HOUSE OF LORDS

Select Committee on the Constitution

7th Report of Session 2005–06

Constitutional aspects of the challenge to the Hunting Act 2004

Report with Evidence

Ordered to be printed 8 March and published 15 March 2006

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 141

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:
To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Viscount Bledisloe
Lord Carter
Lord Elton
Lord Goodlad
Baroness Hayman
Lord Holme of Cheltenham (Chairman)
Baroness O'Cathain
Lord Peston
Lord Rowlands
Earl of Sandwich
Lord Smith of Clifton
Lord Windlesham

Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee are available on the internet at:
http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at www.parliamentlive.tv

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:
http://www.parliament.uk/parliamentary_committees/parliamentary_committees26.cfm

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 5960/1228
The Committee's email address is: constitution@parliament.uk

CONTENTS

Constitutional aspects of the challenge to the Hunting Act 2004

INTRODUCTION

1. On 3 December 2002, the Government introduced a bill to allow licensed hunting. The House of Commons passed an amendment proposing to ban hunting entirely, but the bill did not complete all its stages in the House of Lords before the end of the session.[1] The bill was reintroduced to the House of Commons on 9 September 2004 and received Royal Assent as the Hunting Act 2004 on 18 November 2004, when the House of Commons invoked the Parliament Acts after refusing to accept amendments made in the House of Lords.

2. In the light of the controversy surrounding the passage of the legislation, we invited Professor Rodney Brazier[2] to provide us with an authoritative account of the genesis, main provisions and use of the Parliament Acts, including recent proposals for their legislative reform (as for example were considered by the Wakeham Commission on House of Lords reform[3]), and a discussion of any conventions or practices with regard to their use that may have emerged. We asked that the paper should not be based on original research but should aim to draw together in a single document relevant material already available. The result of Professor Brazier's work is at Appendix 1.

3. An attempt by pro-hunting groups to challenge the Hunting Act by questioning the legality of the Parliament Act 1949 failed in the Administrative Court (28 January 2005) and the Court of Appeal (8 February 2005). The ban took effect on 18 February 2005. The appeal from the Court of Appeal was argued before the Appellate Committee of the House of Lords ("the Law Lords") in July 2005 and the Committee rejected the appeal in a ruling on 13 October 2005.[4]

4. Professor Anthony Bradley[5], who was the Constitution Committee's legal adviser until 31 December 2005, provided us with analyses of the decisions of the Administrative Court and the Court of Appeal in rejecting the challenge to the validity of the Hunting Act 2004, and of the reasons given by the Law Lords. His first paper concluded that, unlike the Administrative Court's decision, the reasons for the decision given by the Court of Appeal raised difficult and potentially far-reaching questions about the Parliament Acts 1911–1949 and the use of those Acts in making future constitutional changes. His second paper concluded that, while the nine Law Lords were

---

1 First reading was on 10 July 2003, second reading on 16 September, and there were two days in Committee (21 and 28 October)

2 Professor of Constitutional Law at the University of Manchester; barrister and Additional Bencher (Lincoln's Inn)

3 Cm. 4534 (2000)

4 *R (on the application of Jackson) v Attorney-General* [2005] UKHL 56

5 Emeritus Professor of Constitutional Law at Edinburgh University; barrister (Inner Temple); a Vice-President of the International Association of Constitutional Law; alternate UK member of the Council of Europe's Commission on Democracy and the Rule of Law; a Visiting Fellow at the Institute of European and Comparative Law, University of Oxford.

unanimous in preferring the reasons for the decision given by the Administrative Court to those given by the Court of Appeal, the individual judgments contain many observations on the Parliament Acts 1911–1949 which are of constitutional interest, particularly in regard to the making of further reforms relating to the House of Lords and the relationship between the two Houses. The papers are reproduced at Appendices 2 and 3 respectively.

5. We publish the three papers for the information of the House and to ensure a wider readership of their analysis of significant questions of principle affecting a principal part of the constitution.

APPENDIX 1: THE PARLIAMENT ACTS, BY PROFESSOR RODNEY BRAZIER

Introduction

1. This paper is my response to the Committee's request for an analysis, based on existing materials, of the genesis, main provisions, and use of the Parliament Acts. The Committee wished the paper to embrace any conventions or practices governing the use of the Acts, any legal limits on what may be done under them, and recent proposals for reform of the Acts. The Committee wanted the arguments about the validity of the Parliament Act 1949 to be touched on. The Committee did not want a heavily-referenced paper.

The origins of the Acts[6]

2. Until 1911 the two Houses had equal legislative power. Legislation could only pass if it was approved by each House. The Lords' veto over the legislative wishes of the increasingly more representative Commons remained in place. If the House of Lords declined to pass any bill approved by the House of Commons, and in the absence of compromise or of one House backing down, there was only one constitutional mechanism available to overcome the Lords' resistance. This was for the Sovereign to be advised to create enough new peers to give the Government a majority in the upper House. Such advice was indeed last tendered in 1832, when King William IV was advised to create peers in order to secure the passage of the Great Reform Bill. The House of Lords gave way and allowed the bill to pass, thus making such creations unnecessary. That general position of co-equal authority had been qualified in one respect before 1911 by non-legal rules. By constitutional convention, and according to the privileges claimed by the Commons since the seventeenth century, bills dealing with taxation or expenditure could not be amended by the Lords, although peers claimed the right to reject such bills outright.

3. But that constitutional settlement was to be thrown over in the early years of the twentieth century. The House of Lords remained hereditary and permanently controlled by the Conservative Party. Yet the House of Commons had been made more representative of the electorate through extensions of the franchise. And in 1906 the Liberals won a landslide General Election victory on a programme which promised major social legislation, much of which was anathema to most peers. The House of Lords rejected some of the Liberal Government's reform bills, and in 1909, in its greatest act of defiance, the Lords rejected the Finance Bill which embodied Lloyd George's "People's Budget". In response the House of Commons passed a resolution which condemned that action as "...a breach of the Constitution and a usurpation of the rights of the Commons..." The Liberals won a General Election in January 1910, and as a result the House of Lords most reluctantly passed the Finance Bill. Asquith's Government had decided to settle the more general point about the relative legislative powers of the two Houses by changing the law, but could only persuade the House of Lords to accept the resulting Parliament Bill after a second General Election in 1910 (which the Government again won) and the subsequent publication of a guarantee from King George V that, if necessary, he would create enough Liberal peers to overcome the resistance of the House of Lords to the bill. Faced with the choice of the loss of its daily control of the upper House,

---

6 A.W. Bradley and K. Ewing, *Constitutional and Administrative Law* (13th ed., 2003), pp. 194–196; O Hood Phillips and P. Jackson, *Constitutional and Administrative Law* (8th ed., 2001), pp. 167–170; S.A de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th ed., 1998), pp. 304–308; Jaconelli, *The Parliament Bill 1910–1911* (1991) 10 Parliamentary History 277.

or a reduction in its legislative powers, peers opted for the trimming of its power as the lesser of two evils. The Parliament Act 1911—passed, it should be noted, by both Houses before receiving Royal Assent—was the outcome of that long constitutional crisis.

4. The Parliament Act 1911 made no attempt to change the composition of the House of Lords, although the preamble stated the intention "to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis," but added (rather plaintively) that "such substitution cannot be immediately brought into operation." The 1911 Act changed the law in three main respects. It stripped the House of Lords of most of its power over money bills. It changed the absolute veto enjoyed by that House over most bills into a power to delay the passage of such bills for up to two years, spread over three parliamentary sessions, after which they would pass into law without the approval of the House of Lords. And the maximum life of Parliament was reduced from seven years to five.

5. No further statutory changes were made to the House of Lords for almost four decades after 1911. The Parliament Act was used soon after its enactment to override peers' opposition to the disestablishment of the Church of Wales and to home rule for Ireland, the statutory results being the Welsh Church Act 1914 and the Government of Ireland Act 1914. But the election of another radical administration with a large Commons majority in 1945—the first since 1906—was to expose a hidden strength for peers in the 1911 Act. The ability of the House of Lords to delay a bill for two years effectively gave that House a veto over Government legislation in the penultimate and final years of a five-year Parliament. A Government would have to pass contentious legislation through the Commons by the end of Parliament's third year to ensure that the 1911 Act could be used, if necessary, to secure its enactment. No Government with a major programme of controversial bills could operate within a three-year parliamentary cycle, and indeed the Labour Government wished to bring forward iron and steel nationalisation later in the 1945 Parliament. A Parliament Bill was introduced late in 1947 and was passed by the House of Commons, designed to reduce the permitted Lords' delay to one year spread over two sessions. All-party talks on reform were initiated, but failed. The House of Lords then rejected the Parliament Bill by a large majority. After it had again been passed by the House of Commons and rejected by the House of Lords in the following two sessions the bill was presented for Royal Assent under the provisions of the 1911 Parliament Act.

6. The Parliament Act 1949 itself was not to be relied on until, ironically, a Conservative Government was to use it to secure the passage of the War Crimes Act 1991. Subsequently the 1949 Act was to be used by the present Government to secure the enactment of the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000, and the Hunting Act 2004.

The law under the Acts[7]

Introduction

7. It is convenient to analyse the law in the Parliament Acts by looking at the position of the two Houses in relation to three types of legislation, and by concentrating on the powers of the House of Lords over them. In doing so it can be seen that the

---

7 Bradley and Ewing, *op. cit.*, pp. 195–197; de Smith and Brazier, *ibid.*; Erskine May, *Parliamentary Practice* (22nd ed.,1997), pp. 569–570, 806–808; *The Parliament Acts*, Standard Note SN/PC/675 (House of Commons Library, 10 September 2004).

