



House of Commons
European Scrutiny Committee

**The EU Bill and
Parliamentary
sovereignty**

Tenth Report of Session 2010–11

***Volume I: Report, together with formal
minutes***

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The European Scrutiny Committee

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1 Introduction

1. Under the heading of ‘Europe’, the Coalition’s *programme for government* said that it would “examine the case for a United Kingdom Sovereignty Bill to make it clear that the ultimate authority remains with Parliament.” On 10 September the Minister for Europe wrote to the Committee announcing the Government’s intention to introduce legislation to ensure that the British people and Parliament would have more say on proposals to transfer power and competence to the EU. On 6 October the Minister wrote again to say that the Bill would include a provision affirming the principle of Parliamentary sovereignty. The European Union Bill was presented to Parliament on 11 November 2010. We immediately announced our intention to conduct an inquiry and to produce a Report on the Bill’s asserted Parliamentary sovereignty clause before the Bill’s Second Reading. It is our intention to report on the Bill’s Part 1 provisions, which require “referendum locks” for transfers of powers or competencies and primary legislation for *passerelles*, at a later date.

2. This is the first occasion on which we have conducted pre-legislative scrutiny. We were conscious of the need to receive submissions from EU and constitutional legal experts of differing views and to challenge them in public evidence sessions; we therefore asked the Government for sufficient time to be made available between First and Second Reading to allow that to happen. In response to that request, the Minister replied:

“You ask that there should be sufficient time after introduction of the Bill for your Committee to consider and take evidence on the Bill and its provisions. In implementing the Government’s commitment for a referendum lock, I am very much aware of the need for Parliament, and indeed our wider public, to have political and legal clarity on what this will and will not mean in practice. It is therefore important that your Committee should be able to consider properly the Bill and its provisions, and in order to assist in your consideration of the Bill, I should be pleased to appear before your Committee soon after First Reading.”¹

3. Given these encouraging words it is hard to see why, in a Parliamentary session which has until 2012 to run, we were given less than four weeks in which to take evidence and agree a Report. The Foreign Secretary declined our request that he, rather than the Minister for Europe, should give evidence. The Minister for Europe’s evidence session is now to be held on the day before the Bill’s Second Reading. It appears to us that the Government has abided by the letter but hardly the spirit of its commitment to allow the Committee properly to consider the Bill and its provisions.

4. The Committee received 14 written submissions and took evidence from five expert witnesses: Professor Paul Craig, Professor in English Law, St John’s College, Oxford; Professor Trevor Hartley, Professor Emeritus of Law, London School of Economics; Professor Trevor Allan, Professor of Jurisprudence and Public Law, Pembroke College, Cambridge; Professor Adam Tomkins, Chair of Public Law, University of Glasgow; and Professor Anthony Bradley, Research Fellow, Institute of European and Comparative Law,

1 Letter from the Minister for Europe, 6 October 2010 (not printed).

University of Oxford. We are extremely grateful to all those who took the trouble, at very short notice, to produce written submissions and give oral evidence. Regrettably, shortage of time before Second Reading denied us the chance of hearing from the Minister for Europe before agreeing this Report. We have, however, a detailed letter from the Minister on clause 18 and the Government's Explanatory Notes on which we comment in our Conclusions.

5. Given the complexity of the subject matter which it addresses, this Report sets out in some detail the legal relationship between the United Kingdom and the European Union and the current debate on the scope of Parliamentary sovereignty, before evaluating the Parliamentary sovereignty clause in the light of the evidence received and coming to our conclusions.

6. European legislation has a profound impact on the daily lives of the voters and the people of the United Kingdom in virtually every sphere of activity. The quantitative impact is significant. According to the House of Commons Library note of 13 October, "The British Government estimated that around 50% of UK legislation with a significant economic impact originates from EU legislation." But as the note also indicates, the qualitative effect is deeper, particularly with EU Regulations which automatically become part of national law as soon as they are adopted in Brussels.

7. All this is reflected in the immense range and impact of the myriad and specific competences and powers derived from the Lisbon Treaty. These can be judged by the several pages of the table of contents to the Treaty covering such matters as external action, foreign and security policy, security and defence policy, citizenship, internal market, agriculture, fisheries, free movement, border checks, asylum and immigration, civil and criminal and police matters, justice and home affairs, transport, competition, tax, economic and monetary policy, employment and social policy, public health, consumer protection, industry, the environment, energy, commercial policy and financial provisions.

8. All of these are regulated within a framework of European Union law within the jurisdiction of the Court of Justice of the EU with implications for Parliamentary sovereignty. Recent vivid examples of the application of European Union law and jurisdiction include provisions relating to the City of London, European economic governance and the Irish bailout, to name but a few.

2 The UK's legal relationship with the EU

9. To come to a conclusion on whether a statutory provision is necessary to shield the doctrine of Parliamentary sovereignty from EU law requires an explanation of the relationship between national and EU law.

European Communities Act 1972

10. The UK is a 'dualist' state, unlike many continental European countries, which are 'monist'.² In dualist states a treaty ratified by the Government does not alter the laws of the state unless and until it is incorporated into national law by legislation. This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the Government or a private individual.

11. Under the European Communities Act 1972 (ECA) Parliament voluntarily gave effect to the UK's obligations and duties under the former Community and now EU Treaties in national law. The ECA defines the legal relationship between the two otherwise separate spheres of law, and without it EU law could not become part of national law.

12. Section 2(1) provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this sub-section applies.

More simply stated, section 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically "without further enactment" incorporated and binding in national law without the need for a further Act of Parliament. Section 2(1) applies to EU law now and as it develops in the future "from time to time" either by Treaty revision "created by" or interpretation by the Court of Justice of the EU "arising under". So, when an EU Regulation enters into force, it automatically becomes part of national law, as it does in the other 26 Member States on the same day. The uniqueness of section 2(1) is that it gives effect to directly applicable or effective EU law without the need each time for implementing legislation, as would usually be required for the incorporation of other obligations assumed under international law by a dualist State. The domestic courts are obliged to give full effect to section 2(1), in the light of the case law of the Court of Justice (section 3(1)).

² In a 'monist' state, a treaty obligation becomes directly applicable in domestic law simply by virtue of the act of ratification, cf. Article 55 of the Constitution of the French Republic.

13. Section 2(2), by contrast, applies to measures of EU law that are neither directly applicable nor have direct effect. This provision makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as statutory instruments; importantly, such secondary legislation can amend an Act of Parliament (section 2(4)) since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.³

14. Section 2(4) also provides that:

any enactment passed or to be passed [...] shall be construed and have effect subject to the foregoing provisions of this section” (the ‘foregoing provisions’ include section 2(1)).

15. Section 3(1) provides:

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

16. Section 2(4) and 3(1) give effect to the doctrine of the supremacy of EU law, as interpreted by the Court of Justice, over national law; and where EU law is in doubt, requires UK courts to refer the question to the Court of Justice. As a consequence of the rule of construction in section 2(4) all primary legislation enacted by Parliament after the entry into force of the ECA on 1 January 1973 is to be construed by the courts and take effect subject to the requirements of EU law. This obliges the courts to disapply legislation which is inconsistent with EU law. This, in short, is what happened in the celebrated *Factortame*⁴ case: Part II of the Merchant Shipping Act 1988 was held by the House of Lords to be inconsistent with EU law and therefore disapplied. The same principle was followed by the House of Lords in disapplying discriminatory provisions in the Employment Protection (Consolidated) Act 1978.⁵ In neither Act was there any provision expressly providing for the later enactment to apply notwithstanding the ECA.

17. The power given to national courts under section 2(4) is remarkable, because, by disapplying provisions of primary legislation, the court refused on these two occasions to give effect to an Act—the will—of Parliament. It is also unique: it is only by virtue of the ECA that the courts have this power. Under the Human Rights Act, for example, the courts have the power to make a declaration of incompatibility, but not to disapply the offending statutory provision.

3 The provisions of s.2(4) do not, of course, displace the power to implement by Act of Parliament, and it would remain necessary to implement by Act of Parliament (or under some other power) in those cases where Schedule 2 of the ECA limits the scope of s.2(2).

4 *Factortame (No 1)* [1990] 2 AC 85; *Factortame (No 2)* [1991] 1 AC 603.

