, but if they each resolved to meet jointly—waiving such privileges to the contrary that they may possess—it does not appear that either the Queen or the courts could refuse to recognize a bill so passed.

18. Constitutional convention requires the Queen to give the royal assent to bills passed by both houses.

19. Parliament Act 1911, 1 & 2 Geo. 5, c. 13, § 2; Parliament Act 1949, 12, 13 & 14 Geo. 6, c. 103, § 1.

20. *See* The Prince's Case, 80 Co. Rep. 1a, 77 Eng. Rep. 481 (K.B. 1606); *Heath v. Pryn*, 1 Vent. 14, 15, 86 Eng. Rep. 11 (K.B. 1670).

is more appropriately categorized by Erskine May as falling under "subsidiary points in connection with legislative procedure."<sup>21</sup>

### The Meaning of the Questions

The meaning we give to questions of the kind, "Can Parliament do that?" is, what would be the probable attitude of United Kingdom courts in cases coming before them in the course of litigation if Parliament purported to do that? We are not concerned with vague doctrines of constitutional morality. In *Madzimbamuto v. Lardner-Burke*,<sup>22</sup> the only appeal to come to the Privy Council from the colony of Southern Rhodesia after the Unilateral Declaration of Independence, Lord Reid referred to the convention that the United Kingdom Parliament did not legislate without the consent of the Rhodesian government on matters within the competence of the Legislative Assembly.

That was a very important convention but it had no legal effect in limiting the legal power of Parliament.

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.<sup>23</sup>

Nor are we concerned with possibilities thought out by constitutional or political theory. The recent discussion by Geoffrey Marshall,<sup>24</sup> for example, professedly consists of theoretical possibilities. We are concerned here with *the law operating in the United Kingdom*, for example, relating to the European Community and Northern Ireland, so that discussion of the Statute of Westminster or Independence Acts, which affected the law operating in the former "Dominions" and other former dependent British territories, is largely beside the point. Marshall exaggerates the power of British courts to propound and give effect to a "new" or "revised" theory of Parliament's legislative power.<sup>25</sup> British courts are not established as coordinate bodies with the legislature by a written constitution. The present system of courts and their jurisdictions are based on acts of Parliament,<sup>26</sup> and judges of the Su-

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21. E. MAY, *supra* note 15, at 556-59.

22. [1969] 1 A.C. 645 (S.R.).

23. *Id.* at 723.

24. CONSTITUTIONAL THEORY 41-42 (Oxford 1971) [hereinafter cited as MARSHALL].

25. R. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* ch. 1 (2d ed. 1964); *OXFORD ESSAYS IN JURISPRUDENCE* ch. 8 (Guest ed. 1961).

26. *E.g.*, Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. 5, c. 49; Appellate-Jurisdiction Act 1876 39-40 Vict., c. 59; Courts Act 1971, c. 23.

preme Court and Lords of Appeal are dismissible on an address from both Houses of Parliament. The House of Lords as the court of final appeal is technically part of Parliament, and its president is the lord chancellor who presides over the Upper House. As a minister and a member of the cabinet the lord chancellor would *ex hypothesi* be identified with the policy of any bills introduced into Parliament by the government of the day. These considerations would not affect the courts in their *interpretation* of acts of Parliament, but they might well be relevant if any litigant challenged the *validity* of an act.

### Concept of "Sovereignty" Discarded

Blackstone identified Parliament with the Sovereign, that legally unlimited power that must exist in any state.<sup>27</sup> Austin<sup>28</sup> and Dicey<sup>29</sup> elaborated and handed on this tradition. The juristic concept of sovereignty has, of course, come under attack from many quarters. Bentham early asserted that the authority of the supreme governor could be limited by an express convention, and later allowed the possibility that sovereignty might be divided between a supreme legislature and the courts, thus giving rise to a consensus between the legislature and the courts.<sup>30</sup> However, the former proposition would presuppose a supreme international law, while the latter proposition would presuppose a supreme constitution superior to both the legislature and the courts. But Bentham's ideas on sovereignty underwent a continual transformation throughout his long writing career, sometimes in works that are only now in course of publication, and he finished up with something like the sovereignty of the people.<sup>31</sup> Austin was logically more consistent than Bentham about sovereignty, although he was not consistent with himself about Parliament, probably because he was carried away by the passing of the Reform Bill at the time he was delivering his lectures. The tradition of mixing up discussions of the legislative power of Parliament, which is a product of constitutional history, with the doctrine of sovereignty, a product of analytical jurisprudence, was continued by Salmond in an appendix to his *Jurisprudence* on "Sover-

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27. 1 W. BLACKSTONE, COMMENTARIES 51, 90.

28. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, lect. 6 (Hart ed. 1954).

29. A. DICEY, THE LAW OF THE CONSTITUTION, pt. 1, (10th ed. Wade 1959).

30. Hart, *Bentham on Sovereignty* 2 IR. JUR. (n.s.) 327 (1967).

31. Burns, *Bentham on Sovereignty: an Exploration*, 24 N. IR. L.Q. (1973). The author of the article is general editor of the Bentham Project.

eignty."<sup>32</sup> which survived through a number of editions but has been omitted by the editor from the latest. This confusion reached the Supreme Court of South Africa in the well-known case of *Harris v. Minister of the Interior*,<sup>33</sup> in which the question was whether the South African Parliament was still bound in 1951 by the entrenched sections of the South Africa Act 1909,<sup>34</sup> the act of the United Kingdom Parliament which formed the basis of the South African Constitution and created its Parliament. Since 1909 the Statute of Westminster<sup>35</sup> had been passed, and also the Status of the Union Act (South Africa) 1934<sup>36</sup> in which the South African Parliament declared itself to be a "sovereign" Parliament. It had to be pointed out by Centlivres, C.J., that the United States was a sovereign state but Congress was limited by the Constitution.

More recently Geoffrey Marshall,<sup>37</sup> exercising his liberties as a political scientist, has given us an interesting discussion of various constitutional theories about the possible powers of legislatures with regard to "forms and procedures" and the related (but not identical) topic of "sovereignty"; but the United Kingdom Constitution is no more based on comparative constitutional theory than on analytical jurisprudence. What is conceivably possible concerning legislative forms and procedures is hardly a practical substitute for a long line of judicial dicta<sup>38</sup> and the attitude taken for centuries by members of Parliament and the legal profession. It would clarify this discussion if we avoided using the term "sovereignty" in constitutional law. It begs the question, which is, can Parliament limit its legislative power for the future? If "sovereignty" is used merely for legislative competence it is ambiguous and confusing. A better term is "legislative supremacy."

## II Substance and Procedure in the Legislative Process

The legislative process may be divided into matters of substance

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32. J. SALMOND, *JURISPRUDENCE* (11th ed. G. Williams 1957). *But cf.* F. MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND* 297-301 (Cambridge ed. 1908) [hereinafter cited as MAITLAND].

33. [1952] 2 S. Afr. L.R. 428 (A.C.), *sub. nom.* *Harris v. Dönges* [1952] T.L.R. 1245.

34. South Africa Act of 1909, 9 Edw. 7, c. 9.

35. Statute of Westminster 1931, 22 & 23 Geo. 5, c. 4.

36. Status of the Union Act (S.A.) 1934, No. 69 (repealed Republic of South Africa Constitution Act (1961) No. 32, § 120).

37. MARSHALL, *supra* note 24, at 34-53. *See also* G. MARSHALL, *PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH* (1957).

38. *See, e.g.*, O. HOOD-PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 47-48 n.48 (5th ed. 1973).



(subject-matter) and matters of procedure, a dichotomy accepted in the exposition of almost any branch of a legal system. There is plenty of judicial authority for saying that British courts do not concern themselves with parliamentary procedure, and this is also the established attitude of members of Parliament. Thus Lord Pearce said in *Bribery Commissioner v. Ranasinghe*: "In the constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers."<sup>39</sup> Each House has the ancient privilege of exclusively controlling its own proceedings, the ordinary courts having no jurisdiction to deal with things done in Parliament, except the commission of serious crimes or breaches of the peace. The Houses themselves and Parliament as a whole have privileges in the internal exercise of which they are regarded as courts superior to the ordinary courts of law.<sup>40</sup> The matter appears also to be covered in article 9 of the Bill of Rights: "[P]roceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament."<sup>41</sup> The power of Parliament to repeal earlier acts expressly is so clear that it has not been questioned in the courts. With regard to the implied repeal of an earlier act, counsel was allowed by the Court of Appeal in *Ellen Street Estates, Ltd. v. Minister of Health*<sup>42</sup> to argue that such power might be excluded by the provisions of an earlier act dealing with the same subject-matter, though the court held that as a matter of interpretation of the earlier act it was not necessary to decide the question; but Serutton, L.J., went on to say that counsel's contention was "absolutely contrary to the constitutional position that Parliament can alter an Act previously passed . . . by enacting a provision which is clearly inconsistent with the previous Act."<sup>43</sup> Maugham, L.J., in the same case said:

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.<sup>44</sup>

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39. [1965] A.C. 172, 195 (P.C. 1964) (Ceylon). Ceylon is now the Republic of Sri Lanka.