Parliament Acts give the House of Lords different powers in relation to those three groups, which may be labelled the House of Lords' veto powers, money bill powers, and delaying powers. For the moment the legal argument that the Parliament Act 1949 is invalid will be left aside.

Veto powers

8. The first group of powers consists of a ragbag in which are retained the pre-1911 prerogatives of the Lords. They concern five types of legislation.

9. First, the House of Lords still has a veto over any bill which is introduced into Parliament in the House of Lords. This is simply because the Parliament Act 1911 can only come into operation in relation to a bill "...passed by the House of Commons..."(1911 Act, sections 1(1), 2(1)). Only if the House of Commons has first put its representative authority behind a measure can the rules in the 1911 Act come into play. Government business managers have to bear this point in mind when planning the route for legislation. Secondly, the consent of the House of Lords remains necessary for any bill to extend the maximum life of Parliament beyond the five years substituted in the Septennial Act 1715 by the Parliament Act 1911 (section 7). That veto is expressly retained by the 1911 Act (section 2(1)). The ability of the House of Lords to ensure that General Elections take place at least every five years is of great theoretical importance, but of course no occasion has arisen in which its use has had to be contemplated: the extension of Parliament's life in the two world wars was done with all-party agreement. Thirdly, the House of Lords still has a veto over a provisional order confirmation bill. This is an express reservation in the 1911 Act (section 5): such a bill is excluded from the expression "public bill" as used in that Act. It was never likely that such a bill would cause conflict between the two Houses. Indeed, Asquith's Government never intended provisional order confirmation bills to be included in the Parliament Act procedure, and caused what became section 5 of the 1911 Act to be added because opinion was divided over whether such bills are or private in nature. Fourthly, the consent of the Lords is still needed for a local and personal bill, simply because the 1911 Act refers only to bills (1911 Act, sections 1(2), 2(1), 5). Once again, such bills would not be politically divisive. Finally, the House of Lords possesses still a veto over subordinate legislation, again because the Parliament Act 1911 refers, and can only apply, to public bills Such a veto has only been used three times—in 1968 (to reject the Southern Rhodesia (United Nations Sanctions) Order, and twice in 2000 (to reject subordinate legislation relating to the Greater London Authority)—and in each case the legislation was passed by the Lords at the second time of asking.

Money bills

10. It was over money bills that the most drastic curtailing of the Lords' powers was effected by the Parliament Act 1911—understandably so, given that it was the rejection of a Finance bill which provoked the original crisis. In essence, the most that the House of Lords can do to a money bill to which it objects is to delay its passage for a month, after which it will be presented for Royal Assent despite the failure of the House of Lords to pass it.

11. The Parliament Act 1911 provides (section 1(1)) that if a money bill, having been passed by the Commons, is sent to the Lords at least one month before the end of a session, and it is not passed by the Lords without amendment within one month after it is sent up, the bill shall (unless the Commons directs to the contrary) be presented for Royal Assent. The House of Lords may amend a money bill, provided it is passed within one month, but the Commons is not obliged to consider such

amendments. The statutory definition of a money bill is closely drawn in the 1911 Act (section 1(2), as amended by the National Loans Act 1968, section 1(5)). Indeed, most annual Finance bills are outside that definition. In summary, a money bill is one which relates only to the following central government matters: taxation; the imposition of charges on the Consolidated Fund, the National Loans Fund, or on money provided by Parliament; supply; the appropriation of money, or loans. A bill which includes any other matters will not be a money bill. It is for the Speaker of the House of Commons to decide whether in his or her opinion a bill contains only money bill provisions, and if that is the Speaker's opinion there shall be endorsed on the bill a certificate signed by the Speaker that it is a money bill. Before giving such a certificate the Speaker must consult, if practicable, two members of the Chairman's Panel (section 1(3)). Such a certificate shall be conclusive for all purposes, and shall not be questioned in any court of law (section 3).

Delaying powers

12. The original Parliament Act is nearly a hundred years old. Section 2, which governs the delaying powers, is the most important in practice. Two of its subsections (sections 2(1), (4)) each consists of a single sentence, one of 180 words, and the other of 248 words. The language of section 2 is, unsurprisingly, not exactly pellucid. It is possible to extract from section 2 (as amended by the 1949 Act) six basic rules. These permit the House of Lords to delay the passage of a bill, but also ensure that the will of the House of Commons will prevail in the end. The term "public bill" embraces any bill, whether a government or private Member's bill, but with the exceptions already noted.

13. First, if the Commons passes a public bill (other than a money bill or one to extend the life of Parliament) in two successive sessions (whether of the same Parliament or not), and the House of Lords rejects it in both of them, then on that second rejection the bill shall be presented for Royal Assent (1911 Act, section 2(1), as amended by the 1949 Act). A bill is deemed to be rejected if it is not passed by the Lords either without amendment or with such amendments only as may be agreed to by both Houses (section 2(3)). Rejection can therefore result from the Lords declining to give it a second reading (as with the European Parliamentary Elections Bill 1998–1999), or by adding an amendment delaying the second reading by six months (as with the War Crimes Bill 1990–1991), or by amending the bill adversely to the wishes of the Commons and so delaying its passage that the end of the session is imminent (as with the Hunting Bill 2003–2004).

14. Secondly, such a bill must be sent up to the Lords at least one month before the end of each of those sessions (section 2(1)).

15. Thirdly, one year must elapse between the date of the Commons second reading of the bill in the first session and the date on which it passes the Commons in the second session (section 2(1)). That delay is designed to give the Government and Commons time to think again about the measure, but also to provide for a maximum period of enforced delay. Taking the second and third rules together, the House of Lords is able to delay a bill into the subsequent session and until not less than thirteen months have elapsed from the date of the second reading in the Commons in the first session. That period results from the requirement that one year must elapse, and that a bill must be sent to the Lords at least one month before the end of the second session. The thirteenth month must elapse before the bill can

go for Royal Assent to guarantee that one month does, indeed, pass before the session ends.[8]

16. Fourthly, the bills rejected by the Lords must be identical, or contain only such alterations as are certified by the Speaker to be necessary owing to the time which has elapsed since the date of the first bill, or to represent any amendments made by the Lords in the preceding session. Any amendments so certified and accepted by the Commons shall be inserted in the bill as presented for Royal Assent (section 2(4)). Thus the bill sent to the Lords in the second session must be identical to the bill which was sent to the Lords in the first session, not as initially presented in the Commons.

17. Fifthly, when such a bill is presented for Royal Assent there must be endorsed on it a certificate signed by the Speaker confirming that the provisions of section 2 of the 1911 Act have been duly complied with (section 2(2)). Such a certificate shall be conclusive for all purposes, and shall not be questioned in any court of law (section 3). That provision is designed to prevent any challenge to the validity of an Act passed under the Parliament Acts on grounds of procedural defects. It is clear that if the provisions of the Acts have been complied with the Speaker has no option but to give the certificate.

18. Finally, the Commons may, on the passage of such a bill in the second session, suggest further amendments without inserting them in the bill itself. The Lords must consider them and, if they are accepted, they may be treated as amendments made by the Lords and agreed to by the Commons. That procedure will not affect the operation of the Parliament Acts if the bill is rejected by the Lords (section 2(4)). The procedure was used, for example, over what became the Hunting Act 2004.[9]

Words of enactment

19. A bill which is presented for Royal Assent under the Parliament Acts bears special words of enactment (1911 Act, section 4(1) as amended by the 1949 Act). Any alteration of a bill to give effect to those words of enactment does not constitute an amendment to the bill (section 4(2)).

Preservation of the rights of the Commons

20. The 1911 Act makes it clear that nothing in that Act diminishes or qualifies the existing rights and privileges of the House of Commons (section 6).

Invoking the Acts[10]

21. It is often said that it is the Government that invokes the Parliament Acts against a recalcitrant House of Lords. That is true in the sense that the Government largely controls the organisation of business in the House of Commons and can, therefore, reintroduce in that House any bill which has been rejected by the House of Lords in the previous session. The Government can be said to set in motion a train of events which, if certified by the Speaker as completed, can cause a disputed bill to receive Royal Assent under the Parliament Acts.

---

8 Two inconsistent Speaker's rulings have, however, been identified on this point: see, *The Parliament Acts*, pp. 5–6.

9 *The Hunting Bill 2003–4 and the Parliament Acts*, Standard Note SN/SC/3181 (House of Commons Library, 11 October 2004).

10 *The Parliament Acts*, pp. 8–17.

22. The Parliament Act 1911 was relied on twice while Asquith's Government was in power, in order to secure the enactment of the Welsh Church Act 1914 and the Government of Ireland Act 1914. The 1911 Act was used only once under the 1945 Labour Government, to amend that Act itself through the passage of the Parliament Act 1949. The House of Lords otherwise avoided legislative deadlock with Attlee's Government by the self-denying ordinance known since as the Salisbury convention, under which any bill which had appeared in a Government's election manifesto would be accepted in the end because it could be taken to have the approval of the people.[11] The 1964 and the 1974 Labour Governments faced a more assertive House of Lords, but no legislation was actually presented for Royal Assent under the Parliament Acts during those Administrations.