5 *R v Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

A challenge to that legal relationship – the ‘Metric Martyrs’ case

18. The relationship between EU law and national law—in this case national constitutional law—was most prominently tested in the ‘Metric Martyrs’⁶ case, which was decided by the Divisional Court (part of the High Court) in 2002. The leading judgement was given by Lord Justice Laws. It is to counter the arguments made in this case, the Explanatory Notes tell us, that the so-called Parliamentary sovereignty clause was included in the Bill. Counsel for Sunderland City Council (one of the prosecuting authorities), Eleanor Sharpston QC, now the UK Advocate-General at the Court of Justice, argued before the Divisional Court that the binding effect of the EC Treaty in domestic law did not depend solely upon the terms of its incorporation by the ECA, but also upon the higher principle of the supremacy of EU law, independent of national law, established by the Court of Justice in cases such as *Costa v ENEL*.⁷ In *Costa v ENEL* the Court of Justice held that:

It follows [...] that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal base of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁸

The effect of this argument was that EC law had become *entrenched*, rather than merely *incorporated*, into domestic law, by virtue of a principle of EU law which was independent of constitutional principles of national law, such as dualism. If this argument were right, the consequence would have been that the EU institutions could set limits on the power of Parliament to make laws which regulate the legal relationship between the EU and the UK.⁹

19. Lord Justice Laws rejected the argument, saying that it would mean that Parliament, in enacting the ECA, had agreed to bind its successors to EU supremacy over it, which, being sovereign, it could not do: “[t]here is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy.”¹⁰ In so deciding, he also held that the ECA was a “constitutional” statute which could not be impliedly repealed by subsequent statutes. His reasons for this finding were as follows:

“In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental [...]. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were “ordinary” and “constitutional” statutes. The two categories

6 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

7 [1964] ECR 585.

8 Paragraphs 593–594.

9 See paragraphs 56 and 57 of the judgment of Laws LJ in *Thoburn*.

10 Paragraph 58 of the judgment of Laws LJ in *Thoburn*, quoted in full in paragraph 108 of the Explanatory Notes.

must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the H[uman] R[ights] A[ct], the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It maybe there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.

“Ordinary statutes may be impliedly repealed Constitutional statutes may not. For the repeal of a constitutional Act the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s actual—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think this test could only be met by express words in the later statute [...].”¹¹

20. We asked the witnesses to assess the impact of *Thoburn*. In his written evidence, Professor Bradley commented that, in failing to include the quotation above, the Government’s Explanatory Notes “do not present a balanced account of this complex judgment”.¹² We agree with this view. He concluded that four propositions could be drawn from the judgment:

“(1) All the specific rights which EU law creates are by the 1972 Act incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation.

“(2) The 1972 Act is a constitutional statute: that is, it cannot be impliedly repealed.

“(3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes.

“(4) The fundamental legal basis of the UK’s relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate

11 Paragraphs 62 and 63.

12 Ev 26.

the measure and give it overriding effect in domestic law. But that is very far from this case.”¹³

21. Professor Hartley summarised the judgment as follows: “the *Thoburn* principle is that the position of EU law in the UK and the sovereignty of the British Parliament ultimately depend on British law.”¹⁴ Professor Allan as follows: “I think the *Thoburn* judgment affords quite a useful reconciliation. We go as far as we can to accept the primacy of the EU law, but without accepting the constitutional basis put forward by the European Court of Justice.”¹⁵ And Professor Craig as follows:

“[M]y reading of *Thoburn*—I don’t think this at all unorthodox or heterodox—is as follows: what Lord Justice Laws said in *Thoburn* was that the constitutional impact of EU law on national law was not going to be dictated top-down by the European Court of Justice on our courts. The nub of his thesis was that whatever impact EU law had within the UK was going to be decided by UK constitutional precepts and by UK courts. That was not at all inconsistent in and of itself with the House of Lords decisions in *Factortame* and the *Equal Opportunities Commission* case. So it is for our courts to decide what they believe to be the impact of EU law within our national constitutional order. That is what I think Lord Justice Laws was saying, and rightly so, in the *Thoburn* case.”¹⁶

3 Divergent opinion on the scope of Parliamentary sovereignty

22. In order to evaluate the stated purpose and likely effect of the Parliamentary sovereignty clause in the EU Bill, it is first necessary to understand, at least in outline, the debate currently taking place among academic commentators and some judges about what Parliamentary sovereignty in the UK really means. The debate is relevant to our inquiry because it has a bearing on:

- whether to conclude that Parliamentary sovereignty is being eroded—the concern asserted by the Government in the Explanatory Notes¹⁷—or evolving;
- whether the Government is correct to say that Parliamentary sovereignty is a “common law principle” that can “be put on a statutory footing”,¹⁸ described by Professor Tomkins as a matter of “great controversy”;¹⁹ and

13 Ev 26; the propositions quoted are conclusions reached by Lord Justice Laws.

14 Q 25.

15 Q 77.

16 Q 5.

17 Paragraph 106 of the Explanatory Notes.

18 Paragraphs 8 and 106 of the Explanatory Notes.

- whether a statutory provision derogating from EU law, and excluding the application of the ECA, would be enforced by the courts.

What is meant by Parliamentary sovereignty?

23. In the light of the evidence submitted to the inquiry we concluded, agreeing with Professor Bradley,²⁰ that the term “Parliamentary sovereignty” bears a number of meanings which can get confused. We prefer to use the term the “legislative supremacy of Parliament” in this Report for the reasons so clearly set out by Professor Bradley:

“Dicey’s *Law of the Constitution* made famous the phrase ‘the sovereignty of Parliament’, but a more exact term for the legal doctrine is ‘legislative supremacy’, whereby the power of the Queen-in-Parliament to legislate is subject to no legal limitations, and the courts have no power to review the validity of Acts of Parliament. This doctrine is always considered to be subject to the limitation that Parliament is unable to bind its successors (a matter to which I return briefly below). An advantage of using the term supremacy rather than sovereignty is that it enables the supremacy of EU law to be balanced against the supremacy of national law.”²¹

An unsettled constitution

24. The British constitution, many commentators agree, is in a state of flux. Professor Tomkins in his evidence spoke of a “prolonged moment of constitutional fluidity”,²² and many of the witnesses enumerated significant constitutional reforms that have taken place in the UK over recent years. These include the devolution settlements, the Human Rights Act 1998 and the Constitutional Reform Act 2005, the last of which incorporated the principle of the rule of law in statute for the first time, and reinforced the principles of the separation of powers and independence of the judiciary by removing the judicial powers of Lord Chancellor and creating the Supreme Court. The 2005 Act did not disturb the Act of Settlement 1701, however, which included ultimate provision for Parliament to petition the Sovereign for the removal of judges.

Acts of Parliament v the common law

25. On one side of the debate are those who argue that the absolute sovereignty of Parliament as understood by Dicey remains unqualified, or at least *should* remain unqualified, by recent constitutional reforms or change in judicial climate. So Parliament can legislate however it chooses, for example to stop judicial review by the High Court. And if it did so, the judges would have to observe the terms of such legislation so long as they were unambiguously expressed. As Professor Tomkins says at paragraph 6 of his written evidence:

19 Q 106.

20 Ev 24.

21 *Ibid.*

22 Q 93.

“What the doctrine establishes is the legal supremacy of statute. It means that there is no source of law higher than—i.e. more authoritative than—an Act of Parliament. Parliament may by statute make or unmake any law, including a law that is violative of international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it.”

The late Lord Bingham was emphatic that judges should be subservient to the legislative supremacy of Parliament, as quoted here in the written evidence of Professor Tomkins:

“It has to my mind convincingly been shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.”²³

Professor Jeffrey Goldsworthy, who submitted written evidence²⁴ and whose book on Parliamentary sovereignty was described by Lord Bingham as “magisterial”,²⁵ is also a notable proponent of this view.

26. On the other side of the debate are those whose view is that the sovereignty of Parliament is a construct of the common law. As such it is open to revision by the courts in circumstances where, say, a court has to reconcile contradictory statutory provisions, or a higher law, such as a fundamental human right, is violated. Professor Allan, who subscribes to this view, explained it as follows:

“The nature and scope of legislative supremacy are matters of common law in the sense that they are questions to be resolved, necessarily, by the courts in order to determine contested and doubtful cases. Such cases depend for correct resolution on consideration of all the pertinent reasons. The present context, concerning the implications of British membership of the EU, vividly illustrates the dependence of Parliament’s continuing legislative authority on judicial interpretation of the nature of the UK legal order, viewed as a whole.