40. See *Bradlaugh v. Gossett*, 12 Q.B.D. 271 (1884). See also 4 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 15.

41. Bill of Rights (1688), 1 W. & M. sess. 2, c. 2.

42. [1934] 1 K.B. 590 (1934); *accord*, *Vauxhall Estates, Ltd. v. Liverpool Corp.* [1932] 1 K.B. 733 (Div. Ct.) (1931).

43. [1934] 1 K.B. 590, 595 (1934).

44. *Id.* at 597.

And Lord Reid in a recent address delivered to the Society of Public Teachers of Law said: "It is good constitutional doctrine that Parliament cannot bind its successors."<sup>45</sup>

The recent decision of the House of Lords in *Pickin v. British Railways Board*<sup>46</sup> was concerned with the question whether a private act of Parliament,<sup>47</sup> if it contained a false recital and Parliament was misled by its being obtained *ex parte* as an unopposed bill, would be effective to deprive the plaintiff of his land; but their Lordships' judgments throw valuable shafts of light onto the background and context of the subject-matter of this article, which of course concerns public acts. Lord Reid quoted with approval the well-known dictum of Lord Campbell (later chief justice and then lord chancellor) in an appeal to the House of Lords from Scotland in *Edinburgh and Dalkeith Ry. Co. v. Wauchope*:

All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses. I trust, therefore, that no such inquiry will again be entered upon in any Court in Scotland, but that due effect will be given to every Act of Parliament, *private as well as public*, upon what appears to be the proper construction of its existing provisions.<sup>48</sup>

Lord Reid in *Pickin's Case* added: "No doubt this was obiter [*semble*, as regards public acts] but, so far as I am aware, no one since 1842 has doubted that it is a correct statement of the constitutional position."<sup>49</sup> The court has no concern, Lord Reid continued, with the manner in which Parliament or its officers in carrying out its Standing Order perform their functions. For more than a century both Parliament and the courts have been careful to avoid conflict between them. The plaintiff was not entitled to go behind the act to show that the section concerned should not be enforced, nor to examine proceedings in Parliament in order to show that the Railways Board by misleading

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45. 12 J. Soc'y Pub. Teachers L. 25 (1972).

46. [1974] A.C. 765.

47. British Railways Act 1968, c. xxxiv. Private acts deal with local or personal matters, for example, giving special powers to a municipal corporation or a public utility corporation. They are promoted by petition to Parliament by interested persons or bodies from outside Parliament, and their legislative procedure is governed by special standing orders, which include the giving of notice to persons likely to be affected.

48. 8 Cl. & F. 710, 725; 1 Bell 252 (1842).

49. *Id.* at 278-79; [1974] 2 W.L.R. at 217.

Parliament had caused him loss.<sup>50</sup> Lord Morris of Borth-y-Gest said that in the processes of Parliament there would be much consideration whether a bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument concerning the correct interpretation of an enactment; there must be none as to whether it should be on the statute book at all.<sup>51</sup> It would be impracticable and undesirable, Lord Morris added, for the court to embark on an inquiry concerning the effectiveness of internal procedures in the High Court of Parliament, or an inquiry in any particular case as to whether those procedures were effectively followed.<sup>52</sup> Lord Wilberforce said he did not understand how courts could inquire whether Parliament was misled by a recital. How can one know how Parliament understood the recital—who is “Parliament” for this purpose—the members of both Houses or of either House—the members of the committee on private Bills—the counsel who advise the chairmen of those committees—the officials whose business it is to look at recitals and at the Bill? We know nothing, continued Lord Wilberforce, and by no process short of summoning some or all of these persons and examining their records could we find out what view of the facts or on what considerations of policy the section concerned was enacted.<sup>53</sup> Lord Simon of Glaisdale said the most peculiar feature in constitutional law of the British system of parliamentary democracy is the sovereignty of Parliament. This involves the courts having no power to declare enacted laws to be invalid. A second concomitant of the sovereignty of Parliament is that the Houses of Parliament enjoy certain privileges, which are part of the law of the land. Among those privileges is the exclusive right to determine the regularity of their own internal proceedings. This rule indeed is reflected in article 9<sup>54</sup> of the Bill of Rights. The plaintiff’s argument, Lord Simon pointed out, would involve questioning proceedings in Parliament. The issues would not be fairly tried without infringement of the Bill of Rights and of that general parliamentary privilege which is part of the law of the land.<sup>55</sup>

Earlier cases in point include *Ex Parte Selwyn*<sup>56</sup> where Canon Sel-

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50. 2 W.L.R. at 217-18.

51. *Id.* at 219.

52. *Id.* at 220.

53. *Id.* at 226.

54. 1 W. & M. Sess. 2, c. 2, art. 9.

55. [1974] 2 W.L.R. at 228.

56. 36 Just. P. 54 (1872) (P.C.).

wyn made an application to the court questioning the validity of the Irish Church Act 1869<sup>57</sup> on the ground that the giving of the royal assent was *ultra vires* the Act of Settlement<sup>58</sup> and the Coronation Oath made thereunder. In refusing the application Cockburn, C.J., and Blackburn, J., said that even if the petition were presented to the Queen and she was disposed to listen to it, "there is no judicial body in the country by which the validity of an act of parliament can be questioned." Another case is *Hall v. Hall*<sup>59</sup> where the defendant was a Jacobite who claimed that the Probate Act of 1857, on which the plaintiff's title to a house was based, had not really received the royal assent as he challenged the royal succession since James II. The county court judge said he could not ignore a statute that had been acted on for more than eighty years, and in any event Parliament could validate all titles by passing an indemnity act. County court cases are not now generally reported because they are not regarded as being of much authority in the development of English law, and the judge as reported twice begged the question by referring to the "statute" and to "Parliament," as of course if the defendant's contention were correct, the measure would not be a statute and the legislature would not have been lawfully summoned. However, so few cases have been brought on fundamental questions of this kind and most of the few that have been commenced have probably sunk without trace in the preliminary stages before the master as showing no reasonable cause of action, that no apology is needed for citing this example from the English county courts.

A legislature may be unrestricted as regards the subject-matter of legislation but limited as to the procedure whereby it is to legislate, perhaps in relation to specific topics such as individual rights or amendment of the legislative procedure itself. Sir Ivor Jennings<sup>60</sup> and others have argued from this that the United Kingdom Parliament might be held to be in this position, so as to be or to become bound by the "manner and form" (Jennings) or "forms and procedures" (Marshall) to be followed in certain legislative fields. They commonly cite in support such cases as *Attorney-General of New South Wales v. Trethowan*<sup>61</sup> and *Bribery Commissioner v. Ranasinghe*,<sup>62</sup> but the former was an appeal from New South Wales and was professedly decided on the basis

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57. 32 & 33 Vict., c. 42.

58. 12 & 13 Will. 3, c. 2 (1700).

59. 88 Sol. J. 383 (1944) (comment on case heard in Hereford County Court).

60. I. JENNINGS, *THE LAW AND THE CONSTITUTION* ch. 4 (5th ed. 1959).

61. [1932] A.C. 526 (P.C. 1964) (Appeal Australian High Court).

62. [1965] A.C. 172 (P.C. 1964) (Ceylon).

of the Colonial Laws Validity Act 1865,<sup>63</sup> which still applied to that state, and the latter was an appeal from Ceylon based on the written constitution of Ceylon in force at that time. Such cases afford no support for arguing that the United Kingdom Parliament can limit *itself* by procedural requirements, such as a special majority in the legislature or a referendum.