23. The assumption that the Parliament Acts would be used only by Liberal or Labour Governments against a Conservative-dominated House of Lords was displaced in 1990 when the Lords rejected the War Crimes Bill on second reading. The bill sought to authorise retrospectively the prosecution in Britain of alleged war crimes committed in Germany or in German-occupied territory during the Second World War by persons who had subsequently become British citizens. The bill had been carried in the Commons on a free vote. The Lords rejected it again during the following session by adding an amendment delaying second reading by six months, and the Parliament Acts were used to pass it as the War Crimes Act 1991. The measure had not featured in the Conservatives' manifesto at the 1987 General Election.

24. The present Government has relied on the Parliament Acts three times. The European Parliamentary Elections Bill provided for a closed party list system for such elections. The bill passed the Commons in 1998, but Conservatives in both Houses preferred an open list system, arguing that there had been no manifesto commitment to a closed system, and the House of Lords insisted on amendments to insert their preferred method. After the Commons had disagreed with the Lords amendments four times the Government reintroduced the bill in the following session and it passed under the Parliament Acts, receiving Royal Assent in 1999. The Sexual Offences (Amendment) Bill, designed *inter alia* to equalise the age of consent for homosexual and heterosexual acts, was introduced into the Commons late in 1998. No such measure had featured in the Labour Party's manifesto: it was a response to a ruling by the European Court of Human Rights. The bill passed that House on a free vote; it was rejected in the Lords, also on a free vote, on a motion delaying a second reading for six months. The bill was reintroduced in and passed the Commons in the following session, incorporating, as permitted, certain amendments which had been added to the original bill in the Commons. The Lords added further amendments unacceptable to the Government, and it became clear that the House of Lords would not pass the bill in that session. The bill was presented for Royal Assent under the Parliament Acts as the Sexual Offences (Amendment) Act 2000. Finally, the Hunting Act 2004 received Royal Assent under the Acts just before the prorogation of Parliament in 2004. The Hunting Bill 2002–2003 had received its second reading in the House of Commons on a free vote in December 2002, as had been promised by the Government in its manifesto. The bill completed all its Commons stages in July 2003, providing for a ban on the hunting of wild mammals with dogs, and was sent to the Lords. The bill was still in Committee of the Whole House at the end of that session, so that it fell and was accordingly rejected for Parliament Act purposes. An identical bill was introduced in

[11] The convention is analysed in the Wakeham Commission Report, *A House for the Future*, Cm. 4534 2000, pp. 39–40.

the 2003–2004 session, and again passed the Commons on a free vote. It was sent to the Lords in September 2004 along with suggested amendments (on which see above, para. 18). Agreement between the two Houses proved impossible during the customary game of "ping-pong", and just before prorogation in November 2004 the Speaker certified that the provisions of the Parliament Acts had been satisfied and the Hunting Bill received Royal Assent.

Principles guiding the use of the Acts

25. When a Government threatens that the Parliament Acts will be invoked the Opposition usually claims that it would be inappropriate—sometimes even unconstitutional—to do so in the particular case. Are there any principles which help to justify the use of the legal powers contained in the Parliament Acts?

26. The 1911 Act itself gives very little guidance as to its appropriate use. The long title merely says that it is "An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament." The preamble recites that "...it is expedient that provision should be made for regulating the relations between the two Houses of Parliament...", and that "...it is expedient to make provision...for restricting the existing powers of the House of Lords." The Act is thus presented as a regulatory mechanism between the powers of the two Houses, while reducing the then existing powers of the House of Lords.

27. All seven statutes that have been passed under the 1911 Act can be said to be constitutional in character, or at least to have constitutional aspects to them. But the word "constitutional" is very elastic in the British context, and this observation is of limited helpfulness. In any event, the Welsh Church Act 1914, the Government of Ireland Act 1914, the Parliament Act 1949, and the European Parliamentary Elections Act 1999 are all clearly constitutional. By stretching the word to include any measure which concerns human rights—as many public bills will—then the War Crimes Act 1991, the Sexual Offences (Amendment) Act 2000, and the Hunting Act 2004 could all be covered by the word. The case for so characterising the Hunting Act includes, for example, the argument that it affects the right of enjoyment of property, protected by Article 1 of the First Protocol to the European Convention on Human Rights. It is possible, of course, that a court will hold that the Act does not breach that right. The use of the Parliament Acts was threatened over the Temperance (Scotland) Bill 1913, the Trade Union and Labour Relations (Amendment) Bill 1975–1976, and the Aircraft and Shipbuilding Industries Bill 1976–1977. It could be argued, in the same very broad sense, that they were constitutional in nature. At best it might be deduced that the use of the Parliament Acts is easier to justify, as a matter of precedent, if a disputed bill can be included in a wide definition of the constitutional.

28. Clearly, a Government wishing to get its legislation under the Parliament Acts if necessary will have a stronger hand politically and perhaps morally if that legislation had been foreshadowed in its General Election manifesto. But the precedents do not establish manifesto authority as a necessary prerequisite for the use of the Parliament Acts. Manifestos in their modern form were only issued at the 1922 General Election and at subsequent elections. Asquith had, however, clearly foreshadowed the Parliament Bill in both of his personal election addresses in 1910 (but there was no such mention for Welsh Church disestablishment or Irish home rule). Labour's 1945 manifesto spoke only in general terms of not tolerating "obstruction of the people's will by the House of Lords," which is a mention of sorts for a Parliament Bill. The War Crimes Bill was not in the Conservatives' manifesto

in 1987, and the Sexual Offences (Amendment) Bill did not feature in Labour's 1997 manifesto. While reference to a bill to ban fox-hunting was made in Labour's 2001 manifesto, the only commitment was to enable Parliament to reach a conclusion about it on a free vote. There is, therefore, no constitutional convention or consistent practice to the effect that the approval of the electorate must be obtained for a measure before the Parliament Acts can be invoked.

29. Nor can it be said that on the basis of past practice a bill may be carried aptly without the Lords' consent only if it is one to which the Government formally shows its commitment by making it part of the Government's programme. Free votes were held on the War Crimes Act, the Sexual Offences (Amendment) Act, and the Hunting Act, although it was understood that the Government wished those measures to pass.

30. Governments do not accept that there are limitations on the kind of legislation which may properly be passed under the Parliament Acts. Ministers have tended to rely on the simple point that if there is a legislative disagreement between the two Houses and if no compromise is possible, then the wishes of the elected House must prevail in the end.[12] Ministers may play down any suggestion of constitutional crisis, and characterise the Parliament Acts as a means of resolving legislative deadlocks.[13] Given what the Parliament Act 1911 says about itself in its long title and preamble, that is a perfectly sustainable position to take. Perhaps the fact that so few Acts have reached the statute book by the use of the Parliament Acts shows that compromises are reached, that Governments have been slow to rely on those statutes, and that the House of Lords sees little point in fighting in the last ditch all legislation with which it profoundly disagrees when the Commons can gets its way in any case.

31. In summary, the statutes passed under the Parliament Acts can (not very helpfully) all be characterised as being constitutional, making the passage of such legislation easier to justify in future under the Parliament Acts because to do so would be in line with broad precedent. But there is no acceptance that only constitutional bills can be subject to those Acts. The Parliament Acts regulate the relations between the two Houses, and it will usually be a matter for political argument whether it is apt that those Acts should be relied on in a particular case. There are, therefore, no constitutional conventions or practices which guide the use of the Parliament Acts.

The validity of the Parliament Act 1949

32. A full examination of whether the Parliament Act 1949 is a valid statute will be conducted by the courts as part of the current legal actions being brought by the Countryside Alliance. The Committee only sought a sketch of the arguments in this paper.

33. There is no doubt that the Parliament Act 1911 is a valid statute. It was passed by both Houses and received Royal Assent. But some constitutional lawyers have doubted the validity of the 1949 Act, and Lord Donaldson of Lymington has twice introduced a bill designed among other things to settle such doubts. Other constitutional lawyers (including me) are satisfied that the Parliament Act 1949 is, indeed, valid.[14] The issue can only be resolved by litigation or legislation.

---

12 See, e.g., Lord Whitty on second reading of the Hunting Bill 2003–2004, 665 H.L. Deb. 127 (12 October 2004).

13 *Ibid.*

14 For the authorities and a summary of the arguments see *The Parliament Acts (Amendment) Bill*, (House of Lords Library Note, LLN 2001/001).

34. The validity of the 1949 Act was first doubted by Professor H.W.R. (later Sir William) Wade in 1955, and subsequent support was given by Professors Hood Phillips and Graham Zellick. The gist of the objection to the Act is as follows:

    (i) When enacting legislation under the 1911 Act the House of Commons and the Sovereign act as delegates of the Queen (or King) in Parliament—that is, as delegates of the Commons, Lords, and the Sovereign. Legislation passed under the 1911 Act is therefore delegated legislation;

    (ii) There is a general legal principle that a delegate cannot enlarge his own power: that can only be done by the delegating authority itself;

    (iii) But the Commons and the Crown, although only delegates, purported to enlarge their own authority in 1949. The Commons and the Crown sought to amend their constituent Act, the 1911 statute, by reducing the Lords' period of delay prescribed under that Act, and thereby increase their own. That is something which only the King in Parliament itself could have done;

    (iv) Accordingly, the Parliament Act 1949 is not an Act of Parliament at all, and consequently measures passed under it are of doubtful validity.