“The *Thoburn* judgment provides a good illustration of the operation of the common law constitution. In seeking to accommodate the European doctrine of the primacy of EU law with the supremacy of Parliament, as a matter of domestic constitutional law, Lord Justice Laws made—or rather proposed—a very modest change to the general rule permitting implied repeal: it would be necessary for Parliament *expressly* to amend or repeal the ECA before it could be overridden by a later statute.”²⁶

Professor Craig shared Professor Allan’s belief that Parliamentary sovereignty was a construct of the common law²⁷ and that “it was not beyond peradventure”²⁸ that the courts

23 Ev 6.

24 Ev 31.

25 Goldsworthy, Jeffrey, *The Sovereignty of Parliament: History and Philosophy* (OUP, 2001). This book was followed by *Parliamentary Sovereignty: Contemporary Debates* (Cambridge Studies in Constitutional Law, CUP, 2010).

26 Ev 27.

27 Q 7.

would disapply a statutory provision which was violative of fundamental rights. In answer to a question from the Chairman,²⁹ Professor Craig reconfirmed his previously stated view that the legislative supremacy of Parliament was ultimately to be decided by the courts as being “derived from normative arguments of legal principle, the content of which can and will vary across time”. He also reconfirmed that “on this view, there is no *a priori* inexorable reason why Parliament merely because of its very existence must be regarded as legally omnipotent”, a view which he shared with Professor Allan.

Professor Bradley expressed a “qualified belief in Parliamentary sovereignty”.³⁰ Underpinning the evidence of all three witnesses was the view that Parliament could not be supreme—that is, having the capacity to make any law whatsoever—simply by dint of being Parliament: a further, normative justification was required.³¹ A corollary of this view was that the courts could in extreme cases, for example where the rule of law was infringed, disapply the offending provision of an Act of Parliament.

The *Jackson* case

27. The scope of the legislative supremacy of Parliament issue was considered by the appellate Committee of the House of Lords in the case of *Jackson v Attorney General*³² in 2005, which concerned a challenge to the constitutional validity of the Hunting Act 2004. Professor Tomkins commented that, although “the case had nothing to do with EU law [...] it is the most recent leading decision on the law of parliamentary sovereignty [and] is directly relevant to a number of the issues raised in the Committee’s call for evidence”.³³ For this reason we cite the relevant passages from the judgements here, and return to it in a subsequent section of the Report.

28. In *Jackson* three of the law lords, albeit *obiter* (that is, not in relation to the question the court was being asked to decide), suggested that in certain circumstances the courts had inherent powers to disapply legislation.

Lord Steyn said:

“We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as

28 Q 7.

29 Q 8.

30 Q 49.

31 Q 8.

32 [2006] 1 AC 262.

33 Ev 4.

it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.”³⁴

Lord Hope said:

“Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

“For the most part these qualifications are themselves the product of measures enacted by Parliament. Part I of the European Communities Act 1972 is perhaps the prime example. Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect of section 2(1) when read with section 2(4) of that Act. The direction in section 2(1) that Community law is to be recognised and available in law and is to be given legal effect without further enactment, which is the method by which the Community Treaties have been implemented, concedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area.”³⁵

And Lady Hale said:

“The concept of Parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century (I appreciate that Scotland may have taken a different view) means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny. Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998. It is possible that other qualifications may emerge in due course. In general,

34 [2006] 1 AC 262, Paragraph 102.

35 *Ibid*, Paragraphs 104 and 105.

however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.”³⁶

We note in passing that, consistent with the reasoning of Lord Bridge in *Factortame*, all three judges directly or indirectly cite the ECA as an early example of the restriction of Parliamentary sovereignty, albeit as a result of a (voluntary) Act of Parliament.

By contrast, Lord Bingham observed in *Jackson* that:

“The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament. It is, as Maurice Kay LJ observed in para 3 of his judgment, unnecessary for present purposes to touch on the difference, if any, made by our membership of the European Union. Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.”³⁷

4 The sovereignty clause

The clause

29. Clause 18 is contained in Part 3 of the Bill and provides as follows:

Status of EU law dependent on continuing statutory basis

It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom.

Stated purpose

30. On 11 October the Government issued a Written Ministerial Statement in the House of Commons on the sovereignty clause. It stated:

The Government have explored how to ensure that this fundamental principle of parliamentary sovereignty is upheld in relation to EU law. We have assessed whether the common law provides sufficient ongoing and unassailable protection for that principle. Our assessment is that to date, case law has upheld that principle. But we have decided to put the matter beyond speculation by placing this principle on a statutory footing.

36 [2006] 1 AC 262, Paragraph 159.

37 Paragraph 9.

31. In a letter to colleagues on the day the Bill was introduced, the Minister for Europe (David Lidington) explained that:

“[w]hile, in our view, the Common Law is clear that the doctrine of Parliamentary sovereignty has not been affected by Britain’s membership of the EU, it cannot be denied that the issue has been the subject of legal and political speculation and arguments to the contrary have been seriously advanced in a court of law. So we believe there is great merit in putting the matter beyond speculation by affirming the Common Law position in statute, which will reinforce the rebuttal of contrary arguments in the future.”

32. The Explanatory Notes accompanying the Bill are intended “to help inform debate on it”. They deal in some length with clause 18.³⁸ Paragraphs 104 and 105 explain that the clause is declaratory of the dualist nature of the UK’s constitution, by which EU law is only enforceable under national law because the ECA makes express provision for it to be so. In answer to why it has been included in the Bill, paragraph 106 says clause 18 serves:

to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts. By placing it on a statutory footing the common law principle that EU law takes effect in the UK through the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.

33. Paragraphs 107 and 108 deal with the ‘Metric Martyrs’ case³⁹ and cite paragraph 59 of the judgment of Lord Justice Laws as support for the statement of the common law principle in paragraph 106, cited above. Paragraphs 109 and 110 add two clarifications. Paragraph 109 states that clause 18

does not alter the existing relationship between EU law and UK domestic law; in particular the principle of primacy of EU law. The rights and obligations assumed by the UK on becoming a member of the EU remain intact.

34. Paragraph 110 adds that “the clause is declaratory of the existing common law position” and does not alter the competences of the devolved legislatures or administrations.

38 See Appendix.

39 See paras 8–21 of this Report.

5 Evidence from expert witnesses

35. We have divided the evidence we took under four main headings:

- Is the doctrine of the legislative supremacy of Parliament under threat from EU law?
- Can an Act of Parliament derogate from EU law by excluding the application of the ECA?
- Clause 18; and
- Parliament binding its successors?

We report on our conclusions in the subsequent chapter.

Is the doctrine of the legislative supremacy of Parliament under threat from EU law?

36. Paragraph 106 of the Explanatory Notes says clause 18 will help “counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law”. We asked the expert witnesses who gave evidence to us whether they agreed.

37. Their replies necessarily involved an evaluation of the judgment of Lord Justice Laws in *Thoburn* and its likelihood of being overturned. This is because it was in *Thoburn* (and *Thoburn* alone) that the argument was advanced that EU law was a higher legal order that had become entrenched autonomously, so not through the gateway of the ECA, in the national constitution. Their views were mixed.

38. Several of the witnesses thought that the judgement in *Thoburn* was well reasoned and, though only a first instance decision of the Divisional Court (of the High Court), was unlikely to be overturned. When asked if *Thoburn* was likely to be overturned, Professor Craig said that:

“the decision in *Thoburn* was a very well-reasoned decision, but it was a decision of the Divisional court and it could, in that sense, be overturned or overtaken by a decision of the Court of Appeal or the Supreme Court—so, undoubtedly, yes. On the argument of the substance of the point, one would, of course, be hypothesising as to whether the Court of Appeal or the Supreme Court would be likely to overturn the reason. But, my own view is whether they did so or not—I think they would affirm the same reasoning in *Thoburn*.”⁴⁰

39. Professor Hartley agreed: “I don’t think the Supreme Court would take a different view. So theoretically a different view could be taken; in practice, I don’t think it would.” Professor Tomkins also agreed, but counselled against placing too much reliance on a first-instance decision of the High Court. When we asked Professor Tomkins whether

40 Q 14.

Parliament could be sure, as a consequence of the *Thoburn* decision, that EU law was only directly applicable and effective in the EU by means of the ECA, he replied:

“That’s my view, and that was my view long before Lord Justice Laws decided the *Thoburn* case. That was my view when I first read and tried to understand the *Factortame* litigation from 10 years previously. I think that it’s an uncontroversial position to take. I’m not aware of anybody taking the alternative position seriously, apart from Eleanor Sharpston QC—as she then was—who put the argument to the contrary on behalf of her clients in the *Thoburn* case.”⁴¹

40. In his written evidence Professor Dougan was particularly dismissive of the concerns raised in paragraph 106 of the Explanatory Notes and clear that EU law is enforced nationally only by means of the ECA:

“It should be observed from the outset that the “concerns” referred to in para 106, so far as concerns the domestic status of EU law, find no objective basis in UK constitutional law and no real support within mainstream scholarly opinion. In fact, the argument that EU law could somehow oust Parliamentary sovereignty as the cornerstone of the UK constitutional order—particularly when expressed in terms of a slow-burning judge-led plan to recognise the EU as a self-authenticating entity whose authority is substituted for that of the UK (or any other Member State)—is essentially political in nature.”[...]