Jennings and Heuston<sup>64</sup> have also argued in the alternative that a requirement such as a referendum or the approval of the Northern Ireland Parliament constitutes a change in the composition of the legislature for the given purpose, and so would bind Parliament in that way. With regard to the status of Northern Ireland this would now involve regarding the majority of the people of Northern Ireland voting in a poll as being part of Parliament for this purpose; while with regard to the withdrawal of Britain from the European Community this argument would involve regarding the governments or possibly the legislatures of the other member states as forming part of Parliament for this purpose. Apart from the fact that aliens are disqualified from membership of either House, it is the law and custom of Parliament that all the elements composing the Houses of Parliament must be summoned to Westminster in the appropriate manner to deliberate and vote.

Another line of argument has gained popularity in the last few years, largely through the forceful advocacy of D. V. Cowen<sup>65</sup> at the time of the *Cape Coloured Voters'* case<sup>66</sup> in South Africa. He was writing about the South African Parliament to the effect that, although South Africa had become an independent sovereign state in international law, its Parliament remained bound by the entrenched sections of the constitution which created the Parliament.<sup>67</sup> Cowen explained this position by saying that the definition of "Parliament" for the purpose of repealing or amending the entrenched sections (two-thirds of the members of both Houses sitting together) was different from the definition of "Parliament" for the ordinary purposes of legislation. He expressly stated more than once that he did not claim that his argument applied to the United Kingdom Parliament. His readers have evidently failed to notice that the redefinition Cowen was writing about was con-

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63. 28 & 29 Vict. c. 63.

64. I. JENNINGS, *CONSTITUTIONAL LAWS OF THE COMMONWEALTH* 124-25 (Oxford ed. 1957); R. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 29 (2nd ed.).

65. D. COWEN, *PARLIAMENTARY SOVEREIGNTY AND THE ENTRENCHED SECTIONS OF THE SOUTH AFRICA ACT* (1957).

66. *Harris v. Minister of the Interior*, [1952] 2 S. Afr. L.R. 428, *sub nom.* *Harris v. Dönges*, [1952] T.L.R. 1245.

67. South Africa Act of 1909, 9 Edw. 7, c. 9.

tained in a higher law which created the South African Parliament itself. The *Cape Coloured Voters'* case was not concerned with self-limitation by the legislature.

The question used to be much canvassed in British law schools, whether Parliament had bound itself by section 4 of the Statute of Westminster 1931, which gave legal recognition to the conventional legislative autonomy of the "dominions" therein named, which now comprise Canada, Australia and New Zealand. This section provides that: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion *as part of the law of that Dominion*, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."<sup>68</sup> Parliament did not say that it would not, still less that it could not, pass any law relating to a dominion without its request and consent (or, rather, unless such request and consent were expressly declared in such act). The absurdity of regarding the government of the dominion concerned (and, in the case of Australia, its Parliament also) as forming part of the United Kingdom Parliament for this purpose has been pointed out above. As the words we have put in italics show, the statute did not refer to the law in the United Kingdom, but the courts are instructed to interpret future acts of the United Kingdom Parliament as not being intended to change the law in the dominions unless the contrary is recited in a certain way. Lord Denning, M. R. uttered an *obiter dictum* in *Blackburn v. Attorney-General*,<sup>69</sup> which has naturally received a good deal of attention in academic circles, to the effect that neither the Statute of Westminster nor the various independence acts could be reversed, but less attention has been paid to the dictum of Salmon, L. J. in the same case (which concerned membership of the European Community): "As to Parliament, in the present state of the law, it can enact, amend and repeal any legislation it pleases."<sup>70</sup> Somewhat different considerations arise in relation to independence acts<sup>71</sup> because they expressly cover executive responsibility as well as legislative autonomy, and where Parliament purports to transfer to a given territory all the executive powers of the Crown as well as the legislative powers of the Crown in Parliament in relation thereto, intending to make the transferee territory a sovereign state in international law, it is difficult to see how Par-

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68. 22 & 23 Geo. 5, c. 4, § 4.

69. 10 COMM. MKT. L.R. 784; [1971] 1 W.L.R. 1037 (C.A.).

70. *Id.* at 791; 1 W.L.R. at 1041.

71. *E.g.*, Ceylon Independence Act 1947, 11 & 12 Geo. 6, c. 7.

liament could change the law in the new state. With regard to the law in the United Kingdom it is the practice for Parliament in an independence act to make special provision for the modification of statute law in the United Kingdom, for example, the British Nationality Acts, Citizenship and Visiting Forces Acts.<sup>72</sup>

It is sometimes said that Parliament has bound itself by the Parliament Acts 1911<sup>73</sup> and 1949,<sup>74</sup> which provide that, subject to certain exceptions and in accordance with certain procedures and time limits, a bill may become law on receiving the royal assent although the Lords have not consented to it. But Parliament has not bound itself by these procedures: they are effective if employed in the prescribed manner, but they are permissive only and alternative to the customary procedures, for the Commons do not have to operate them if they do not wish to do so. Nor did these acts alter the composition of Parliament for any purpose: the Lords may not be bypassed, but all bills must still by the law and custom of Parliament be presented to the House of Lords before the question of using the Parliament Act procedures arises. In any event these acts do not "bind" Parliament, because they can be repealed or amended at any time by the ordinary legislative procedure. A special enacting formula is prescribed by the Parliament Acts for statutes passed thereunder, which must declare that the special procedures have been complied with, thus indicating that the Queen and the Commons are not themselves Parliament but are acting (as it were) as delegates of the full Parliament.<sup>75</sup> It is questionable whether the express and vital exception of bills to extend the life of Parliament beyond five years can be repealed or amended without the consent of the Lords.<sup>76</sup>

Nor is it correct to say that Parliament has bound itself by the Regency Acts 1937-53,<sup>77</sup> which provide that if the Sovereign is under eighteen years of age the royal functions shall be exercised by a regent, who may assent to bills except bills to alter the succession to the throne or to repeal the acts securing the established Scottish

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72. *E.g.*, Bahamas Independence Act 1973, c. 27, §§ 2-4.

73. 1 & 2 Geo. 5, c. 13, §§ 1 & 2.

74. 12, 13 & 14 Geo. 6, c. 103, § 1.

75. *See* Wade, *The Basis of Legal Sovereignty*, 1954 CAMB. L.J. 172.

76. *Quaere* whether the "Parliament Act 1949," purporting to reduce the "delaying power" of the Lords and passed without their consent, has the nature of an act of Parliament. *See* O. HOOD PHILLIPS, *REFORM OF THE CONSTITUTION* 18-19, 50, 89, 91-93 (1970); *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 74, 113 (5th ed. 1973).

77. 1 Edw. 8 & 1 Geo. 6, c. 16; 2 & 3 Eliz. 2, c. 1. The Regency Acts have never in fact come into operation.

church. The regent and the two Houses can not repeal those exceptions, not because Parliament has bound its successors but because legislation passed with the assent of the regent would be a kind of delegated legislation. The Regency Acts are valid and effective so long as they remain unrepealed; but this does not mean that Parliament has bound itself, because the two Houses with the Sovereign's assent could repeal or amend them.

There was no legal limit to the duration of a Parliament before the Revolution. The Parliament Act ("Triennial Act") 1694 provided: "That from henceforth no Parliament whatsoever that shall at any time hereafter be called assembled or held shall have any continuance longer than three years only at the farthest."<sup>78</sup> Nevertheless at the time of the Jacobite rising Parliament enacted in the Septennial Act 1715: "That this present Parliament and all Parliaments that shall at any time hereafter be called assembled or held shall and may have continuance for seven years, and no longer . . ."<sup>79</sup> unless sooner dissolved by the Crown. Whether one adopted the "manner and form" or the "composition" or the "redefinition" argument, one would conclude that Parliament was bound by the Triennial Act of 1694, that it had no power either to prolong its own life or to extend that of subsequent Parliaments, and that the Parliament which passed the Septennial Act ceased to exist at the end of three years. The extraordinary exercise of legislative power in 1715 did in fact arouse speeches of opposition in the Commons, a signed protest from a number of dissentient peers, and political controversy outside Parliament that continued for many years. It was argued in the Peers' protest that (*inter alia*) the House of Commons must be chosen by the people, and that when so chosen they are the representatives of the people, which they cannot properly be said to be when continued for a longer time than that for which they were chosen; and that reasons as strong or stronger than those given for passing the bill might be found for continuing the existing Parliament still longer, or even for perpetuating it. Objections of this kind could not be raised if the Act of 1694 had merely been repealed, leaving the prerogative and (later) conventions relating to dissolution, or if the maximum life of Parliament had been reduced to (say) two years, and there would be less room for objection if the extension to seven years had not been applied to the existing Parliament. The Septennial Act was amended by the Parliament Act 1911, section

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78. 6 & 7 W. & M., c. 2 & 3.