35. By contrast, other constitutional lawyers, such as Professors S. A. de Smith and Rodney Brazier, and Anthony Bradley and Keith Ewing, believe that the 1949 Act is valid. The essence of their argument is as follows:

    (a) The Queen in Parliament has the power, recognised at common law, to enact primary legislation;

    (b) The Queen in Parliament can provide for alternative and simpler methods of enacting primary legislation for particular purposes. In doing so, the Queen in Parliament redefines itself for those specified purpose;

    (c) That has actually been done, by providing that a Regent can be substituted for an incapacitated Sovereign and can give Royal Assent (Regency Act 1937), and that the Commons and the Sovereign can enact primary legislation, in effect leaving out the House of Lords (Parliament Act 1911);

    (d) In such a redefinition, no question of delegation arises: rather, a redefined Parliament passes primary (and wholly valid) legislation under the specified, alternative procedure; and

    (e) In any case, where the "delegation" argument has been raised in the context of colonial legislatures the courts have been reluctant to apply it to legislatures.

36. It will be for the courts to decide in the current litigation whether the Speaker's certificate, given under the Parliament Act 1911, is any bar to proceedings which challenge the validity of the 1949 Act. It has been held judicially that statutes which seek to provide that an order or certificate shall be conclusive evidence do not protect from judicial inquiry an order or certificate which was beyond the power of the maker to make.

37. The present Government has rejected the argument that the Parliament Act 1949 is in any way invalid. It did so both during parliamentary consideration of Lord Donaldson's Bill, and during the debates on what became the Hunting Act 2004.

The High Court came to the view at the first stage of the Countryside Alliance's action,[15] but an appeal is being made from that decision.

38. If the Parliament Act 1949 is, indeed, an Act of Parliament, then in law the House of Commons could pass and obtain Royal Assent for any bill under the Parliament Acts. It might be one to remove the remaining veto powers of the House of Lords, or even (more radically but perhaps fancifully) to abolish the House of Lords itself. As a matter of law there is nothing which could not be done under and within the terms of the Parliament Acts 1911 and 1949.

Proposals for reform

39. The Wakeham Commission[16] was of the view that the current balance of powers between the two Houses was "about right and should not be radically disturbed", and it thought that the Lords' delaying powers, as described in the Parliament Acts, should continue (Recommendations 2, 3). The subsequent Joint Select Committee on House of Lords Reform[17] also thought that there was no need to alter the Parliament Acts. Although the Wakeham Commission recognised certain "technical weaknesses" in the Parliament Acts, the Commission thought that they had given rise to no real difficulty in practice and recommended against tackling them unless wider substantive changes to the House of Lords were proposed (Report, p. 36). Those technical weaknesses in the Acts noted by Wakeham included the lack of any statutory definition of the changes to a bill which are necessary owing to the effluxion of time, and the conundrum that a bill can be presented for Royal Assent at the end of the second session, but that it is impossible to get Royal Assent once the session has ended. The Commission also noted that the Acts can only be invoked for bills which start in the Commons, but rejected change to that rule unless the Acts were to be subjected to a radical overhaul (Report, p. 38). The Commission's views were subject to the continued observance of two important conventions—that Government business is considered within a reasonable time, and that the principles underlying the Salisbury convention be maintained (Report, pp. 39–40).

40. The Wakeham Commission did, however, recommend that the two Houses consider whether the present informal conciliation procedures could be replaced by the establishment of a Joint Committee (Report, pp. 40–41). The Commission also suggested that the Parliament Acts be amended so that those Acts could only be amended in future with the agreement of both Houses (Recommendation 19). The Commission thought that the ability to use the Parliament Act to amend that Act, as was done in 1949, was a weakness which should be ended in order to protect the current balance of power between the two Houses and to guarantee that it could only be altered in future with the agreement of both Houses. That could be done by a simple amendment to section 2(1) of the 1911 Act (Recommendation 5.15). The Commission also recommended that the House of Lords' veto over subordinate legislation should be replaced by a power to delay it for three months (Recommendation 41).

41. By contrast, a Working Party which reported to the Labour Peers Group in 2004 called for a new Parliament Act as part of a package of reforms of the House of

---

15 *R. (Jackson and Others) v. Attorney–General*, The Times, 31 January 2005.

16 Cm. 4534 (2000).

17 First Report, H.C. 17 (2002–2003).

Lords.[18] The report argued that there is a case for modernising the language of the 1911 Act so as to make it more clearly understood, and to deal with a number of technical difficulties. The report supported the principle of the House of Lords having a delaying power. The report noted the "dense and technical structure" of the 1911 Act, which "is cumbersome in the extreme...", "and far from readily understood by peers, MPs or the public" (Report, p. 9). The report also supported the idea of a new Joint Committee to try to resolve legislative disagreements, and advocated extending the Parliament Act machinery to bills initiated in the Lords. It also supported the Wakeham recommendation to strengthen the Lords' veto over any bill to extend Parliament's life by requiring the assent of both Houses to any further reform of the Parliament Acts.

42. The general view is, therefore, that the relative legislative powers of the two Houses, as reflected in the Parliament Acts, is broadly satisfactory. A number of matters, however, remain for further consideration at some stage. They include possible changes to extend the Parliament Acts to bills starting in the Lords, to give the Lords a veto over any further changes to the Parliament Acts, to create formal reconciliation machinery, to deal with certain technical difficulties, and to modernise and make more comprehensible the rules in the 1911 Act.

43. To those suggestions from official bodies might be added the question of whether conventions might be sought to identify the types of bill which could aptly be passed under the Parliament Acts, and whether only measures envisaged in a General Election manifesto could qualify for such treatment. Legislation approved by both Houses could also settle once and for all any question about the validity of the Parliament Act 1949, if that issue remained a live one at the conclusion of the current litigation.

Summary of conclusions

44. The main conclusions of this survey may be summarised as follows:

(a) The Parliament Act 1911 was designed to regulate the legislative relations between the two Houses as a direct result of the constitutional crisis of 1909–1911. The Parliament Act 1949 was enacted so as to reduce the House of Lords' effective veto over legislation during the last two years of a five-year Parliament (see paras. 2–6 above);

(b) The Parliament Acts give the House of Lords the power to veto five types of legislation (see para. 9); the Acts severely limit the Lords' powers over Money bills (paras. 10–11); they permit the Lords to delay other bills for 13 months (paras. 12–18). The wording of the crucial section 2 of the 1911 Act is not pellucid (para. 12), but the delaying power can be analysed as involving six statutory rules (paras. 13–18);

(c) Statutes have been passed under the Parliament Acts seven times. Only once has this happened under a Conservative Government; the present Government has relied on the Acts three times (paras. 21–24);

(d) The appropriateness of the use of the Acts in a particular case comes down to political argument. There are no constitutional conventions or consistent practices which guide the use of the Acts:

---

[18] Labour Peers Group, *Reform of the Powers, Procedures and Conventions of the House of Lords* (July 2004). The report was debated in the Lords on 26 January 2005.

(i) The Acts themselves give very little guidance about the kinds of bill which might appropriately be passed under them (para. 26);

(ii) On a very broad definition of the word "constitutional", all of the seven statutes passed under the Acts can be characterised as being constitutional in nature or having constitutional aspects to them (para. 27);

(iii) Governments have, however, asserted that there is no limit on the type of bill which could aptly be passed under the Parliament Acts, and rely on the general justification that if there is legislative deadlock between the two Houses over any public bill the wishes of the elected House must prevail over the unelected House (para. 30);

(iv) There are precedents for invoking the Acts over measures (1) which did not feature in a Government's General Election manifesto, as well as others which did, and (2) which had been passed on free votes in the Commons, and which therefore could not be said to be as much part of a Government's legislative programme as bills which are whipped by the Government (paras. 28–29);

(e) There are legal arguments which divide constitutional lawyers about the validity of the Parliament Act 1949 (paras. 34–36). Those arguments could only be settled by legislation or litigation; the Countryside Alliance is conducting such litigation (para. 32). On the assumption that the 1949 Act is valid then as a matter of law there is nothing that could not be done under and within the provisions of the Parliament Acts (para. 38);

(f) Both the Wakeham Commission and the Joint Select Committee on House of Lords Reform have expressed broad satisfaction with the Parliament Acts, although suggestions for change were made by the Wakeham Commission. Reform has been urged by a Working Group which reported to the Labour Peers Group in 2004 (paras. 39–41);

(g) Several matters have been identified in this survey as matters for consideration if statutory changes to the Parliament Acts were to be contemplated (paras. 42–43).

December 2004

APPENDIX 2: THE DECISIONS OF THE ADMINISTRATIVE COURT AND THE COURT OF APPEAL, BY PROFESSOR ANTHONY BRADLEY

Summary

This note examines the decisions of the Administrative Court and the Court of Appeal in rejecting the recent challenge to the validity of the Hunting Act 2004. It concludes that, unlike the Administrative Court's decision, the reasons for the decision given by the Court of Appeal raise difficult and potentially far-reaching questions about the Parliament Acts 1911–1949 and the use of those Acts in making future constitutional changes. An appeal against the Court of Appeal's decision is to be heard by the Law Lords in July.