There is a strong consensus among legal experts that EU law was and remains incorporated into UK law by virtue of an Act of Parliament. Doctrines such as the duty of consistent interpretation (the obligation of national courts to interpret national law, as far as possible, in conformity with EU legislation), the principle of direct effect (the capacity of a provision of EU law to produce cognisable legal effects within the national system) and the principle of supremacy (the preference given to EU law where national law is incompatible with directly effective EU provisions) all apply within the UK thanks to the Parliamentary mandate created by the European Communities Act 1972, as interpreted by the UK courts in landmark rulings such as *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1990] 3 WLR 818 and *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

On the basis of that mandate, the UK courts will interpret UK legislation in conformity with our EU obligations and will disapply UK legislation if it conflicts with directly effective EU law. The requirement that directly effective EU law enjoys supremacy in the event of an irreconcilable conflict with national law is a highly significant practical reality within the UK—but it does not take effect in some autonomous manner, directly under the authority of the European Union or the European Court of Justice, independently of or despite the will of Parliament itself. Its fundamental constitutional basis remains the principle of Parliamentary sovereignty.⁴²

41 Q 82.

42 Ev 11.

41. Professors Allan and Bradley were more circumspect. But their arguments were concerned more with the ability of an Act of Parliament to disapply the ECA than with the autonomous encroachment of EU law. Professor Bradley did not think that *Thoburn* answered:

“all the future questions that there might be about the relationship between European Union law and United Kingdom law for this reason: the European Communities Act provides the doorway through which European Union law is received, but it is a very short Act, and European Union law is very complex, being a legal system of a kind to which we have not been exposed before. Therefore, there is the European dimension which cannot simply be controlled by the European Communities Act. So long as the European Communities Act remains in force, at a European level, European law will prevail. The difficulties come—they were seen in the *Thoburn* case to be difficulties that the courts could deal with—if it is the intention of Parliament to depart from European Union law, how it should do that and, when it has done that, what the effects of it will be as a matter of United Kingdom constitutional law. Those difficulties have not been fully resolved by the *Thoburn* case.”

42. Although Professor Allan thought the “entrenchment view” argued in *Thoburn* was “rather weak” and “rightly rejected”, he followed a similar line of reasoning to Professor Bradley:

“I think that the halfway house, keeping the European Communities Act unamended but then having a notwithstanding clause in relation to a later measure, sets up a real contradiction. The longer we remain a member of the European Union and the more powers that are transferred, the less realistic it becomes, probably, for judges—not to deny that Britain could not withdraw altogether—but the more unrealistic it becomes to expect judges to disapply or, rather, to override EU law in particular instances. I do think there is some possibility there that doctrine may shift in that respect and so we might then see *Thoburn* as one step towards a larger modification whereby the judges would say, ‘Well, we must have an explicit repeal or amendment of the European Communities Act.’”⁴³

Can an Act of Parliament derogate from EU law by excluding the application of the ECA?

43. Overall, the majority of witnesses thought that if an Act of Parliament were to derogate from an EU Regulation or Directive, for example, and in so doing expressly and unequivocally disapply the ECA, the courts would be likely to follow the derogating Act of Parliament. They did not, on the whole, think that the *obiter* comments of the law lords in *Jackson* would make it less likely that the courts would follow the derogating act,⁴⁴ although Professor Tomkins thought we ought to be concerned about the impact of *Jackson* on Parliamentary sovereignty.⁴⁵ But their views were necessarily informed by their

43 Q 66.

44 Q 70, for example.

45 Q 87: “The case, I think, is authority for not much, but it is authority for the proposition that we have the right to be concerned about what is going to happen to parliamentary sovereignty in the hands of the courts.”

opinion of the scope of the legislative supremacy of Parliament, reported in chapter 3, as interpreted by the courts, whose duty it was to uphold the rule of law, under EU law through the ECA as well as national law.

44. Professor Hartley thought that Parliament could legislate contrary to EU law:

“Provided it makes its intention clear, Parliament can legislate contrary to Union law. It can restrict or abolish the power of the European Court to give judgments that are legally binding in the United Kingdom. It can abolish, in whole or in part, the power of United Kingdom courts to refer questions to the European Court. If the Act was appropriately drafted, there would be no way in which its effectiveness could be challenged in the courts of the United Kingdom.”⁴⁶

45. In evidence he elaborated further:

“provided the revocational amending statute was appropriately drafted, was clear and unequivocal and expressed clearly, notwithstanding anything in EU law and notwithstanding the European Communities Act 1972. If it was in sufficiently strong terms, then in my opinion, the Supreme Court would accept it as valid law and would not disapply it.”⁴⁷

46. His views were consistent with those of Lord Denning in *Macarthy's Ltd. v Smith*—an authority referred to in the Explanatory Notes, although this important passage of the judgment was inexplicably and wrongly omitted—who said:

“If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. ... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.”⁴⁸

47. Professor Bradley thought this was a difficult question, but his view, at the moment, was that “if the intention is made very clear in the derogating statute that it is to operate, notwithstanding the particular rule of EU law, that is what the courts would apply and enforce.”⁴⁹ Professor Allan was less sure. He thought that if the ECA gives instructions to the judges to respect the primacy of EU law—which, in effect, it does—and a subsequent statute says that EU law is not to apply in a particular instance, the judges would be faced with a conflict of instructions. They then have to decide what the United Kingdom legal order requires them to do in those circumstances. He thought it was very hard to know the correct answer, although on balance he concluded that the courts would probably follow the derogating Act for the time being. However, a political solution might be preferred:

46 Ev 11.

47 Q 30.

48 *Macarthy's Ltd. v Smith* [1979] 3 All ER 325 at 329, as reported in paragraph 11 of Professor Hartley's written statement.

49 Q 64.

“I think that is right, but it may be that the judges are not the right forum. It may be that we have to rely on political measures to resolve the problem in the machinery of the Union. Otherwise we are giving judges conflicting statutory instructions and they have some duty to ensure that the rule of law, in the sense that people know what their obligations are, has reasonable certainty. Professor Bradley may be right. At the moment I think that a clear notwithstanding clause would probably be accepted, but I don’t think we can be confident that that will remain the case for ever.”⁵⁰

48. Professor Tomkins also thought a clear “notwithstanding clause” would be respected by the courts:

“I agree with the evidence that you’ve heard already this morning that it is very difficult to know whether clause 18 adds anything very much to the current legal and political debate about what the effect of a “notwithstanding” clause is likely to be. The short answer is we simply don’t know what the British courts would do with a “notwithstanding” clause, as it hasn’t been in legislation that has been litigated. I agree with the evidence of Professors Bradley and Allan that, assuming that the “notwithstanding” clause was sufficiently robustly and tightly drafted, as you would expect it to be, the British courts, on current evidence, would be highly likely to give effect to it.”⁵¹

Clause 18

What it purports to do

49. In its written evidence, the Government says that:

“by providing by statute that directly applicable and directly effective European Union law takes effect in the UK by virtue of an Act of Parliament, Parliament will be affirming the existing position under the common law, and making a clear and unambiguous statement of its intention. As paragraph 106 of the Explanatory Notes says, this will ‘provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.’ It will deal with the main concern expressed by the commentators which is that there may be future judicial drift on the question of how the primacy of EU law is achieved domestically in UK law;”⁵²

and that:

“[s]etting out categorically that directly applicable and directly effective European Union law takes effect in the UK by virtue of an Act of Parliament puts the matter

50 Q 68.

51 Q 90.

52 Ev 41.

beyond speculation and will assist the courts by providing clarity about Parliament's intentions."⁵³

50. However, the evidence, both written and oral, given by our witnesses does not support this legislative intention. It also begs the question whether it was right for the Explanatory Notes to say that Parliamentary sovereignty was a) "a common law principle" that could b) be put on a statutory footing.