79. 1 Geo. 1, c. 38, § 2. See C. ROBERTSON, SELECT STATUTES, CASES AND DOCUMENTS 200-03 (6th ed. 1935).



7,<sup>80</sup> which reduced the maximum life of Parliament to five years; but during both world wars Parliament extended its own life until after the end of hostilities, although it adopted the self-denying practice of doing so by annual acts.<sup>81</sup>

### Composition of the Legislature

Parliament can and does alter its own composition from time to time. A series of Representation of the People Acts from 1832 onwards, Redistribution of Seats Acts and other acts have extended the qualification for membership of the House of Commons, admitted roman catholics, changed the number and distribution of seats and the size and shape of electoral boundaries. The provisions for independent boundary commissions could be abrogated by act of Parliament. The composition of the House of Lords has been altered by provision for the creation of life peers and enabling life peeresses to sit,<sup>82</sup> extending the qualification of peers of Scotland beyond that prescribed by the Union with Scotland Act, and allowing hereditary peers to renounce their titles and be eligible for election to the Commons.<sup>83</sup> Parliament has altered and settled the succession to the throne, and thus the composition of Parliament.<sup>84</sup> In the classification of the legislative process into matters of substance (subject-matter) and matters of procedure, it is submitted that changes in the composition of the legislature fall under the heading of matters of *substance*. Parliament by such measures as those indicated does not limit its powers for the future: it modifies the elements that go to compose Parliament. The question of Parliament "binding itself" or self-limitation is beside the point here. This is one of our main contentions against the argument of Geoffrey Marshall and those who agree with him, for Marshall somewhat off-handedly classifies measures affecting the composition or structure of the legislature under the heading of "forms and procedures."<sup>85</sup>

### III Self-limitation Implies "Higher Law"

The three specific questions raised in this article involve the

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80. A Lords' amendment designed to balance the enlargement of power of the Commons, and somewhat casually agreed to by the Commons.

81. *E.g.*, Parliament and Local Elections Act of 1916, 6 & 7 Geo. 5, c. 44; Prolongation of Parliament Act 1941, 4 & 5 Geo. 6, c. 48.

82. Life Peerages Act of 1958, 6 & 7 Eliz. 2, c. 21, § 1.

83. Peerage Act 1963, c. 48, §§ 1-6.

84. Act of Settlement, 12 & 13 Will. 3, c. 2 (1700); Succession to the Crown Act of 1707, 6 Anne, c. 41; His Majesty's Declaration of Abdication Act of 1936, 1 Edw. 8 & 1 Geo. 6, c. 3.

85. *See* MARSHALL *supra* note 24, at 42.

problem of self-referring statements. The logical objection to reflexive propositions is manifested in law by the impracticability of self-limitation by a legislature, unless it is empowered, expressly or impliedly, to do so by some "higher law."<sup>86</sup> This principle applies to both legislative procedure and subject-matter. If the courts recognised any limitations on the power of the United Kingdom Parliament to pass statutes applicable within the United Kingdom which are expressly inconsistent with Community law, or to repeal the European Communities Act altogether, or to alter the status of Northern Ireland as part of the United Kingdom without the consent of the majority of the people of Northern Ireland voting at a poll, or to abridge a hypothetical statutory declaration of individual rights, there must be some juridical reason for the courts so deciding. In British constitutional law what could such a reason be? Three possible higher laws may be suggested: (a) a written constitution with entrenched provisions, (b) international law, or (c) some kind of natural law. Otherwise where the courts are faced with two inconsistent acts of Parliament and are unable to reconcile them by applying reasonable principles of interpretation, they will apply the maxim *leges posteriores priores contrarias abrogant*.<sup>87</sup>

With regard to a written constitution with entrenched provisions, if such existed it would be capable of covering all three questions relating to the Common Market, Northern Ireland and a new declaration of individual rights. With regard to (b) if British courts recognised international law as being superior to municipal (national or domestic) law, this might cover the question of the Common Market, and perhaps also a declaration of rights in so far as the declared rights coincided with those contained in the European Convention of Human Rights and Fundamental Freedoms. With regard to (c) recognition by the courts of a higher natural law might cover the matter of a declaration of rights.

### Entrenched Constitutional Provisions?

No authority is needed for saying that there is no written British constitution, with or without entrenched provisions, although of course the constitution is partly enacted by Parliament itself, the enacted parts presupposing a great deal of common law and constitutional conven-

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86. See Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1; H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 124-28 (1945).

87. "Later laws abrogate prior laws that are contrary to them." 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 685; [1842] 5 Beav. 574.

tion.<sup>88</sup> There is a possibility that Parliament is theoretically bound by certain provisions of the Union with Scotland Act 1706<sup>89</sup> and the corresponding statute passed by the Scottish Parliament, because those acts created the Parliament of Great Britain, that is, England and Wales with Scotland. The relevant provisions—relating to the existence of the Union itself, the maintenance of the established (presbyterian) Church of Scotland, a vague restriction on the alteration of Scots private law, and the preservation of the superior Scottish courts—are not directly in point; but Parliament has more than once infringed some of these “entrenched” provisions. Thus lay patronage was restored in the Church of Scotland in 1711,<sup>90</sup> and the requirement that professors at Scottish universities should subscribe to the Confession of Faith was removed in 1853.<sup>91</sup> However that may be, Lord Cooper said *obiter* in the Scottish case of *MacCormick v. Lord Advocate*<sup>92</sup> that he doubted whether in any event the court would have jurisdiction to review governmental acts purporting to be authorized by an act of Parliament which was repugnant to the Treaty of Union.<sup>93</sup> It is even more doubtful whether an English court, or the House of Lords as the final appeal court in all but Scottish criminal cases, would hold Parliament to be bound by these provisions. It was implicitly accepted that the Parliament of Great Britain could merge the Union into a wider Union with Ireland.<sup>94</sup>

### Primacy of International Law?

There is ample judicial authority for saying that general international law does not take priority in the United Kingdom over acts of Parliament. The common law has not adopted a theory of a monistic world legal order involving the supremacy of international law over the various state legal systems.<sup>95</sup> In *R. v. Secretary of State for the Home*

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88. See text accompanying notes 2-5 *supra*.

89. 6 Anne, c. 11.

90. Church Patronage Act, 10 Anne, c. 21 (Scot.).

91. Universities Act, 16 & 17 Vict., c. 89 (Scot.).

92. [1953] Sess. Cas. 396; [1953] Scots. L.T.R. 255.

93. Scots lawyers tend to refer to the “Treaty” of Union between Scotland and England which was later ratified by the Union with Scotland Act of 1706, 6 Anne, c. 11 and the Union with England Act of 1706, c. 7 (A.P.S. XI, 406).

94. See Union with Ireland Act of 1800, 39 & 40 Geo. 3, c. 67.

95. See H. Kelsen, *THE PURE THEORY OF LAW* ch. 7 (2d ed. Knight transl. 1967). But see H. Hart, *Kelsen's Doctrine of the Unity of Law*, *ETHICS AND SOCIAL JUSTICE*, 4 *CONT. PHIL. THOUGHT* 171, 188-90.

*Department, Ex parte Thakrar*<sup>96</sup> Lord Denning, M.R., cited with approval the dictum of Lord Atkin in *Chung Chi Cheung v. The King*<sup>97</sup> that a rule of international law cannot be treated as incorporated into English municipal law when to do so would be inconsistent with the provisions of a statute. Thus it was held in Thakrar's case that, even if the applicant were still a British protected person, he could not invoke a right under any rule of international law which placed on one state a duty to receive any of its nationals expelled by another state, for such rule was inconsistent with the Immigration Act 1971<sup>98</sup> under which Thakrar was a "nonpatrial" and required a license to enter the United Kingdom. In *Mortensen v. Peters*<sup>99</sup> the Danish captain of a Norwegian ship was convicted of infringing the Herring Fishery (Scotland) Act 1889,<sup>100</sup> which forbade trawling in the Moray Firth, although the acts done were outside the three-mile limit which was at that time accepted as the limit of territorial waters under international law. The lord justice (Lord Dunedin) said:

In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. . . .

It is a trite observation that there is no such thing as a standard of International Law, extraneous to the domestic law of a kingdom, to which appeal may be made. International Law so far, as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland. . . .