Introduction

1. The Committee will remember that several legal questions arising from the Parliament Acts 1911–1949 were considered by the Wakeham Commission on reform of the House of Lords. These included a question as to the validity of the 1949 Act. The Wakeham Commission did not express a view on this question, but did conclude that "it is a potential weakness of the Parliament Acts that they can themselves be amended using Parliament Act procedures, as was done in 1949".[19]

2. The question as to the validity of the 1949 Act was the central ground raised in the recent challenge to the validity of the Hunting Act 2004, and the question has been decided first, on 28 January 2005 by Maurice Kay LJ and Collins J in the Administrative Court;[20] and then on 8 February 2005 by the Court of Appeal (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and May LJ).[21] While both courts upheld the validity of the Hunting Act, the Court of Appeal did not endorse the reasoning adopted in the Administrative Court. Because of the doctrine of the sovereignty (legislative supremacy) of Parliament, English courts have had very little experience of dealing with challenges to the validity of primary legislation. Such challenges are normally wholly outside the jurisdiction of the courts: on the rare occasions when such questions have arisen, the courts have limited their task to deciding whether a document on which a litigant relies is or is not an Act of Parliament. To simplify this task, the courts have applied what is known as the "enrolled Act" rule. By this rule,

   "all that a Court of Justice can do is to look at the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament, during its progress in its various stages through Parliament".[22]

   Against this background, the judgments in the Hunting Act case have an interest for constitutional lawyers that owes nothing to the merits or otherwise of a ban on hunting foxes with dogs.

---

19 *A House for the Future*, Cm 4534, 2000, para 5.13.0

20 *R (on application of Jackson and others) v Attorney-General* [2005] EWHC 94 (Admin).

21 (the same) [2005] EWCA Civ 126.

22 *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, 725.

The grounds of challenge

3. In outline, the claimants argued that the Hunting Act was not a lawful statute because it had not been enacted by the sovereign legislature (Commons, Lords and Royal Assent) but depended for its validity upon the Parliament Acts. The central claim made was that the 1949 Act had not been lawfully passed by Parliament, since that Act had itself been enacted under the procedure in the 1911 Act. It was argued that the scope of the 1911 Act was subject to an implied exclusion of power under the Act to amend its own terms; thus the 1911 Act could lawfully be amended only by "Parliament", meaning the sovereign legislature (Commons, Lords and Royal Assent), and not by the Commons and Royal Assent alone. The claimants concluded that the 1949 Act was not in law an Act of Parliament, and therefore neither was the Hunting Act, the validity of which depended on the validity of the 1949 Act.

The decision of the Administrative Court

4. Maurice Kay LJ, giving the leading judgment, dealt with the challenge under three main headings. First, he considered that the claimants' arguments foundered "on the clear language of the 1911 Act", in particular the reference in section 2(1) to the enactment of "any public bill", a provision that was subject to the express exclusion of money bills and bills to extend the life of Parliament. "[The] existence of express exclusions militates against the implication of additional excluded categories" (para 17). The provision for the Speaker of the Commons to issue a certificate that the 1911 Act provisions had been observed in respect of a bill would impose "an unduly onerous obligation" on the Speaker if implied limitations to the scope of the Parliament Act 1911 existed. No support for the "implied limitations" argument was to be found in the Preamble to the 1911 Act.

5. Secondly, Maurice Kay LJ rejected as "inapposite" the argument favoured by some academic lawyers that legislation passed under the Parliament Act procedure must be regarded as delegated legislation. He was inclined to favour the position (held by other academic lawyers) that the legislature had been "redefined" or "remodelled", holding that what emerged from the Parliament Act procedure was not delegated legislation but an Act of Parliament. The 1911 Act thus had provided a second route by which laws could be enacted by Parliament, even if in exceptional circumstances the use of that route might be subject to judicial scrutiny to ensure compliance with section 2 of the 1911 Act.

6. Thirdly, for reasons similar to those stated in paragraph 4 above, Maurice Kay LJ rejected the argument that the House of Commons and the Queen constituted a "subordinate legislature" and as such were debarred from amending the conditions under which that power to legislate was conferred. What was important was the language of the 1911 Act: "I do not doubt that [that language] is sufficient to permit amendment in the manner that was achieved by the 1949 Act" (para 27).

7. Among incidental matters that he considered, the judge noted what had been said in Parliament in 1911 about the scope of the bill: "history discloses that the central issue in this case was in the minds of Parliamentarians in both Houses in 1911"(para 30). He ended his judgment with this passage:

> "Constitutionally, I can well understand the argument that it would have been preferable if amendments to the 1911 Act had been excluded from the machinery of section 2. However, they were not. Apart from the two specifically excluded matters, [money bills and bills to extend the life of Parliament] resort to section 2 is

constrained more by political self-restraint and accountability than by legal inhibition." (para 34).

8. In a concurring judgment, Collins J focussed on the "delegated legislation" argument, but only to reject it. An Act resulting from the 1911 Act procedure was not delegated legislation, even though a court could intervene if the limitation on the face of section 2 of the 1911 Act was not complied with (for instance, if the procedure had been applied to a bill that purported to extend the life of Parliament). It seemed to Collins J "inconceivable that in enacting the 1911 Act Parliament did not have regard to the very real possibility that the existing House of Lords would not willingly accept its own demise or measure to limit its powers and so the provisions of the Act might have to be used" (para 41). He concluded: "There is no question but that an Act passed by the use of the section 2 procedure is an Act of Parliament and must be treated by the courts and given the same effect as any other Act" (para 45). The very limited (and "impossible to conceive occurring") situation of non-compliance with the two express limitations in section 2 did not affect this conclusion.

9. These judgments were based somewhat narrowly on textual interpretation of the 1911 Act, accompanied by sufficient reference to Hansard in 1911 to confirm that the issue in dispute had been in the minds of parliamentarians at the time. This reasoning excluded any possibility that there were implied legal limitations on use of the Parliament Acts.

The decision of the Court of Appeal

10. Delivering a single judgment, the Court of Appeal arrived at the same conclusion, but took a broader approach to the issues involved. In summary, and differing from the Administrative Court's view, the court held that there are indeed *implied* limitations of a constitutional nature that restrict the use of the Parliament Acts procedure (in my view, this conclusion is controversial both as a matter of constitutional law and as a matter of politics). However, the court held that the change made in 1949 to shorten the delaying power of the Lords from two years to one year was not a sufficiently extensive or fundamental change to be affected by any implied constitutional limitations.

11. The court emphasised that the case was not "an ordinary case turning on a point of statutory interpretation", but a case of constitutional significance (paras 3, 4). As the court said later,

    "This appeal is concerned with much more than the scope of a statutory power. It is concerned with the extent of the restriction of the role of the House of Lords as one of the constituents of sovereign power affected by what was in reality a concordat and what was in form a statute" (para 76).

    The court regarded the Parliament Act 1911 as "having established a new constitutional settlement" (para 8). The Act itself "was a most unusual statute", in that the sovereign Parliament had "used the machinery of Parliament to make a fundamental constitutional change".[23] In considering the effect of the Act, the court was "acting as a constitutional court", although there was no precise precedent for this jurisdiction (para 12). The court was justified in reading Hansard to find out what was said in Parliament at the time: in so doing it was not adjudicating on the

[23] While it is not at all unusual for constitutional changes to be made by Act of Parliament, the point that the court was making here is that it is not usual for an Act of Parliament to seek to change the legal effect of primary legislation, since this has evolved as a matter of common law, not as a result of legislation. For instance, the "enrolled Act" rule already quoted was defined and applied by the courts, and is thus a matter of common law.

propriety of what had happened in Parliament (and, in my view rightly, the court thus believed that this did not breach Article 9 of the Bill of Rights, that protects the freedom of speech and debate in Parliament from being questioned in any court).

12. The court considered that Dicey's classic statement of parliamentary sovereignty [24] had been "significantly qualified" by the 1911 Act in curtailing the role of the House of Lords. The Preamble to the 1911 Act "makes it clear that the 1911 Act was only a stepping stone on the way to even more fundamental changes in the House of Lords…It is not suggested that the 1911 Act was to be the vehicle for these changes. It includes the more limited changes."(para 20). The 1911 Act had redefined the relationship between the two Houses, but had still left the House of Lords with a very significant legislative role. Nonetheless, in the court's view, "[the] changes made by the 1949 Act were far less significant than the changes made to the constitutional position of the House of Lords by the 1911 Act"(para 27). The judgment proceeded to deal with the three main questions raised by the case.

Is legislation passed under the 1911 Act primary or delegated (subordinate) legislation?

13. This question was regarded as being at the heart of the case. The Attorney-General had argued that legislation passed under the 1911 Act was in every respect identical to legislation passed with the consent of both Commons and Lords. The claimants argued that this could not be so, since legislation under the 1911 Act depended for its validity on compliance with that Act. The court accepted the claimants' case on this point, holding that this entitled the court to decide whether what was said to have happened under the 1911 Act in fact complied with that Act (para 33). The main reason given for the court's rejection of the Attorney-General's argument was that, if it had been accepted, the 1911 Act could be used to extend the life of Parliament, contrary to the express language of the Act. All that would be required would be the enactment under the Parliament Acts of a bill to delete from the 1911 Act the express exclusion of bills seeking to extend the life of Parliament, after which the Commons and the Queen could pass a bill that would have this effect. The court was not prepared to accept this.

14. Further, the court stated that in the "new constitutional settlement" established by the 1911 Act, one feature of it was to preserve the role of the Lords in the legislative process. "In our view it would be in conflict with the 1911 Act for it to be used as an instrument for abolishing the House of Lords"(para 42). The 1911 Act did not show an intention that it be used, "directly or indirectly, to enable more fundamental constitutional changes to be achieved than had been achieved already" (para 42).