What it does do

51. The great majority of the witnesses agreed that clause 18 is nothing more at most than a restatement of the doctrine of dualism. If it can be properly called a sovereignty clause at all, it is "sovereignty as dualism"⁵⁴ thought Professor Craig—but nothing to do with sovereignty as the legislative supremacy of Parliament over the courts⁵⁵. It simply reaffirms the idea that no treaty negotiated by the executive can take effect domestically until adopted by the legislature by Act of Parliament. As such, all agreed that it was declaratory (but consequently not constitutive of a right).

52. Opinions differed on whether clause 18 had any symbolic effect, but the great majority thought it did not. Professor Craig, however, thought its symbolic effect could come into play in two "unlikely scenarios": in the gap between Parliament repealing the ECA and the UK withdrawing from the EU Treaties, and as support for an act of Parliament which derogated from EU law by excluding the ECA.⁵⁶

53. In his written evidence, Professor Hartley set more store by the symbolism of the clause:

"I think that the clause has value, because it emphasises that this is the law and this is the constitutional position. In my opinion, even without clause 18, courts would do what it says, but it would encourage and sort of strengthen them. I think that it has value even though, strictly speaking, it does not change anything."⁵⁷

What it does not do

54. Professor Bradley did not see a need for clause 18:

"I see no good reason to dispute what is almost a truism, but I am not persuaded that there is a need for this even as a declaratory measure for the avoidance of doubt. If this is enacted, we can be certain that if at a future date the UK Parliament wished to revoke the 1972 Act to enable Britain to leave the EU, an Act to do so would be upheld by United Kingdom courts. However, is there any real doubt about this at the present time?

53 *Ibid.*

54 Q 11.

55 See paragraph 23 of this Report.

56 Ev 13, Q 10.

57 Q 31.

“But as is clearly stated in para 109 of the Explanatory Notes, what clause 18 does not do, and could not do, is to alter the nature of EU law, its primacy within the EU system and its relationship with UK law.

Nor does clause 18 provide an answer to questions about implied repeal of the kind that were considered by Laws LJ in the *Metric Martyrs* case.”⁵⁸

55. In oral evidence, Professor Bradley said that clause 18 was “unlikely to have much practical effect” but “may have symbolic effect”, but this would be very limited:⁵⁹ it would not have led to a different conclusion in *Factortame*.⁶⁰

56. Professor Allan was particularly dismissive of clause 18:

“The Explanatory Memorandum, paragraph 107, shows that clause 18 is intended to resist the theory whereby ‘the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States’. The clause is apparently intended to confirm the view of Lord Justice Laws, who insisted that since Parliament could not abandon its own continuing sovereignty, it was not possible for the ECJ by its own jurisprudence to alter the constitutional basis on which EU was received in the UK.

“It is hard to see how clause 18, if enacted, could affect the existing constitutional position. If it is true that the constitutional basis for the reception of EU law is a matter of British constitutional law, it must be true in virtue of a correct understanding of the common law. According to Lord Justice Laws’s account, Parliament may not abandon or surrender its continuing legislative supremacy, which is ultimately defined by judicial interpretation of the UK legal and constitutional order. Clause 18 therefore makes no difference: since it is a question of the nature and boundaries of Parliament’s powers, a statutory declaration adds nothing to the existing common law position.

“If, in the alternative, *Thoburn* were wrongly decided, and the correct position were that the autonomous EU legal order is now also the constitutional basis for the authority of EU law in the UK, clause 18 would equally be unable to alter the position. A court which accepted that the primacy of EU law was now entrenched within the UK would be forced to conclude that clause 18, if enacted, was erroneous.

“The Explanatory Memorandum, para 106, says that by ‘placing on a statutory footing the common law principle that EU law takes effect in the UK though the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties ... which has become an integral part of the UK’s legal system independent of statute. It is not, however, possible to place such a common law principle ‘on a statutory footing’ because the principle concerns the nature of continuing legislative authority. If, for example, a

58 Ev 25.

59 Q 55.

60 Ev 25.

new statute were to purport to override, or derogate from, directly applicable EU law, there would be a conflict with the legal consequences of the ECA, which only the courts could resolve. Doubts about the limits or consequences of conflicting statutory instructions cannot be resolved by appeal to further such instructions without begging the question at issue.”⁶¹

57. In evidence to us Professor Allan stated that he could not see how the clause would have any effect at all, other than restating the dualism principle. If there was no enabling power for legislation implementing EU law, that flaw could already be raised as a legal challenge without the need for clause 18. In the event that the Supreme Court did overturn *Thoburn*, finding that EU law was a higher legal order entrenched by virtue of the UK’s membership of the EU alone, clause 18 would make no difference: the court would have to conclude that it was an erroneous declaration. He concluded: “I can’t see any circumstances in which clause 18 could be significant other than perhaps in a purely symbolic way, as a restatement.”⁶² Similarly, neither Professor Craig nor Allan thought clause 18 would have been able to prevent the “entrenchment argument” raised in *Thoburn*.⁶³

58. Professor Goldsworthy was equally dismissive of Clause 18 and the Explanatory Notes, (and the passages in our Press Notice “Announcement of Inquiry” which were taken from, but did not endorse, the Explanatory Notes) but for opposite reasons to those of Professor Allan in the last paragraph of the quotation above. For him it is not only “dangerous, but false” to say that Parliamentary sovereignty is a common law principle. On the other side of the debate to Professor Allan, Professor Goldsworthy rejects any notion that Parliamentary sovereignty can be “made by the judges”, if so they could “at any time ‘unmake’ it if they should come to the view that it is no longer justified”. He also rejects the statement that Parliamentary sovereignty can be put on a statutory footing because an enactment containing a provision declaring Parliamentary sovereignty would necessarily presuppose that Parliament already has the sovereign authority to enact it.

59. Professor Craig, in saying clause 18 addressed “sovereignty as dualism”, drew a distinction with sovereignty as the legislative supremacy of Parliament:

“Clause 18 is not a sovereignty clause in that it tells us nothing as such about the relation between EU law and national law in the event of a clash between the two. It does not address sovereignty as primacy. Indeed EM para 109 expressly states that nothing in Clause [18] is intended to affect this.”⁶⁴

60. Professor Tomkins expanded on the same point in his evidence:

“There are two claims to supremacy on the table here and there have been since 1964, when *Costa v. ENEL* was decided by the Court of Justice eight years before the UK joined. These two claims to supremacy compete with one another. So far in the

61 Ev 26–28.

62 Q 56.

63 See Qq 14 and 56 for example. Of the witnesses who gave evidence only Professor Bradley disagreed with this (Q 52).

64 Ev 14.

history of the European Union, quite remarkably, these two claims to sovereignty have never clashed. The nearest they came to clashing in the UK case, of course, was the example of *Factortame*. But they have never actually clashed, so we don't know what will happen if or when they do. It's necessarily a speculative exercise.