[I]t can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction make me think that it did so legislate.<sup>101</sup>

In *Theophile v. Solicitor-General*<sup>102</sup> Lord Porter said that where a statute was clear and unambiguous the "comity of nations" was irrele-

96. [1974] Q.B. 684 (C.A.).

97. [1939] A.C. 160, 167-68 (P.C. 1938).

98. C. 77.

99. 14 Scots L.T.R. 227 (Scot. Ct. Justiciary) (1906). The financial control and the crew of the ship were in fact British.

100. 52 & 53 Vict., c. 23, § 7(1).

101. 14 Scots L.T.R. at 230-31.

102. [1950] A.C. 186, 195.

vant. There is a presumption of interpretation, but only a presumption, that Parliament does not intend to legislate contrary to the principles of international law which have been recognized or adopted by the domestic law.<sup>103</sup>

The making of treaties is regarded by British constitutional law as an entirely executive act, and the treaty-making function lies within the prerogative (common law) powers of the Crown. Treaties as such do not require the approval of Parliament in order that the state (the Crown) may be bound by them in international law,<sup>104</sup> though they may be made expressly subject to parliamentary approval. On the other hand, the internal law cannot be altered by the making of a treaty because, as was declared in the *Case of Proclamations*<sup>105</sup> and in the Bill of Rights,<sup>106</sup> the Monarch cannot make law for the realm without Parliament. Thus in *Cheney v. Conn*, Ungoed-Thomas J., said:

First, International Law is part of the law of the land, but it yields to statute . . . . Secondly, conventions which are ratified by an Act of Parliament are part of the law of the land. And, thirdly, conventions which are ratified but not by an Act of Parliament, which thereby gives them statutory force, cannot prevail against a statute in unambiguous terms.<sup>107</sup>

He therefore held that, even if there were a conflict between the Geneva Conventions Act 1957,<sup>108</sup> implementing the conventions concerning the construction of nuclear weapons, and the Finance Act 1964<sup>109</sup> under which the appellant was taxed (which there was not),

103. See *Mortensen v. Peters* 14 Scots L.T.R. 227 (Scot. Justiciary) (1906); *The Zamora* [1916] A.C. 77 (P.C.); *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* [1947] A.C. 87 (P.C. 1946); see also *The Queen v. Keyn* 2 Ex. D. 63 (*The Franconia*) (1876) holding Central Criminal Court had no jurisdiction to try foreigner, the captain of foreign ship bound for foreign port, for manslaughter occurring within three miles of the British coast. This case led to the passage of the Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict., c. 73 extending jurisdiction of British courts over all acts by whomever committed within the three mile limit.

104. *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326 (P.C.). It is the practice for Heads-of-State treaties to be laid before both Houses for 21 days before ratification by the Crown.

105. 12 Co. Rep. 74, 77 Eng. Rep. 1352 (1611). "[T]he King by his proclamation cannot create any offence which not an offence before, for then he may alter the law of the land by his proclamation. . . . [A]lso the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them."

106. See text accompanying note 13 *supra*.

107. [1968] 1 W.L.R. 242, 245.

108. 5 & 6 Eliz. 2, c. 52.

109. C. 49.

the Finance Act prevailed over the international conventions. Lord Denning in *Blackburn v. Attorney-General* said:

Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.<sup>110</sup>

Similarly, in *McWhirter v. Attorney-General*<sup>111</sup> his Lordship said that the courts did not let treaties signed by the Crown impinge on the rights or liberties of any man unless and until they were incorporated into the law by act of Parliament. Diplock, L.J., went so far as to say in *Salomon v. Customs and Excise Commissioners*<sup>112</sup> that the sovereign power of Parliament extended to the breaking of treaties. Therefore if it is required to alter the general law of the land in any way, or to affect private rights or to impose any form of taxation, this can only be done by act of Parliament.<sup>113</sup> On all grounds—alteration of the general law, modification of the rights and obligations of individuals and the variation of fiscal arrangements—the passing of the European Communities Act was constitutionally necessary to implement accession to the Community Treaties.

### Natural Law?

Doctrines of natural law have persisted among European thinkers in one form or another for well over two thousand years, though the content of natural law has been vague and variable. As a moral or theological theory it is entitled to the greatest respect, but there is no authority for saying that the United Kingdom Parliament is bound by natural law in any form.<sup>114</sup> *Obiter dicta* uttered in the seventeenth century by Coke, C. J., and Hobart, C. J., and reported by themselves,<sup>115</sup> arose out of special sets of circumstances concerning the privileges of corporations under royal charters confirmed by statute. The dicta can be explained as expressing a presumption of interpretation that Parliament does not intend to confer jurisdiction on a corporation or its offi-

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110. [1971] 1 W.L.R. 1037, 1039; *see also* *Rustomjee v. The Queen*, 2 Q.B.D. 69, 74 (1876) (*per* Lord Coleridge, C.J.).

111. 11 COMM. MKT. L.R. 882 (1972) (English Court of Appeals).

112. [1967] 2 Q.B. 116 (1966).

113. *See* LORD MCNAIR, *THE LAW OF TREATIES*, ch. 2.

114. *See generally* J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955); R. POUND, *THE DEVELOPMENT OF GUARANTEES OF LIBERTY* (1957).

115. *Dr. Bonham's Case*, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1610); *Day v. Savadge*, Hobart 85, 87, 80 Eng. Rep. 235, 237 (1615). *But cf.* *Lee v. Bude and Torrington Junction Railway Co.*, L.R. 6 C.P. 576, 582 (*per* Willes, J.) and 4 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 36.

cer to decide its own legal rights in disputes between the corporation and other persons. Blackstone explains<sup>116</sup> that if Parliament gave a man power to try all causes arising in his manor, the courts would construe this as not intending to extend to causes in which he himself is a party; but if Parliament should clearly and expressly enact that he might try his own causes as well as those of other persons, no court would have power to defeat the intent of the legislature. In modern times we have the statement of Lord Wright in *Liversidge v. Anderson*:

Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament . . . is alleged to limit or curtail the liberty of the subject . . . the only question is what is the precise extent of the powers given.<sup>117</sup>

More recently in the tersely reported case of *R. v. Jordan*,<sup>118</sup> in which the leader of the British movement contended that the Race Relations Act 1968,<sup>119</sup> under which he had been sentenced to imprisonment, was invalid as being in curtailment of free speech, the divisional court said that Parliament was supreme, there was no power in the courts to question the validity of an act of Parliament, and the ground of the application was completely unarguable.

#### IV The European Community

The signing of the treaty of accession to the Community was, as has been said, an executive act. The European Communities Act 1972<sup>120</sup> provides by section 2(1) that "enforceable Community rights," which in accordance with the treaties are without further enactment to be given legal effect or used in the United Kingdom, shall be recognized and available in law, and be enforced accordingly. Such rights and obligations are those created by the treaties themselves, and also by existing and future regulations which take effect directly as law in the member states. Section 2(2) confers power by statutory instrument to implement in the United Kingdom existing or future Community laws that are not directly applicable, including Community directives addressed to the member states which are binding as to the result to be achieved while leaving to member states the form in which they shall be implemented. Certain limitations on such delegated legislation are set out in schedule 2, *viz.*, it may not impose taxation, have

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116. 1 W. BLACKSTONE, COMMENTARIES 91.

117. [1942] A.C. 206, 260-61 (1941).

118. 1967 CRIM. L. REV. 483.

119. C. 71.

120. C. 68.

retroactive effect, sub-delegate legislative power, or create new criminal offences punishable by more than two years' imprisonment or a fine of £400. Section 2(4) is designed to obviate conflict between future United Kingdom legislation and Community law. It provides that power to implement Community directives by delegated legislation includes power to amend acts of Parliament, and that existing and future enactments are to be construed subject to this section (including the enforceability of Community rights); but the limitations prescribed by schedule 2 are to continue unless repealed by any future act. Section 3 provides that in any legal proceedings any question as to the interpretation of the treaties or Community instruments shall be treated as a question of law and, if not referred to the Court of Justice of the European Communities,<sup>121</sup> shall be determined in accordance with the principles laid down by, and any relevant decision of, that court. Part II of the act, with schedules 3 and 4, contains detailed legislation needed on, or shortly after, accession in order to implement treaty obligations, notably amendments to company law.