15. This reasoning led to a key point of disagreement with the court below: "*Thus, it does not necessarily follow that because there is compliance with the requirements in the 1911 Act, the result is a valid Act of Parliament*" (para 43), [emphasis supplied]. In the court's view, Parliament in 1911 was not intending to create a power to make fundamental constitutional changes: had this been the case, the court would have expected this power to be unambiguously stated in the Act (para 45). But not all constitutional changes were necessarily fundamental. In the court's view, the reduction in the delaying power of the Lords made in 1949 was not a fundamental change and had been validly made under the 1911 Act. As examples of changes that the court would regard as fundamental, the court instanced extending the life of Parliament beyond five years or abolishing the House of Lords.

---

[24] Namely, that Parliament has "under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" : Dicey, *Law of the Constitution*, 10th edn, 1959, pp 39–40.

Can powers granted by an enabling Act (such as the Parliament Act 1911) be enlarged or modified by express words of authorisation?

16. The claimants' based their case here on the principle that where an Act delegates authority to a body, the delegated power cannot be used to enlarge or vary the power itself. After much citation of constitutional cases from Commonwealth countries, the Court of Appeal described the position of the Administrative Court as being an over-simplification (para 62) and held that a legislature was not prevented by any principle from altering its own constitution by amending the very instrument from which its powers derived. "This is not performing an act of bootstrap levitation, provided the power exercised is duly derived" from a sufficient original power and authority.

Does Section 2 of the 1911 Act authorise the Commons to amend the conditions on which its law-making power is granted?

17. The Court of Appeal found nothing in the text of section 2(1) of the 1911 Act that prevented the amendment that the House of Commons wished to make in 1949. In reaching this view, the court made a close examination of the passing of the 1911 Act, having found that textual analysis of the 1911 Act did not resolve the doubt as to what Parliament was intending to be the scope of the Act. The court also looked at later events to discover the subsequent understanding of Parliament as to the nature of the change made by the 1911 Act. Quoting extensively from Hansard in 1911, the court found the parliamentary material to show that enactment of the Parliament Bill in the form in which this occurred "indicated general acceptance" that it would be open to the Government to use the bill's provisions to reduce further the limited powers that it gave to the House of Lords (para 86).

18. The Court of Appeal did not stop there, going on to look at post-1911 and post-1949 events to determine whether there was general recognition of the "consensual constitutional change in the manner in which sovereign power is exercised"(para 90). On the basis of the later practice of Parliament, especially after 1949, the court found there to have been "general recognition" that the 1949 Act was a proper exercise of sovereign legislative power, and concluded:

"The restrictions on the exercise of the powers of the House of Lords that the 1949 Act purported to make have been so widely recognised and relied upon that they are today a political fact"(para 97).

The court found that the reduction in the delaying power of the Lords made in 1949 was a "a relatively modest and straightforward amendment" (para 98), and said that this was quite different from allowing the power of amendment to include "making changes of a fundamentally different character to the relationship between the House of Lords and the Commons from those which the 1911 Act had made" (para 99). The court did not decide where the line should be drawn in future between acceptable and unacceptable amendment, but made the "obvious" point that "the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act" (para 100).

Conclusions

19. The Law Lords are expected to hear the appeal against the Court of Appeal's judgment in July, and it is therefore likely that their decision, and the reasons for it, will not be known before October. My main comment at this stage is that the Administrative Court's reasoning was what I had expected to be the outcome of the

challenge to the Hunting Act. It plainly would give legal power to a Government with a clear majority in the House of Commons to use the Parliament Acts to make reforms affecting the "constitutional settlement" established by the 1911 Act, whether these concern the composition or powers of the Lords or even conceivably of the Sovereign.

20. On the other hand, I can see why the Court of Appeal felt that such an approach was rather narrow, and why that court emphasised that the dispute raised constitutional issues. However, the extent to which the court accepted the claimants' arguments is notable, the court going appreciably further than was needed to decide the case. For instance, the Court of Appeal could have said the following: "Whether or not there are implied limitations in the 1911 Act that prevent fundamental constitutional reforms from being made without the assent of the Lords by use of that Act, the changes made in 1949 were not sufficiently fundamental to run up against any such limitations". The court did in fact say (in summary): "(1) Parliament in 1911 did not intend fundamental constitutional reforms to be made under the 1911 Act; such changes are in law required to be made with the assent of the Lords; (2) nonetheless, the changes made in 1949 were not fundamental constitutional reforms for this purpose."

21. As was emphasised above, in paragraph 15, the Court of Appeal said, "it does not necessarily follow that because there is compliance with the requirements in the 1911 Act, the result is a valid Act of Parliament" (para 43). This means that a future government that wishes to make controversial fundamental reforms and cannot secure the support of the Lords could face the possibility of a court holding that, despite compliance with express provisions of the 1911 Act, and despite a certificate of compliance being given by the Speaker of the Commons, the result of much legislative and political effort is not necessarily a valid Act of Parliament—yet the dividing-line between fundamental and non-fundamental changes will be a very difficult one to draw. If the Court of Appeal's approach is correct, it means that the Parliament Act procedure may not be used to force through major constitutional changes that affect the relationship between the Lords and the Commons. Thus the Lords would retain a power of veto in fundamental constitutional matters that went well beyond its power to veto bills that extend the life of Parliament. This ruling by the Court of Appeal provides judicial support for the view of the Wakeham Commission that the House has an important role to play in safeguarding fundamental constitutional principles.

22. In this note, I have concentrated on questions of principle and have not discussed in detail the legal and parliamentary material relied on by the Court of Appeal. For present purposes, it is enough to say that (in my view) this material does not provide an unequivocal pointer to the correctness of the court's reasoning. There will be much scholarly discussion of the approach taken by the Court of Appeal. If the validity of the Hunting Act is confirmed on appeal by the Law Lords, it will be of great interest, and of no small political significance, to know whether they endorse the Court of Appeal's approach.

3 May 2005

APPENDIX 3: THE REASONS GIVEN BY THE LAW LORDS, BY PROFESSOR ANTHONY BRADLEY

Summary

This note examines the reasons given by the Law Lords on 13 October 2005 when they rejected the challenge to the validity of the Hunting Act 2004 made in the case of *R (on the application of Jackson) v Attorney-General.*

The nine Law Lords were unanimous in preferring the reasons for the decision given by the Administrative Court to those given by the Court of Appeal, but the individual judgments contain many observations on the Parliament Acts 1911–1949 which are of constitutional interest.

Introduction

1. In my earlier paper[25] I summarised the grounds given by the Administrative Court and the Court of Appeal in rejecting the challenge brought to the validity of the Hunting Act 2004 in the case of *R (on the application of Jackson) v Attorney-General.* The unanimous decision of the nine Law Lords given on 13 October 2005[26] was to reject the appeal for reasons that reinstated the approach adopted by the Administrative Court at first instance. The House disapproved of the remarkable conclusion reached by the Court of Appeal that raised novel questions limiting the scope of the Parliament Acts procedure for making fundamental constitutional reforms.

2. The judges who heard the appeal were, in order of seniority, Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood. (No disrespect is intended if hereafter I refer to them by shorter forms of their names.) It is an indication of the potential constitutional importance of the issues raised by the challenge that nine judges sat, rather than the five judges (or occasionally seven) who usually sit to decide appeals to the Lords. In giving judgment on the weighty issues raised by the appeal, eight of the judges each gave his or her reasons. For commentators who observe the judicial scene closely and have time to read separate judgments that traverse the same ground several times, the individual judgments provide stimulating material for comparison. In some instances (for example, the speech of Baroness Hale), the personal judgment enables the reader to discover where, to use the current phrase, the individual judge is coming from. However, for a constitutional issue of this kind, I consider it likely that most parliamentarians and lawyers would prefer to read a single judgment given in the names of as many of the judges as possible, together with the addition (if desired) of individual judgments adding separate glosses to the unanimity. A single judgment of this kind should help to promote understanding of the law and to reduce the need for interpretation and reconciliation of the different approaches taken to the appeal.

3. In the event, only Lord Walker did not take the opportunity to state his own approach to the result. He preferred simply to express his agreement with Lord Bingham (who gave the leading judgment) and with all the concurring judgments, and he went on to say this: "*On the crucial points which have to be decided in order to*

[25] Appendix 2.

[26] [2005] UKHL 56; [2005] 3 WLR 733; [2005] 4 All ER 1253.

dispose of the appeal there is, as I see it, *a striking unanimity*, in which I respectfully concur" (para 141) [emphasis supplied]. Lord Walker then referred to differences of opinion that appear in some of the judgments, but which *"need not be resolved on this occasion"*. On these he preferred to express no view.

4. It appears to me that there is much wisdom in this approach. Lord Walker's brief statement may be read in support of the view that an important element of the onerous discipline of appellate decision-making is found in the self-imposed restraint of the judges in limiting themselves to deciding what is necessary to be decided in order to dispose of the appeal. In the future, to an even greater extent than at present, a final court of appeal (whether the present Law Lords or the new Supreme Court) will often be dealing with issues of public law on which it would be in the interests of legal certainty if the unanimity that exists in a court could be identified for all to read in the form of a common judgment. Not only would this make it easier to discover matters for which the decision is an authority; it would help to strengthen the institutional (or collegiate) nature of the decision. Justice at this level should not be seen as a personalised response to difficult issues.