"The immediate question for this Committee and the House is whether clause 18 will make any difference to any of this. My respectful submission to you is that it doesn't."⁶⁵

61. In relation to the assumptions made in paragraph 106 of the Explanatory Notes Professor Tomkins said:

"First, there is great controversy, as we have already seen, about whether parliamentary sovereignty is a common law principle. Secondly, clause 18 does not place on a statutory footing the common law principle of parliamentary sovereignty, not even with respect to directly applicable or directly effective EU law. It doesn't deal, as you have already heard, with the primacy issue; it deals only with the source issue, which isn't really a question of sovereignty."⁶⁶

62. He also said that he found clause 18 "baffling", because "it is addressing only that little bit of what is actually a much bigger set of concerns, and it is addressing the little bit of a much bigger set of concerns that does not seem to be problematic",⁶⁷ and that this could lead to dangerous consequences:

"Why put it in? I think it's extremely dangerous, as I say in the closing paragraphs of my written submissions. The rule that I would respectfully urge you to bear in mind in dealing with this or any other question of constitutional reform is the most powerful law of constitutional reform, which is the law of unintended consequences. The more I think about this, the smaller clause 18 seems. It seems to be dealing, as I said a few moments ago, with one aspect of a big problem that is not itself particularly problematic, because it was fairly clearly dealt with by the *Thoburn* judgment. Yes, we can't be overly relaxed about the fact that the *Thoburn* judgment is definitive for all intents and purposes. None the less, it's the state of the law for the time being, and nobody is really suggesting to you that it shouldn't be the state of the law for the time being. It deals with that. That's an issue that doesn't really need to be dealt with. It doesn't deal with any of the problems that do really need to be dealt with, in my respectful judgment, relating to questions of sovereignty in the context of the relationship between the UK and the EU. Nor does it deal with any other of the challenges to parliamentary sovereignty outwith the context of the EU that again do, in my submission, need at least to be considered or examined, if not necessarily legislated for."⁶⁸

63. Towards the end of his evidence he repeated the point, in starker terms:

65 Qq 92 and 93.

66 Q 106.

67 Q 84.

68 Q 94.

“if the House of Commons were to proceed to legislate this Bill into law without considering what the implications of legislating on a little bit of parliamentary sovereignty might be on the rest of the areas that I have highlighted in which parliamentary sovereignty may be perceived to be under challenge, there may be very grave consequences in terms of the way in which such incomplete and partial legislation would subsequently be used in case law. I tried to sketch that out in the closing paragraphs of my written submission.”⁶⁹

Parliament binding its successors?

64. This Report deals primarily with consideration of clause 18. However, as Professor Bradley states in his written evidence, discussion of legislative supremacy is likely to involve the proposition that Parliament is unable to bind its successors.⁷⁰ He sees it as remarkable therefore that the Government’s Explanatory Notes do not deal with the application of this proposition to the proposals that approval to certain changes in EU law will require first to be approved by an Act of Parliament and that the change should be approved by a referendum. Clauses 2, 3 and 6 provide that the Act of Parliament to approve a specific change must contain provision for the holding of a referendum. Professor Bradley goes on to state that:

“It is one thing for Parliament to require that certain actions may be taken by the Government only when approval has been given for them by a further Act. But today’s Parliament may not require that further Act to include the requirement of a referendum. A future Parliament may of course expressly repeal or amend the requirement of a referendum clause, but (unless the present European Union Bill is recognised by the courts as being a constitutional statute, and thus immune from implied repeal) what is the position if no referendum clause is included in the later Act—either because no such clause is proposed by the Government or if a referendum clause is proposed but is then defeated?”

He poses the question of whether it is envisaged that a future Act of Parliament that did not include a referendum clause would be subject to judicial review. And suggests that in direct contrast to Laws LJ in the *Thoburn* case, in Part 1 of the Bill, Parliament is attempting to “stipulate as to the manner and form of any subsequent legislation”.

65. For Professor Dougan there was an obvious irony in the drafting of a Bill which sought to safeguard the UK from what was, in his view, a fictitious prospect of an attack from the EU or from UK judges on the basis of EU law. By proposing “referendum locks” the Government was attempting “to persuade the current Parliament to bind its successors in a manner which runs counter to accepted understandings of our constitutional order.”⁷¹

66. Two submissions mentioned the present Government’s indication that it will not support any Treaty change, or transfer of powers in this Parliament.⁷² The inference

69 Q 101.

70 Ev 26.

71 Ev 13.

72 Professor V. Bogdanor (Ev 28), Andrew Duff MEP (Ev 21).

therefore had to be that the purpose of the Bill was to prevent a future government from supporting such an amendment or transfer without a referendum—that the Bill seeks, in other words, to bind a future government. For Professor Bogdanor this was inconsistent with the Bill’s declaratory proposition that Parliament is sovereign.⁷³ When questioned on this, Professor Bradley commented that the Government was entitled to say that there will be no transfer of power or competence in the lifetime of this Parliament and that Parliament could incorporate that statement in legislation if it wished to. But he went on to say:

“What I think cannot happen is that it would be binding on future Parliaments. I have in mind a similar point in the Fixed-term Parliaments Bill. It is one thing for this Government and Parliament to say that the next election is going to be on such and such a date in five years’ time. It is not really competent for this Parliament to say that the next Parliament also has to have a fixed term of five years, because that Parliament will surely be able to make up its own mind.”⁷⁴

67. Following the argument put forward by Professor Tomkins, it appears that whether a Parliament is “bound” turns on the proposition that there is such a thing as a “constitutional statute”, an expression which, in his view, was invented by Lord Justice Laws in his judgement on the *Thoburn* case in order to deal with the argument put by counsel about implied repeal.⁷⁵ In Professor Tomkins’ opinion, implied repeal occurs when Parliament has forgotten that it has already legislated about something, or when there has been an oversight leading to the mutual incompatibility of two pieces of legislation.

68. Professor Goldsworthy’s written evidence states:

“To seek to bind future parliaments by prohibiting the enactment of legislation without a referendum first being held is not consistent with the doctrine of parliamentary sovereignty.”⁷⁶

But he goes on to say that to be effective the prohibition would have to be “self-entrenched”, that a referendum would be needed to bring about the repeal of the Act which seeks to bind future Parliaments. Furthermore, that the Act itself should be subject to a referendum in order to entrench it and avoid a situation in which a later Parliament might seek to ignore the prohibition and reassert its sovereign authority to legislate without a referendum. All this to counter the objection:

“[that] if an earlier Parliament can use ordinary legislation to implement its preferred policies, why should a future Parliament not have the same liberty? To put it another way, why should the later Parliament be bound by the expression of a will that has no higher authority than its own will? This is the main justification of the orthodox view that Parliament cannot bind itself. But if a referendum requirement is enacted with the support of a majority of voters in a referendum, the objection is overcome. A future Parliament could then be said to be bound, not by an earlier will of no higher

73 Ev 28.

74 Q 75.

75 Q 102.

76 Ev 31.

authority than its own will, but by an earlier will that does have such a higher authority—the expressed will of the people.”⁷⁷

69. Governments may legislate to place restrictions on their scope for executive action, although the Government itself may well argue that it has no need of the self-imposed restriction, because it would never seek to do what it has seen necessary to proscribe by law. To revert to Professor Bradley’s comments on the Fixed-term Parliaments Bill, the Coalition Government has said that it will call the next general election on 7 May 2015. The Fixed-term Parliaments Bill is intended therefore to bind future governments. But Parliament cannot be bound and a future government may repeal the legislation.⁷⁸ The same must apply in the case of the European Union Bill. Repealing the provisions which provide for a “referendum lock” may cause political difficulties for a future government, but it does not restrict the ability of a future Parliament to repeal or amend the legislation.

70. Even if one were to accept the argument on “entrenchment” and consider the “referendum lock” provisions in the Bill, by invoking the will of the people, to introduce a “higher authority” over Parliament, there remains the problem which Professor Goldsworthy himself raises.⁷⁹ The European Union Bill, which places these requirements on governments, is not itself to be endorsed by a referendum; it would be difficult to argue that it could not be repealed without one.

6 Evaluation and conclusions

Is the doctrine of the legislative supremacy of Parliament under threat from EU law?

71. **The evidence we received suggests that the legislative supremacy of Parliament is not currently under threat from EU law.** The nearest the legislative supremacy of Parliament has come to being threatened by EU law was the argument raised by Eleanor Sharpston QC on behalf of Sunderland City Council in *Thoburn*. That argument was, in summary, that EU law should be seen as having been *entrenched*, rather than merely *incorporated*, into domestic law, by virtue of a principle of EU law which was independent of constitutional principles of national law, such as dualism. It is this argument, the Explanatory Notes tell us, that clause 18 will help counter.

72. We received a great deal of evidence on the impact of the judgment of Lord Justice Laws in *Thoburn*, given its importance to our inquiry. We draw from it the following conclusions:

77 *Ibid.*

78 For example, the Septennial Act 1715 as amended by the Parliament Act 1911.

79 Ev 31.

- that the “entrenchment” argument made by Sunderland City Council was bold rather than strong;
- that *Thoburn* is a first-instance decision of the High Court (not the Appeal Court as stated in the Government’s written evidence).⁸⁰ As such it could be overturned by the Court of Appeal or the Supreme Court;
- but that this was unlikely. None of the witnesses thought that the judgment of Lord Justice Laws on this point was weak; on the contrary, they commented that it was well reasoned, to the extent that a higher court was more likely to follow it than overturn it; and
- no evidence was submitted that the reasoning of the judgment was under recent threat. On this point Professor Hartley said: “changes in the fundamental principles can occur, but I don’t think anything has happened in the last 50 years to suggest that there has been a change, at least as far as Europe is concerned, so I can’t see anything that would make the British courts—the UK courts—take a different view from the view they’ve taken before.”⁸¹

73. In the light of this evaluation we have no reason to doubt that *Thoburn* reflected the well understood and orthodox position, which left the constitutional principle of dualism intact and is unlikely to be overturned.