Two proceedings were brought in the English courts before the European Communities Act was passed, one before the treaty was signed and one after it was signed. In *Blackburn v. Attorney-General*<sup>122</sup> Blackburn claimed declarations to the effect that, by signing the treaty, the government would irreversibly surrender in part the sovereignty of the Crown in Parliament, and in so doing would be acting in breach of the law. Lord Denning, M.R., said that, in the first place, no treaty had yet been signed, even if a treaty were signed the courts could take no notice of it until it was embodied in an act of parliament and even if this treaty was in a category by itself the same principle applied. Secondly, his Lordship said:

If Her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not.<sup>123</sup>

Lord Denning has a penchant for speculative dicta which please the academics more than the practitioners. As the matter of legislation was at that time hypothetical it was not necessary to deal with Black-

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121. For reference to the European Court from British courts, see *Bulmer v. Bolinger*, [1974] ch. 401; *Van Duyn v. Home Office*, [1974] 1 W.L.R. 1107.

122. [1971] 1 W.L.R. 1037, 1040 (C.A.).

123. *Id.* at 1040.



burn's argument about Parliament, as Stamp, L.J., pointed out.<sup>124</sup> It was held that the statement of claim disclosed no reasonable cause of action and should be struck out. In the other case, *McWhirter v. Attorney-General*,<sup>125</sup> McWhirter sought a declaration that the signing of the treaty of accession was unlawful because it was in conflict with the Bill of Rights which vested in William and Mary "the entire perfect and full exercise of the regall power and government . . . ." The Court of Appeal upheld the master's order that the summons be struck out as not disclosing any reasonable cause of action, but although McWhirter's *locus standi* was doubtful they were not prepared to say that it was frivolous and vexatious.

The implementation of the treaties by section 2 of the European Communities Act does not necessitate a restatement of the fundamental principles of British constitutional law, although it has set before both Houses of Parliament the difficult problem of devising adequate methods for supervising Community secondary legislation, as well as British delegated legislation implementating Community directives, before it is too late to criticize and influence the policy behind it. The strictly constitutional position appears to be that Parliament could repeal or unilaterally amend the European Communities Act. If this were done without the agreement of all the other members of the Community for good cause, however, it would in international law (as well as European Community law) involve a breach of treaty on the part of the United Kingdom. Actual renunciation of the treaty would be a matter for the government. With regard to repeal of the act, what we have said is in accordance with the advice given to both the Conservative and Labour governments before accession to the Community by four successive lord chancellors in their capacity as the chief legal and constitutional advisers to the government.<sup>126</sup>

With regard to conflicts between British municipal law and Community law, the effect of the European Communities Act is that an earlier domestic law gives way to a later Community law, whether such laws were made before or after the act came into force. As between an earlier Community law and a later act of parliament, the British courts would no doubt interpret the later act so far as reasonably possi-

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124. *Id.* at 1041.

125. 11 COMM. MKT. L.R. 882 (1972) (English Court of Appeals).

126. See O. HOOD PHILLIPS, *supra* note 38 at 64-65. Namely, Lord Kilmuir and Lord Dilhorne to Mr. Macmillan's Conservative government, Lord Gardiner to Mr. Wilson's Labour government, and Lord Hailsham of St. Marylebone to Mr. Heath's Conservative government.

ble in such a way as not to conflict with the community law. Implicit conflicts of this kind would surely be inadvertent on the part of draftsmen and legislators, and they would presumably be corrected by amending legislation. It is submitted, however, that if a later act of Parliament were clearly and expressly inconsistent with an earlier Community law, a British court would regard itself as bound to apply the later act.<sup>127</sup>

From the point of view of the European Court the matter looks different. In the leading case of *Costa v. ENEL*<sup>128</sup> an Italian court asked the European Court in accordance with article 177 of the treaty (whereby the courts of member states may, and in some cases must, ask the European Court to interpret Community laws) whether an Italian post-treaty law nationalising the electricity power industry was compatible with the provisions of the treaty. It was not within the competence of the European Court to rule on the relation between Community law and national law, but in the course of exercising its function of interpreting the relevant provisions of Community law the court stated its opinion on certain general principles:

As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. The reception, within the laws of each member-State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the member-States, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity.

The transfer, by member-States, from their national order, in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail. As a conse-

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127. See Howe, *The European Communities Act 1972*, 49 INT'L AFFAIRS 1 (1973) (the author was the minister chiefly responsible for drafting the bill and piloting it through the Commons); Forman, *The European Communities Act 1972*, 10 COMM. MKT. L. R. 39 (1973) (the author was employed as a solicitor by the Commission of the European Communities).

128. COMM. MKT. L.R. 425 (1964) (Italian Corte Costituzionale).

quence, **Article 177** should be applied regardless of any national law in those cases where a question of the interpretation of the Treaty arises.<sup>129</sup>

Now the European Court merely interprets Community laws; it cannot, and does not purport to, decide cases in national courts. The Italian legal system may accept the principle propounded in *Costa v. ENEL* as applicable within that country; but so far as the United Kingdom is concerned, the Crown could not bring about such an effect within the United Kingdom by acceding to the treaty, and with regard to Parliament we are back to the constitutional problem of self-limitation. As the European Communities Act makes opinions of the European Court binding on British courts, there appears to be a kind of *renvoi*, but ultimately within the United Kingdom its constitutional law must prevail.

In the *Internationale Handelsgesellschaft* case<sup>130</sup> the question before a German administrative court was whether a Community agricultural regulation prescribing a deposit system for exports was invalid on the ground that it violated certain basic rights guaranteed by the German Federal Constitution. The European Court was asked to interpret the relevant regulation, and in upholding it said:

[T]he validity of a Community instrument or its effect within a member-State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure.

An examination should however be made as to whether some analogous guarantee, inherent in Community law, has not been infringed. For respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to the member-States must be ensured within the framework of the Community's structure and objectives. We should therefore examine in the light of the doubts expressed by the Administrative Court whether the deposit system did infringe fundamental rights respect for which must be ensured in the Community legal order.<sup>131</sup>

Community lawyers, notably Gerhard Bebr,<sup>132</sup> Mitchell<sup>133</sup> and

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129. *Id.* at 455-56.

130. *Internationale Handelsgesellschaft mbH v. Einfuhr—und Vorratsstelle Für Getrade und Futtermittel*, 11 COMM. MKT. L.R. 255 (1970) (European Court of Justice).

131. *Id.* at 283. The German court did not accept the ruling of the European Court but referred the matter to the Federal Constitutional Court, who decided by 4-3 that they were competent to rule on the application of Community Law in relation to the Federal Constitution. There the matter rests as of the time of this writing.

132. Bebr, *Law of the European Communities and Municipal Law*, 34 *Modern L.*

Dagtoglou,<sup>134</sup> have adopted this theory that Community law is a new kind of legal order. This new legal order is regarded as being autonomous and distinct from either international law or constitutional law. Mitchell rhapsodies about the "revolution" which the British Government has joined its fellow governments in bringing about. He also draws a parallel with the new legal order established in 1707. But the Treaty and Acts of Union of 1707 created the Parliament of Great Britain; the Parliament of the United Kingdom has not been created by the Treaty of Brussels. In more sober language Mitchell's view is that this new legal order is binding on the United Kingdom unless it renounces the treaty. But "binding" only has meaning in relation to a given system of norms. What may be regarded as binding in Community law is not necessarily binding in constitutional law. Two different legal orders are under discussion, with different foundations. The priority of Community laws over the content of national law, whatever may be the scope in which that priority operates, was created by, and continues at the will of, Parliament. Thus Lord Diplock has said extra-judicially:

If the Queen in Parliament were to make laws which were in conflict with this country's obligations under the Treaty of Rome, those laws and not the conflicting provisions of the Treaty would be given effect to as the domestic law of the United Kingdom.<sup>135</sup>

And Lord Justice Scarman, also extra-judicially, has written:

The European Communities Act preserves, of course, the *de jure* sovereignty of Parliament. Community law has the force of law because Parliament says so.

. . . [C]onflicts between Community law and home-made law should be few.

Nevertheless, they will arise one day . . . . It is likely to take the form of a conflict between a Community rule of law and a

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Rev. 481 (1971). The author, legal adviser to the European Commission, reviews decisions of the European Court down to 1971.

133. Mitchell, Kuipers and Gall, *Constitutional Aspects of the Treaty and Legislation Relating to British Membership*, 9 COMM. MKT. L.R. 134 (1972). Mitchell is Salvesen Professor of European Institutions at Edinburgh University. A more polemical discussion will be found in Mitchell, *Constitutional Law, THEN AND NOW 1799-1974* (London 1974) 100-04.