The decisions of the Administrative Court and Court of Appeal

5. In this section, I give a brief summary of the decisions made on 28 January 2005 by Maurice Kay LJ and Collins J in the Administrative Court;[27] and on 8 February 2005 by the Court of Appeal (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and May LJ).[28] This section repeats more concisely points made in my earlier paper. To recapitulate, the present challenge to the Hunting Act 2004 has brought into play what is customarily known as the "enrolled Act" rule. By this rule,

> "all that a Court of Justice can do is to look at the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament, during its progress in its various stages through Parliament".[29]

This rule was laid down in these terms in 1842, but it has since often been affirmed.[30] It expresses the rule that it is not for the courts to inquire into what has happened while a bill is passing through Parliament; hence, all that a court can do, if confronted by a document that appears to be an Act of Parliament, is to look at the Parliament Roll to check that it has been approved by both Houses and has received the Royal Assent.[31] Today, it is wholly unnecessary for a court to look at the Parliament Roll itself, since the words of enactment that generally appear at the heading of an Act state:

> "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows".

---

27 *R (on application of Jackson and others) v Attorney-General* [2005] EWHC 94 (Admin).

28 (the same) [2005] EWCA Civ 126.

29 *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, 725.

30 See in particular *Pickin v British Railways Board* [1974] AC 765.

31 The "enrolled Act" rule also serves as convenient shorthand for the proposition that flows from the doctrine of parliamentary sovereignty, namely that the courts have no power to review the validity of Acts of Parliament. The lack of that power explains the unusual question coming before the courts in *Jackson*—namely the question of whether the Hunting Act was in law an Act of Parliament. This question must in logic be answered *before* the judges can conclude that the document in question is in truth a document whose validity they have no power to review.

These words of enactment are sufficient to satisfy the "enrolled Act" rule. They were used in the Parliament Act 1911 itself.

6. However, these words of enactment are not appropriate when a bill becomes law under the Parliament Acts, because the consent of the Lords Spiritual and Temporal has not been given to it. The 1911 Act therefore provided for different words of enactment to be used when necessary:

"Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent *of the Commons* in this present Parliament assembled, *in accordance with the provisions of the Parliament Act 1911*, and by the authority of the same, as follows" [emphasis supplied].

7. In outline, the claimants argued that the Hunting Act was not a lawful statute because it had not been enacted by the sovereign legislature (Commons, Lords and Royal Assent), but depended for its validity upon the Parliament Acts. The central claim was that the Parliament Act 1949 (that amended the 1911 Act by reducing the length of time in which the Lords could delay a bill) had itself not been lawfully enacted, since it had been enacted under the 1911 Act. It was argued that the extent of the 1911 Act was limited by the implied exclusion of future bills that sought to amend its own terms; thus, the 1911 Act could lawfully be amended only by the sovereign legislature (Commons, Lords and Royal Assent), not by the Commons and Royal Assent alone. The claimants thus submitted that the 1949 Act was not in law an Act of Parliament, and neither was the Hunting Act, whose validity depended on the validity of the 1949 Act. The consequence of this approach was that the arguments before the judges all turned on the history and interpretation of the 1911 and 1949 Parliament Acts, and no arguments were heard about the merits of the Hunting Act itself.

The decision of the Administrative Court

8. In the Administrative Court, Maurice Kay LJ, giving the leading judgment, dealt with the challenge under three main headings.

(1) The claimants' arguments foundered "on the clear language of the 1911 Act", in particular the reference in section 2(1) to the enactment of "any Public bill", from which the Act expressly excluded money bills and bills to extend the life of Parliament. "[The] existence of express exclusions militates against the implication of additional excluded categories" (para 17). The provision for the Speaker of the Commons to issue a certificate that the 1911 Act provisions had been observed in respect of a bill would impose "an unduly onerous obligation" on the Speaker if implied limitations to the scope of the 1911 Act existed.

(2) The judge rejected the argument favoured by some academic lawyers that legislation passed under the Parliament Act procedure must be regarded as delegated legislation. He was inclined to favour the position (held by other academic lawyers) that the legislature had been "redefined" or "remodelled", holding that what emerged from the Parliament Act procedure was not delegated legislation but an Act of Parliament. The 1911 Act thus had provided a second route by which laws could be enacted by Parliament.

(3) Similarly, the judge rejected the argument that the House of Commons and the Queen constituted a "subordinate legislature" and as such were debarred from amending the conditions under which their power to legislate was conferred. What was important was the language of the 1911 Act: "I do not doubt that [that language] is sufficient to permit amendment in the manner that was achieved by the 1949 Act" (para 27).

9. In a concurring judgment, Collins J also rejected the "delegated legislation" argument. An Act resulting from the 1911 Act procedure was not delegated legislation, although a court could intervene if the limitation on the face of section 2 of the 1911 Act was not complied with (for instance, if the procedure had been applied to a bill that purported to extend the life of Parliament).

The decision of the Court of Appeal

10. Delivering a single judgment, the Court of Appeal arrived at the same conclusion, but took a broader approach to the issues involved. In summary, the court held that there are indeed *implied* limitations of a constitutional nature that restrict the use of the Parliament Acts procedure. However, the change made in 1949 to shorten the delaying power of the Lords from two years to one year was not a sufficiently extensive or fundamental change to be affected by any implied limitations. Moreover, the court stressed the constitutional significance of the case, and regarded the Parliament Act 1911 as "having established a new constitutional settlement" (para 8). Dicey's classic statement of parliamentary sovereignty[32] had been "significantly qualified" when the 1911 Act had curtailed the role of the Lords. The 1911 Act had redefined the relationship between the two Houses, but had still left the House of Lords with a very significant legislative role. Nonetheless, in the court's view, "[the] changes made by the 1949 Act were far less significant than the changes made to the constitutional position of the House of Lords by the 1911 Act" (para 27).

11. On whether legislation passed under the 1911 Act was to be regarded as primary or delegated (subordinate) legislation, the court rejected the Attorney-General's argument that legislation passed under the 1911 Act was in every respect identical to legislation passed with the consent of both Commons and Lords. The main reason given by the court for this was that, if the Attorney-General's argument had been accepted, the 1911 Act could be used to extend the life of Parliament, contrary to the express language of the Act. The court also stated that one feature of the "new constitutional settlement" established by the 1911 Act was that it preserved the role of the Lords in the legislative process. The 1911 Act could not be used as an instrument for abolishing the House of Lords or for making other fundamental constitutional changes. In particular, the Court of Appeal stated: "…it does not necessarily follow that because there is compliance with the requirements in the 1911 Act, the result is a valid Act of Parliament" (para 43).

12. However, as to whether the 1911 Act authorised the Commons to amend the conditions on which its law-making power was granted, the Court of Appeal found nothing in the text of the Act that prevented the amendment that the Commons wished to make in 1949. In reaching this view, the court examined closely the passing of the 1911 Act and quoted extensively from Hansard in 1911. The court found that Hansard "indicated general acceptance" that it would be open to the Government to use the bill's provisions to reduce further the limited powers that the bill left with the House of Lords (para 86). In the light of the later practice of Parliament, especially after 1949, there had been "general recognition" that the 1949 Act was a proper exercise of sovereign legislative power, and the Act must today be regarded as a "political fact"(para 97).

---

[32] Namely, that Parliament has "under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament", Dicey, *Law of the Constitution*, 10th edn, 1959, pp 39–40.

The key findings of the Law Lords

13. In my earlier paper[33] I criticised the unduly open-ended nature of the broad conclusions reached by the Court of Appeal and I suggested that they were controversial both on legal and political grounds. In argument in the House of Lords, neither side supported the Court of Appeal's view: (a) that the Parliament Act procedure could not be used to make fundamental constitutional changes; and (b) that the reduction in the delaying power of the Lords in 1949 was not a fundamental constitutional change. It is therefore not surprising that none of the Law Lords supported the Court of Appeal's reasoning. What then were the matters on which the nine Law Lords were unanimous, or on which there was a clear majority?

14. There were four main points of unanimity:

    (1) The Law Lords supported the reasoning of the Administrative Court and rejected the approach taken by the Court of Appeal. They rejected the analogy with delegated legislation on which the appellants relied as their central argument (Bingham, Nicholls, Steyn, Rodger, Carswell).[34] The aim of the 1911 Act was not to entrust the Commons with new or enlarged powers, but to restrict the powers of the Lords (Bingham, Hope, Rodger, Hale).[35]

    (2) The 1911 Act must be understood as having created a new way of making primary legislation (Bingham, Nicholls, Steyn, Hope), having in effect "re-defined" Parliament for the purposes authorised by the 1911 Act (Steyn, Hale, Brown). The outcome of the 1911 Act procedure was the enactment of an Act of Parliament, albeit with different words of enactment from those that were generally used.

    (3) In view of the express exceptions stated in the 1911 Act (in particular, the restriction on the use of the Act to extend the life of Parliament), there were no additional *implied exceptions* to the scope of the Parliament Act procedure (Bingham, Nicholls, Steyn, Hope, Hale: Rodger left this point open; Carswell found it "difficult"). The 1911 Act procedure could be used to effect major constitutional changes (Bingham, Steyn, Rodger, Hale; Carswell reserved his position) and, in particular, to amend the 1911 Act (Bingham, Nicholls, Hale; Hope found the argument against this "not unattractive", but said that the court could not ignore that Parliament had legislated four times on the basis of the 1949 Act amendments).

    (4) However, the 1911 Act expressly excluded from the new way of making primary legislation a bill to extend the life of Parliament. This exclusion was regarded by the Law Lords as being of great importance, but they differed as to its consequences. There was unanimity that a bill that directly sought to extend the life of Parliament without first amending the 1911 Act could not be enacted without the approval of the Lords. However, there was a difference of opinion

---

[33] Appendix 2, paras 19–21.