74. The experts who gave evidence to us had differing views on whether Lord Justice Laws was right to place statutes in a hierarchy, at the top of which were “constitutional statutes”, which could not be subject to implied repeal.

Can an Act of Parliament derogate from EU law by excluding the application of the ECA?

75. The majority of our witnesses thought that if an Act of Parliament were to derogate from an EU Regulation or Directive, and in so-doing expressly and unequivocally disapply the European Communities Act, the courts would be likely to follow the instruction of the derogating Act. They did not, on the whole, think that the *obiter* comments of the three law lords in the case of *Jackson* would make it less likely that the courts would follow a derogating Act, although Professor Tomkins thought we ought to be concerned about the impact of the *Jackson* on Parliamentary sovereignty. But their views were necessarily informed by their opinion of the proper scope of the legislative supremacy of Parliament.

76. Our conclusions from the evidence we received are as follows. **We think it right that, should an Act of Parliament instruct the courts to disapply an aspect of EU law, the courts should do so: this is not only consistent with the case law of the courts,⁸² but also with the doctrine of the legislative supremacy of Parliament; and also with the rule of law.** However unlikely such legislation may be, it is of the highest importance for us, as a

80 Ev 40.

81 Q 26.

82 See paragraph 46 of this Report.

committee of the House of Commons assessing the potential impact of EU law on national law, to know that this principle holds true, and may be relied on.

77. Professor Allan, by contrast, gives a role and power to the courts that, when seriously entertained, make it difficult to make any safe predictions about the future effect of EU law on the legislative supremacy of Parliament:

“The longer we remain a member of the European Union and the more powers that are transferred, the less realistic it becomes, probably, for judges—not to deny that Britain could not withdraw altogether—but the more unrealistic it becomes to expect judges to disapply or, rather, to override EU law in particular instances. I do think there is some possibility there that doctrine may shift in that respect and so we might then see *Thoburn* as one step towards a larger modification whereby the judges would say, ‘Well, we must have an explicit repeal or amendment of the European Communities Act2.’”⁸³

78. **We think this view leads to a state of uncertainty and gives primacy to the rule of EU law over the national constitutional rule of law. And so we cannot see why it is “unrealistic” for an Act of Parliament to ask judges to disapply an aspect of EU law if it is the will of a democratically-elected Parliament, even if it were to lead to infringement proceedings in the Court of Justice.** We also think there are degrees of non-compliance with EU law, and that derogation from a Directive does not have to lead to repealing the ECA and withdrawing from the EU. Professor Hartley gave a good example of this: France’s recent deportation of Roma immigrants was almost certainly in violation of EU law but, at the time of writing, had not led to infringement proceedings.⁸⁴

79. More generally we think that, for the reasons we cite above, **there is considerable risk in the legislative supremacy of Parliament being seen as a construct of the common law if this means the principle will vary according to the judicial climate of the time.** Not least because it will lead judges inevitably into a legislative role and raise issues of democratic legitimacy and accountability. We note in this regard what Professor Tomkins had to say about the case of *Jackson*:

“The leading case on this is the *Jackson* case, which you talked about with your previous witnesses and which I wrote at some length about in my written submissions to the Committee, for the reason that, although it is a case that on the face of it does not have anything to do with EU law, one of the things that that case most sharply and, to my mind, alarmingly indicates is that even our highest court, as was, is not sure what to do with parliamentary sovereignty. It isn’t sure what the legal basis for parliamentary sovereignty is. It isn’t sure how much parliamentary sovereignty is under challenge. It isn’t sure how much parliamentary sovereignty continues to represent the group ‘norm’ or the ‘bedrock’ or the ‘keystone’ of the constitution—all of those words are used.

“The reason why the *Jackson* and the Attorney-General case is so long, although so little was decided in it, is that so many of the judges who decided that case, not only

83 Q 66.

84 Ev 11 (footnote).

in the House of Lords but also lower down, wanted to use the case as a vehicle for the expression of a bewildering variety of different views about the past, present and future state of parliamentary sovereignty. The case, I think, is authority for not much, but it is authority for the proposition that we have the right to be concerned about what is going to happen to parliamentary sovereignty in the hands of the courts.”⁸⁵

Clause 18

80. We draw the following conclusions on clause 18.

81. **Clause 18 is a reaffirmation of the role of a sovereign Parliament in a dualist state, nothing more, nothing less.** The principle of dualism, and Parliament’s role within it, is neither controversial nor in danger of erosion by the courts. It did not need declaring in statute. The majority of the evidence we received attests to this.

82. **Clause 18 does not address the competing primacies of EU and national law.** The evidence we received makes plain that these two spheres of law coexist, usually peacefully, clashing occasionally. When they do clash, neither side gives way. The Court of Justice of the EU maintains that EU law has primacy over national law, including national constitutional law.⁸⁶ National courts, such as the Divisional Court in the case of *Thoburn* in the UK, maintain by one route or another that their constitutions have primacy over EU law. This *impasse* has existed since the Court of Justice first started asserting primacy over national constitutions. It is irrelevant to clause 18 and, more importantly, clause 18 is irrelevant to it—it cannot resolve it. So here again **the evidence suggests that clause 18 is not needed.**

83. With the exception of one witness,⁸⁷ the clear evidence we received suggested that, were clause 18 to be enacted, it could not prevent the argument that was run in *Thoburn* from being run again. The Explanatory Notes, however, raise the entrenchment argument in *Thoburn* as the mischief which clause 18 will address, saying it “will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order”. And the Minister of Europe told Parliamentary colleagues in a letter:

“[w]hile, in our view, the Common Law is clear that the doctrine of Parliamentary sovereignty has not been affected by Britain’s membership of the EU, it cannot be denied that the issue has been the subject of legal and political speculation and arguments to the contrary have been seriously advanced in a court of law. So we believe there is great merit in putting the matter beyond speculation by affirming the Common Law position in statute, which will reinforce the rebuttal of contrary arguments in the future.”⁸⁸

84. The evidence we have received contradicts this, leading us to the conclusion that clause 18 would not be able to counter the arguments made in *Thoburn*.

85 Q 87.

86 See paragraph 18 of this Report.

87 Ev 24.

88 Dated 11 November 2010 (not printed).

85. Nor do we accept the assertion made in the Minister's letter of the "affirming the Common Law position in statute". **If Parliament wills it may legislate to override the European Communities Act 1972 or the EU Treaties by repealing them, amending them or any provisions in them, or by clearly and expressly legislating inconsistently with them in respect of EU legislation or generally.**

It seems to us from the evidence we received that, **if the legislative supremacy of Parliament is under threat, it is from judicial opinions in other areas of law.** One witness, Professor Tomkins, spoke starkly of the unseen consequences of limiting a clause on the legislative supremacy of Parliament to EU law. Because of trends in judicial interpretation flowing from the assertion of the common law basis of Parliamentary sovereignty, **we attach weight to the warnings expressed by Professor Tomkins if the Government maintains clause 18 in the EU Bill.** Expressing a principle in the context only of EU law invites questions about why Parliament chose not for it to apply more generally. Professor Tomkins expressed the view that the Bill, overall "goes out of its way to invite litigation".⁸⁹

86. The consequence of our conclusions above is that the Explanatory Notes are misleading when they state at paragraph 106 that the clause has been included "to address concerns that the doctrine of Parliamentary sovereignty may be eroded by the courts". **Clause 18 is not a sovereignty clause in the manner claimed by the Government, and the whole premise on which it has been included in the Bill is, in our view, exaggerated.** We are gravely concerned that for political reasons it has been portrayed by the Government as a sovereignty clause in correspondence and also in the Explanatory Notes, which we discuss below. For these reasons we deeply regret that the Secretary of State's refused to come and give evidence himself on these matters.