134. Dagtoglou, *European Communities and Constitutional Law*, [1973] C.A.M.B. L.J. 256. Dagtoglou points out certain limiting factors, including the limited jurisdiction of the Community and its institutions; the practice of the unanimity principle by the Council and its committees in all but technical matters, the (non-judicial) control of the commission by the national executives and not by the European Parliament, and the modification of the treaties by new treaties rather than according to the procedure provided therein.

135. Diplock, *The Common Market and the Common Law*, 6 J.A.L.T. 3, 5 (1972).

subsequently enacted statute . . . . The European Communities Act cannot be read as limiting the sovereignty of Parliament. No British court could, I suggest, go so far as to hold that Parliament to-day had limited the freedom of action of Parliament to-morrow without a constitutional reform that is in fact beyond the power of Parliament by statute to effect.<sup>136</sup>

Even if the system of Community law be regarded among the member states as a new kind of legal order creating obligations different from those arising from ordinary treaties, yet the act of joining the Community is itself an act of state in international law. "No doubt the treaty is important," as Phillimore, L.J., said in *McWhirter v. Attorney-General*,<sup>137</sup> in forming part of international law . . . ." Community law, if a new kind of legal order, is based on international law. The member-states are bound *according to the rules of the system* while they remain members. With regard to the power of Parliament to repeal the European Communities Act or to pass other legislation expressly inconsistent with Community law, we have submitted that it is one aspect of the impracticability of self-limitation. A cardinal difference between the European Communities Act and the Statute of Westminster or Independence Act is that the European Communities Act directly affects *the law in the United Kingdom*. With regard to any attempt by one Parliament to tie the hands of a later Parliament as to membership or non-membership of the Community by requiring a referendum or some special majority in Parliament, such matters would be matters of procedure with which British courts would not concern themselves. This view is in accordance with the constitutional and political history of the country, for it is difficult to imagine a British court declaring as invalid, or declining to apply, an act of Parliament passed at the instance of (say) an existing Labour government because of some attempt under a previous Conservative government (or vice versa) to prevent or obstruct the passing of such an act.

## V Status of Northern Ireland

The declaration in the Northern Ireland Constitution Act 1973<sup>138</sup> has been preserved by section 2(7) of the Northern Ireland Act

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136. Scarman, *The Law of Establishment in the European Economic Community*, 24 N. IRE. LEGAL Q. 61, 70-72 (1973); see also Trindade, *Parliamentary Sovereignty and the Primacy of European Community Law*, 35 MODERN L. REV. 375 (1972); D. LASOK AND J. BRIDGE, INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 226-29 (London 1973).

137. 11 COMM. MKT. L.R. 882, 887 (1972).

138. C. 36, § 1. See text accompanying note 9 *supra*.

1974,<sup>139</sup> which provided for the dissolution of the Northern Ireland Assembly and the holding of a constitutional convention. So we have the declaration in the Ireland Act 1949<sup>140</sup> that the status of Northern Ireland as part of the United Kingdom would not be changed without the consent of the Parliament of Northern Ireland; the confirmation of this by the Northern Ireland (Temporary Provisions) Act 1972,<sup>141</sup> which suspended the Northern Ireland Parliament; the alteration of this arrangement by the substitution of a referendum under the Northern Ireland Constitution Act 1973 which abolished the Northern Ireland Parliament and replaced it by an Assembly; and now the Northern Ireland Act 1974, mentioned above, which preserves the referendum for altering the United Kingdom status. The declaration in the 1973 act indicates that the United Kingdom Parliament was not bound by the Act of 1949 as regards the "manner and form" or "forms and procedures" required for acts altering the status of Northern Ireland; and the confirmations declared first by the 1972 Act and then by the 1974 Act—however reassuring morally to the majority in Northern Ireland—would be redundant if the provisions confirmed were regarded as legally binding.

Another question is the competence in this context of the United Kingdom Parliament if it is the creature of the union of Great Britain with Ireland. The Union with Ireland Act 1800<sup>142</sup> passed by the Parliament of Great Britain, and the corresponding act passed by the Parliament of Ireland, followed parallel resolutions passed by each parliament in response to messages from the Crown; but unlike the union between England and Scotland there was no previous treaty negotiated by commissioners representing each country.<sup>143</sup> Further, the constitutional relationship between England (later, Great Britain) and Ireland in the centuries before the Irish union is confusing for the historian. Generally Ireland seems to have been a subordinate kingdom of the

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139. C. 28, § 2(7). "Nothing in subsections (3) to (6) above shall be construed as authorizing the Secretary of State to direct the holding of a poll otherwise than in accordance with Schedule 1 to the Northern Ireland Constitution Act 1973 in relation to the matters dealt with in section 1 of that Act (status of Northern Ireland as part of the United Kingdom)."

140. 12, 13, & 14 Geo. 6, c. 41. See text accompanying note 10 *supra*.

141. C. 22.

142. 39 & 40 Geo. 3, c. 67.

143. H. CALVERT, CONSTITUTIONAL LAW IN NORTHERN IRELAND 17 (London 1968) [hereinafter cited as CALVERT]. The author contends that the Irish Union was based on a "treaty," although forced on the unwilling Irish. *Contra*, E. CURTIS, HISTORY OF IRELAND 351-53 (London 1936).

English (British) Crown, although an act passed by the British Parliament in 1783<sup>144</sup> enacted that:

The Right claimed by the People of Ireland to be bound only by Laws enacted by his Majesty and the Parliament of that Kingdom, in all Cases whatever . . . shall be, and it is hereby declared to be established and ascertained for ever, and shall, at no time hereafter, be questioned or questionable.<sup>145</sup>

However that may be, the Union with Ireland Act (G.B.) provided that the kingdoms of Great Britain and Ireland should be united "for ever" into one kingdom, by the name of the United Kingdom of Great Britain and Ireland, and that the United Kingdom should be represented in one and the same Parliament. It further provided that the government and doctrine of the United Church of England and Ireland should be and remain "for ever" assimilated to those of the existing Church of England, and that the continuance of the United Church should be deemed "a fundamental and essential part" of the Union. The first breach in the fundamental terms of the Union came with the disestablishment of the Church of Ireland in 1869;<sup>146</sup> and the Union itself was disrupted in 1922 by the separation of the Irish Free State with dominion status similar to that of Canada,<sup>147</sup> later recognized as the independent Republic of Ireland.<sup>148</sup> Northern Ireland remained within the United Kingdom with a subordinate Parliament and a measure of governmental devolution,<sup>149</sup> until these were replaced in the last few years by the various acts mentioned above.

The grounds for arguing that the United Kingdom Parliament may be bound by certain fundamental provisions of the acts creating the union between England and Scotland are weaker in the case of the Irish Union, both because of the pre-union history of Ireland and because the greater part of the Irish Union has already disappeared. In any event it is doubtful whether even those who champion the supremacy of the Scottish Union would claim that the courts have jurisdiction to review acts of Parliament on this ground. One of Lord Cooper's *obiter dicta*

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144. An Act for preventing and removing all Doubts which have arisen, or might arise concerning the inclusive Rights of the Parliament and Courts of Ireland in matters of Legislation and Judicature of 1783, 23 Geo. 3, c. 28.

145. *Id.* § 1.

146. 32 & 33 Vict., c. 42.

147. Irish Free State (Agreement) Act of 1922, 12 & 13 Geo. 5, c. 4; Irish Free State Constitution Act of 1922, 13 Geo. 5, sess. 2, c. 1; Irish Free State (Consequential Provisions) Act of 1922, 13 Geo. 5, sess. 2, c. 2.

148. Ireland Act of 1949, 12, 13 & 14 Geo. 6, c. 41.

149. Government of Ireland Act of 1920, 10 & 11 Geo. 5, c. 67, as amended from time to time. Northern Ireland comprises six of the counties of Ulster.

in *MacCormick v. Lord Advocate*<sup>150</sup> was a disclaimer of jurisdiction to review matters of this kind. The probable attitude of the House of Lords as the final appeal court in all cases except criminal appeals from Scotland is less in doubt.