[34] Despite the risk of error or misinterpretation, I have felt it worthwhile to attempt to identify in this way the judges who in their judgments gave express support (or otherwise) to a particular point. Where (in later instances) I name fewer than five judges as supporting a proposition, it must not be supposed that the proposition is necessarily a minority view, since support for it may be implicit in other judgments.

[35] The point being made here may at first seem difficult to understand, since it seems absurd to say (as a matter of political power) that the power of the House of Commons is not increased if the power of the House of Lords is reduced. But the point is rather that, in a legal sense of the word "power", legislation that delegates power to legislate is generally conferring power that the delegate would otherwise not have. In this sense, the 1911 Act was not conferring any new "power" to legislate on the House of Commons, but provided a different procedure by which a Bill could be presented for the royal assent when this was considered necessary.

as to the validity of a bill that did not directly seek to extend the life of Parliament, but first sought to amend the 1911 Act by deleting the exception of bills that did extend the life of Parliament. The majority (Nicholls, Steyn, Hope, Hale and Carswell) said that such an attempt would not be lawful (Rodger and Brown reserved their position; Bingham said that such an aim probably could be achieved).

15. Other issues were touched on to a greater or lesser extent in the individual judgments. Several matters concerned the process by which the judges should decide the case and the material that they should take into account.

(1) There was general agreement that the issue of the validity of the 1949 Act involved a question of law that could be decided by the courts (Bingham, Nicholls, Hope), and this was not challenged by the Attorney-General. The interpretation of all statutes, including the 1911 Act, was a matter for the courts (Nicholls, Carswell). Parliament had sole jurisdiction over its own proceedings, but no such question arose in the present case (Bingham, Nicholls).

(2) The historical context in which the 1911 Act was enacted was important in understanding the purposes being addressed by that Act (and illuminating accounts of the history were given by Bingham and Hale), but it was necessary to consider the text of the Act closely, as it had been drafted with great precision.

(3) There was no ambiguity or obscurity in the provisions of the 1911 Act, and there was no need to look at Hansard[36] to read what ministers had said about the bill (Bingham, Steyn, Walker, Carswell, Brown; Nicholls said that it was useful to read Hansard for confirmation of the position, and transparency required that this should be recognised openly).

(4) There was a difference of opinion as to the relevance of the fact that the practice of Parliament since 1949 indicated that Parliament had on four occasions legislated on the basis that the 1949 Act was valid; some judges (Nicholls, Hope and Carswell) found that the practice of Parliament in this regard should be given weight.[37] These judges relied on the need for "mutual respect" to be observed between the main institutions of the state (the legislature, the executive and the courts).

16. Other observations by individual judges related to the fundamental question of the relationship between the courts and the legislature, which in British constitutional tradition has been referred to in absolute terms as the doctrine of the "sovereignty of Parliament".

17. Two questions need to be kept in mind here (a) are there any constitutional reforms that may not be achieved by use of the Parliament Act procedure? (b) are there any constitutional reforms that may not be achieved by ordinary Act of Parliament? Neither question arose for a definitive answer in the case, although the first question was often mentioned in the Lords' debate on the Court of Appeal's decision. On this question, Lord Steyn said that "strict legalism" suggested that the Attorney-General might have been right to claim that the Parliament Acts could be used to abolish the House of Lords. But he added that he was:

---

[36] Under the rule in *Pepper v Hart* [1993] AC 593.

[37] Lord Steyn disagreed, holding that Parliament had not pronounced on the question. Lord Brown took the view that the court must decide the case as if the Parliament Act 1949 had only just been enacted: on this approach, the practice of Parliament after 1949 was irrelevant.

"deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level."(para 101)

Lord Steyn proceeded to examine the broader implications of the Attorney-General's claims in a passage that raised the second of the two questions:

"If the Attorney-General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. *This is where we may have to come back to the point about the supremacy of Parliament* [emphasis supplied]. We do not in the United Kingdom have an uncontrolled constitution as the Attorney-General implausibly submits."(para 102)

Lord Steyn referred to the European Union, devolution to Scotland and the European Convention on Human Rights and observed:

"The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created the 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*"(para 102) (the first emphasis is original, the second is supplied).

Giving again the example of an attempt to abolish judicial review or the ordinary role of the courts, Lord Steyn asked whether the judges in future might have to consider whether this was a constitutional fundamental "which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish"(para 102). However, he concluded that it was not necessary to explore the ramifications of this question, since no such issues arose in the present case.

18. Although I have elsewhere discussed the legislative supremacy of Parliament in an essay that largely agrees in substance with the points made by Lord Steyn,[38] these fundamental points plainly did not arise for decision in this case. The judge's observations had no effect on the outcome of the Hunting Act challenge. They may be contrasted with a well-known statement by Lord Reid in 1969:

"It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid."[39]

Lord Reid's view of what constitutionalism implies differs significantly from the 'different hypothesis of constitutionalism' to which Lord Steyn refers, and which may possibly develop in the future.

19. Do any of the other judgments afford support for Lord Steyn's approach? As already stated, and contrary to the view of the Court of Appeal, the Law Lords held that

---

[38] See J Jowell and D Oliver (ed), *The Changing Constitution* (5th edn, 2004), chapter 2 (by A W Bradley), "*The Sovereignty of Parliament— Form or Substance?*"

[39] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723. This passage was cited by Lord Carswell at [177].

major constitutional changes could be made under the Parliament Acts. Nonetheless, in discussing legislative sovereignty we must remember that powers may be very broad without being unlimited. On this occasion, several judges were reluctant to accept that there were no limits to the changes that could be made by legislation. Lord Hope emphasised that a fundamental principle of the constitution was "the universal rule or supremacy throughout the constitution of ordinary law", a principle that in its modern form "protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" (para 107). Later in his judgment he said:

"…a conclusion that there are no legal limits to what can be done under section 2(1) [of the Parliament Act 1911] does not mean that the power to legislate which it contains is without any limits whatever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law" (para 120).

Lord Hope emphasised that the ultimate rule by which people are prepared to recognise the existence of law "depends upon the legislature maintaining the trust of the electorate", adding:

"The principle of parliamentary sovereignty which, in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve" (para 126).

20. Baroness Hale emphasised that the concept of parliamentary sovereignty which has been fundamental to the constitution since the seventeenth century "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, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional." (para 159)[40]

Lord Carswell stated that the conditions of law-making that exist for the time being must be observed, and may if necessary be enforced by the courts,[41] but he expressly reserved his position on whether a legal challenge could succeed to the use of the Parliament Act 1911 that aimed to bring about what he described as "a fundamental disturbance of the building blocks of the constitution" (para 178). Lords Brown and Walker reserved their position on these wide-ranging matters.

Conclusions

21. This decision means that further reforms of the composition and functions of the House of Lords may be carried through under the Parliament Acts, that is, without

---

[40] See also the suggestion by Lady Hale (at 163) that Parliament could "re-define itself upwards". She was here referring to a question much discussed by legal theorists, whether Parliament could bind its successors by requiring an additional step (such as a referendum) before certain changes (such as abolishing the Scottish Parliament) could be made. The orthodox view based on Dicey's analysis is that such an attempt would be nugatory since it could simply be ignored by a future Parliament.

[41] Meaning that, if prescribed conditions were not observed by Parliament, the courts would have power to declare as a nullity any legislation that had been affected by this departure from the law.

the consent of the House itself. Contrary to the position of the Court of Appeal, this is the case even if the reforms are "fundamental", since the view taken of the 1949 Act in the Lords was that the reduction in the period of the delaying power was itself of substantial constitutional importance. Thus the creation of a maximum number of days in which the Lords might be permitted to consider bills coming from the Commons could be achieved under the Parliament Acts. So too could the conversion of the House of Lords into a wholly elected chamber, and possibly also the replacement of the upper house's power to decide by a power merely to advise the Government and the Commons. But the judgments do not settle the question of whether the House of Lords could simply be abolished and not replaced under the Parliament Acts.

22. The judgments of the Law Lords may be seen by some as opening the door to a determined government with a majority in the Commons to make such constitutional changes as it thinks fit, regardless of the views of the second chamber. However, the historical material reviewed by Lord Bingham and Lady Hale makes clear (in my opinion) that the door has been open in this way to a determined government ever since 1911. Against the background of events in 1911, it was the decision of the Court of Appeal in February 2005 that broke controversial new ground in a reading of the 1911 settlement that gave greater authority to the House of Lords than was justified by the political history.

23. As already stated, several indicators in the judgments suggest that some of the Law Lords would be prepared to revisit the classic propositions (by Dicey and others) laying down the legislative supremacy of Parliament, should the need for this arise. These passages are likely to be of great interest to constitutional theorists, who will be likely to speculate on the reasons that prompted such expressions of opinion that were not required by the issues that had to be decided.

24. I am however doubtful whether speculation of this kind would have immediate practical value. On the central issues affecting the validity of the Parliament Act 1949, I have long held the view that a challenge to the validity of that Act would have no reasonable chance of success. For this and other reasons, I do not consider that the Committee on the Constitution need take any action specifically arising from the decision in *Jackson v A-G*. Nor do I consider that the decision provides an appropriate peg on which a new attempt to settle the powers of the House of Lords in the legislative process should be made. Nonetheless, if in the future the Committee should decide to examine the role of the judiciary in a democracy founded upon the rule of law but lacking a written constitution, the judgments in *Jackson* will be amongst the contemporary material that will have to be assessed in deciding whether that role is changing and (if so) the likely direction of any change.

31 December 2005