Explanatory Notes

87. **The Explanatory Notes present as fact what the evidence we have received tells us is disputed, viewed from any perspective.** We are concerned about the precedent this sets for future Explanatory Notes. Minimal research reveals the depth of the division of opinion on whether Parliamentary sovereignty is a common law principle (Professor Tomkins told us there was "great controversy" about this),⁹⁰ as it does whether Parliamentary sovereignty can ever be put on a statutory footing. Yet, astonishingly, none of this is reflected in the Explanatory Notes. In addition, the case law which they quote—*Macarthys* and *Thoburn*—fails to include relevant passages of the judgments of Lord Denning and Lord Justice Laws and so gives a distorted impression.

88. Explanatory Notes are, we assume, drafted with care; they may be used to illustrate the context and mischief of an enactment, even if they are not approved by Parliament, and this would apply in relation to clause 18. All the more reason then that they should be drafted to reflect the *status quo*, rather than to present a partial opinion.

89. Professor Tomkins summarises our concern well:

89 Q 103.

90 Q 106.

“I have never seen a Bill about which I am so concerned about the explanatory notes as I am with regard to this Bill. Explanatory notes are cited in court these days. There are contrary dicta about the extent to which you can do it, but it is a bit like the Pepper and Hart rule about ministerial statements. It is clear that, as usual, these explanatory notes have been very carefully drafted, but it is not clear that these explanatory notes have the sole purpose of explaining what is in the Bill.”

Parliament binding its successors?

90. The arguments over binding future Parliaments are interesting and the debate will continue among constitutional lawyers and experts. But, in our view, as the UK does not have a single codified constitutional document from which legislative power is derived, there are no unambiguously constitutional “higher” laws. All Parliaments legislate for the future. Laws passed by one Parliament do not contain a sunset clause at the Dissolution. **The real point is whether a government can, in law, make it difficult for a future Parliament to amend or repeal the legislation it has passed; in our view it cannot. Our conclusion therefore is straightforward—that an Act of Parliament applies until it is repealed.** We leave the final word with Professor Hartley, who in summing up his evidence said that:

“[T]he Bill, assuming it becomes law, will be an Act of Parliament. We know that Parliament cannot bind future Parliaments, so a future Parliament could always change it. It could repeal it—totally repeal it—or amend it, or repeal it in part. I don’t think that this Bill limits the powers of Parliament, any more than the European Communities Act 1972 does—the original one.”⁹¹

Appendix

EUROPEAN UNION BILL

Explanatory Notes

Status of EU law

Clause 18: Status of EU law dependent on continuing statutory basis

104. *Clause 18* is a declaratory provision which confirms that directly applicable or directly effective EU law only takes effect in the UK as a result of the existence of an Act of Parliament. The words ‘by virtue of an Act of Parliament’ cover UK subordinate legislation made under Acts, and because of the particular context of this clause, also covers Acts and Measures of the devolved legislatures in exercise of the powers conferred on them by the relevant UK primary legislation.

105. This reflects the dualist nature of the UK’s constitutional model under which no special status is accorded to treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU Treaties and judgments of the EU Courts provide that certain provisions of the Treaties, legal instruments made under them, and judgments of the EU Courts have direct application or effect in the domestic law of all of the Member States, such EU law is enforceable in the UK only because domestic legislation, and in particular the European Communities Act 1972, makes express provision for this. This has been clearly recognised by the Courts of the UK. As Lord Denning noted in the case of *Macarthy Ltd v. Smith* ([1979] 1 WLR 1189): “Community law is part of our law by our own statute, the European Communities Act 1972.”

106. This clause has been included in the Bill to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts. By placing on a statutory footing the common law principle that EU law takes effect in the UK through the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.

107. In the ‘Metric Martyrs’ case (*Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)), attempts were made, but rejected, to run the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the UK. It was argued that, in effect, the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States. This argument was rebutted by the High Court, who noted that Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the European Communities Act 1972.

108. Paragraph 59 of the judgment in the ‘Metric Martyrs’ case illustrates this point. Lord Justice Laws stated:

“59. Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament’s legislative supremacy in the United Kingdom necessarily remain in the United Kingdom’s hands. But the traditional doctrine has in my judgement been modified. It has been done by the common law, wholly consistently with constitutional principle.”

109. This clause does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law. The rights and obligations assumed by the UK on becoming a member of the EU remain intact.

110. This clause is declaratory of the existing common law position and does not alter the competences of the devolved legislatures or the functions of the Ministers in the devolved administrations as conferred by the relevant UK Act of Parliament.

Formal Minutes

Monday 6 December 2010

Members present:

Mr William Cash, in the Chair

Mr James Clappison
Jim Dobbin
Chris Heaton-Harris
Kelvin Hopkins
Chris Kelly

Penny Mordaunt
Stephen Phillips
Jacob Rees-Mogg
Henry Smith

Draft Report (*The EU Bill and Parliamentary sovereignty*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 16 read and agreed to.

Paragraph 17 read, amended and agreed to.

Paragraphs 18 and 19 read and agreed to.

Paragraph 20 read, amended and agreed to.

Paragraphs 21 to 24 read and agreed to.

Paragraph 25 read, amended and agreed to.

Paragraphs 26 to 34 read and agreed to.

Paragraph 35 read, amended and agreed to.

Paragraphs 36 to 52 read and agreed to.

Paragraph 53 read, amended and agreed to.

Paragraphs 54 to 70 read and agreed to.

Paragraph 71 read as follows:

Despite the Government's assertions in its Explanatory Notes, the evidence we received clearly suggests that the legislative supremacy of Parliament is not under threat from EU law. The nearest the legislative supremacy of Parliament has come to being threatened by EU law was the argument raised by Eleanor Sharpston QC on behalf of Sunderland City Council in *Thoburn*. That argument was, in summary, that EU law should be seen as having been *entrenched*, rather than merely *incorporated*, into domestic law, by virtue of a principle of EU law which was independent of constitutional principles of national law, such as dualism. It is this argument, the Explanatory Notes tell us, that clause 18 will help counter.

Amendment proposed, in line 1 to leave out from the beginning to “under” in line 2 and to insert the words “The evidence we received suggests that the legislative supremacy of Parliament is not currently”.— (*Stephen Phillips*.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 7

Mr James Clappison
Chris Heaton-Harris
Kelvin Hopkins
Penny Mordaunt
Stephen Phillips
Jacob Rees-Mogg
Henry Smith

Noes, 1

Michael Connarty

Paragraph, as amended, agreed to.

Paragraphs 72 and 73 read and agreed to.

Paragraph 74 read, amended and agreed to.

Paragraphs 75 to 77 read and agreed to.

Paragraph 78 read, amended and agreed to.

Paragraph 79 read, amended and agreed to.

Paragraphs 80 to 85 read and agreed to.

Paragraph 86 read, amended and agreed to.

Paragraphs 87 to 90 read and agreed to.

A Paper was appended to the Report as an Appendix.

Resolved, That the Report be the Tenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

Written evidence was ordered to be reported to the House for placing in the Library and Parliamentary Archives.

[Adjourned till Wednesday 8 December at 2.00 pm]

Witnesses

Monday 22 November 2010

Professor Paul Craig , Professor in English Law, St John's College, Oxford	HC 633-i
Professor Trevor Hartley , London School of Economics	HC 633-i

Thursday 25 November 2010

Professor Trevor Allan , Professor of Public Law and Jurisprudence, Pembroke College, University of Cambridge, and Professor Anthony Bradley , Research Fellow, Institute of European and Comparative Law, University of Oxford	HC 633-ii
Professor Adam Tomkins , Chair of Public Law, University of Glasgow	HC 633-ii

List of written evidence

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1 Professor Adam Tomkins, University of Glasgow	Ev 1
2 Professor Philip Allott, University of Cambridge	Ev 7
3 Professor Trevor Hartley, London School of Economics	Ev 9
4 Professor Michael Dougan, University of Liverpool	Ev 11; Ev 32
5 Professor Paul Craig, University of Oxford	Ev 13
6 Andrew Duff MEP	Ev 21
7 Professor Anthony Bradley, University of Oxford	Ev 24
8 Professor Trevor Allan, University of Cambridge	Ev 26
9 Professor Vernon Bogdanor, University of Oxford	Ev 28
10 Martin Howe QC	Ev 29
11 Professor Jeffrey Goldsworthy, Monash University, Australia	Ev 31
12 Jean-Claude Piris, Legal Counsel of the European Council	Ev 39
13 Foreign and Commonwealth Office	Ev 40
14 Professor Richard Rose, University of Aberdeen	Ev 43