A distinguished former lord chief justice of Northern Ireland, Lord MacDermott, recently wrote:

[A]s respects a juristically recognised region of the United Kingdom like Northern Ireland it is at least arguable that, in the absence of duress, or consent on the part of the region concerned, or the wish of its people to secede, the United Kingdom Parliament has no power to alienate the allegiance or reduce the status of the people of that region. British sovereignty [in Northern Ireland] sits on a platform which rests firmly on a collection of treaties, acts of conquest, Acts of Parliament and solemn undertakings that have all been cemented together by a wide consensus: and it cannot lightly be taken for granted that the planks of the platform can be removed at pleasure.<sup>151</sup>

This is a subtle and elegant statement, and we hope we have not been guilty of lightly taking the matter for granted. It has been suggested that if a bill purported to separate Northern Ireland from the United Kingdom without the consent of a majority of its people, this would be "unconstitutional" and the royal assent could, and should, be withheld;<sup>152</sup> but this point was settled a century ago when Gladstone overrode Queen Victoria's extreme reluctance to give her assent to the Irish Church Bill, by reminding her that her main constitutional duty was to act on the advice of her ministers.

## VI Feasibility of a New Bill of Rights

People in Britain who in speeches and letters to the press call for a new Bill of Rights or statutory declaration of civil liberties, but who are unacquainted with the flexible nature of the British constitution, are not aware of the juristic problems involved. To educated readers in a country which has a written constitution containing a special procedure for amendment and entrenched sections, the problems will seem familiar and obvious. To most British lawyers the matter has so far appeared to be merely "academic," which in practitioners' parlance

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150. [1953] S.C. 396; [1953] S.L.T. 255.

151. MacDermott, *The Decline of the Rule of Law*, 23 N. IR. L.Q. 475, 494 (1972).

152. CALVERT, *supra* note 143. The author was a senior lecturer in law at Queen's University, Belfast. *Contra*, MAITLAND, *supra* note 32, at 332: "We have no ir-repealable laws; all laws may be repealed by the ordinary legislature, even the conditions upon which the English and Scottish parliaments agreed to merge themselves in the parliament of Great Britain."



means, not worth discussing. However, at least three holders of high judicial office have recently advocated a statutory declaration of individual rights. Quintin Hogg, Q.C., M.P., shortly before he became lord chancellor as Lord Hailsham of St. Marylebone, published some proposals for constitutional reform. Among his proposals were a new Bill of Rights by which Parliament would limit its right to legislate to the detriment of individuals or regional rights; and a provision that the judiciary would have the right to adjudicate on the constitutionality of laws, unless the constitution had been deliberately overridden in any particular by a deliberate decree, which could not be passed without debate. Lord Hailsham went on to say that he had changed his mind about the traditional British view of the relative unimportance of declarations of rights compared with remedies.

It is the arbitrary rule of the modern Parliament itself which needs consideration. Every other country—including those Commonwealth countries—have insisted on safeguards of this kind, and in theory we are committed to it . . . . [T]he European Convention—which embodies many of the same rights—is enforceable, and we are party to it. Cannot our judiciary be entrusted with some of the powers, which, at least in theory, we have entrusted to a European court?<sup>153</sup>

This refers to the European Court of Human Rights set up under the European Convention of Human Rights and Fundamental Freedoms.<sup>154</sup> The United Kingdom has accepted the compulsory jurisdiction of this court, and has recognized the right of individuals to bring petitions against her before the European Commission of Human Rights.<sup>155</sup> Lord Justice Salmon (now a lord of appeal) said in a recent lecture:

I am beginning to wonder whether it would not be wise to evolve, not an elaborate constitution, but perhaps the equivalent of a modern Bill of Rights. A statute which should lay down our basic freedoms, provide for their preservation and enact that it could not be repealed save by, say, a 75% majority of both Houses of Parliament . . . . I recognise that, in theory, it would be possible to repeal such an Act—even perhaps by a simple majority. In practice, however, it would be exceptionally difficult for any Government to do so. Whilst it remained on the Statute Book, it would afford real protection against the gradual erosion of liberty as well as direct attack upon liberty.<sup>156</sup>

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153. Q. HOGG, *NEW CHARTER* (1969). See also articles by Lord Hailsham in *The Times* (London) May 12, 16, 19 and 20, 1975.

154. *CMD. No. 8969* (1953); *CMD. No. 9221* (1954).

155. *CMD. No. 2894* (1966); prolonged *CMD. No. 5026* (1972).

156. Lord Scarman, who was the first chairman of the English Law Commission, in his recent Hamlyn Lectures (expected to be published in 1975) expressed the opinion that Britain needs an entrenched Bill of Rights which would take into account her inter-

Charles L. Black, Jr., has gone so far as to ask whether, in view of the adoption of the European Convention, there is not already a British Bill of Rights. It should be noticed that the recognition of the jurisdiction of the European Court of Human Rights and of the right of individuals to petition is in practice made for short periods at a time. Black acknowledges that adoption of the convention does not make it part of the internal law, and suggests that Parliament could make the convention enforceable by internal law and could prescribe a rule of construction whereby the courts would make it override inconsistent laws. He admits, however, that this would hold only so long as it was not expressly repealed and that no Parliament can bind its successor.

Two model precedents exist within the commonwealth whereby legislatures which are unable to bind themselves have attempted what we may call quasi-entrenchment of certain provisions. One model is provided by the unicameral Parliament of New Zealand which passed an Electoral Act in 1956 which enacted in section 189 that certain provisions relating to the life of Parliament, the franchise and secret ballot, might not be repealed or amended except by a majority of 75% of all the members of the House of Representatives or by a simple majority of votes in a referendum. Section 189 itself was not similarly protected, because it was recognized that double quasi-entrenchment would be no more effective than the simple kind. The better opinion appears to be that the effect of this provision, while it may impose a moral obligation amounting to a constitutional convention, does not constitute a legal limitation on the New Zealand Parliament. Some New Zealand lawyers, however, think that repeal or amendment by simple majority would require "two bites to the cherry," it being necessary first to repeal section 189 (which could be done by simple majority);<sup>157</sup> but there does not seem to be any point in this<sup>158</sup>—if necessary at all, it could probably be done by two sections in the same act.

The other model is provided by Canada, whose Parliament—although bicameral and federal—may be regarded in federal matters as

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national and internal obligations in the human rights field, as well as her new relationship with the European Economic Community and, if devolution comes about with the various regions." *The Times* (London), Dec. 6, 1974, at 4, col. 5.

157. Robertson, *The Reserved Provisions of the Electoral Act*, 1 OTAGO L. REV. 222 (1967).

158. "Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. 'When you repeal the law itself', says he, 'you at the same time repeal the prohibitory clause which guards against such repeal.'" 1 W. BLACKSTONE, COMMENTARIES 90-91.

being in a similar position to that of New Zealand for the present purpose. An act passed by the Canadian Parliament in 1960 contains the "Canadian Bill of Rights." This recognises and declares certain enumerated rights and freedoms and, in a section of which the side note reads "Construction of law" enacts that: "Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognised and declared." The effect of the decision of the majority of the Supreme Court in *R. v. Drybones*<sup>159</sup> seems to be that an abridgment of the declared rights cannot be done by statutory implication, but would require *express* words in an act of Parliament. This is far from constituting entrenchment because, not only could the Canadian Parliament expressly exclude the operation of the Bill of Rights in any act, but it could by the ordinary legislative procedure expressly repeal or amend the Bill of Rights itself.

Opinions in Britain will differ as to whether it is desirable for the United Kingdom to follow either the New Zealand or the Canadian model, and (if so) which. The present writer has suggested elsewhere<sup>160</sup> a method by which—if this were desired—the United Kingdom could give itself a legally entrenched bill of rights. The solution is so radical, however, that it is almost certainly beyond the bounds of practical politics at the present time. It would require nothing less than the replacement of the existing constitution (including Parliament) by a new (written) constitution, which would create a new legislature, and would entrench the Declaration of Rights together with the procedure for constitutional amendment and the power of judicial review of legislation. There would have to be a breach of legal continuity between the old constitution and the new. If the country were to go through all this trouble, the new written constitution might as well include membership of the European Community and the status of Northern Ireland, together with provision for the monarchy, a second chamber, the maximum life of the legislature and the frequency of its meetings, the prime minister, the cabinet and ministerial responsibility, citizenship,

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159. 9 D.L.R. 3d 473 (1969); see also MacKinnon, *Booze, Religion, Indians and the Canadian Bill of Rights*, [1973] Pub. L. 295; Marx, *The Canadian Bill of Rights and R. v. Drybones—A New Outlook?*, 24 N. IRE. LEGAL Q. 74 (1973).

160. O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW, *supra* note 76, at 156-61.

independence of the judiciary and so on. All this would involve the most drastic constitutional transformation since Cromwell's short-lived Instrument of Government.<sup>161</sup>

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161. S. GARDINER, CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, 405 (Oxford, 3d ed., 1906).