

HOUSE OF LORDS LIBRARY



LIBRARY NOTE

The Parliament Act 1949

(Updated November 2005)

LLN 2005/007

Contents

1.	Introduction	p. 1
2.	Events leading to the Parliament Act 1949	p. 2
3.	Doubts as to the validity of the Parliament Act 1949	p. 4
4.	Opinions accepting the validity of the Parliament Act 1949	p. 7
5.	Parliament Acts (Amendment) Bill [HL] 2000/01	p. 9
6.	Parliament Act 1949 (Amendment) Bill [HL] 2001/02	p. 15
7.	Other proposals for reform	p. 15
8.	Hunting Act 2004	p. 18
9.	Jackson v. Attorney General [2005] UKHL56	p. 21
10.	References	p. 30

1. Introduction

The passage of the Hunting Act 2004 through Parliament using the provisions of the Parliament Acts 1911 and 1949 generated renewed parliamentary and public discussion of the validity of the 1949 Act, including a legal challenge to its validity by opponents of the ban on hunting with dogs, which ended in the House of Lords. The 1949 Act, which was itself passed under the provisions of the 1911 Act, amended the 1911 Act by reducing the delaying powers of the House of Lords over public Bills from two years to one year, spread over two sessions instead of three. Under section 2(1) of the 1911 Act this procedure may be applied to any public Bill except Money Bills (which under section 1 can only be delayed by the Lords for one month) and a Bill to extend the life of a Parliament beyond five years.

Discussion about the validity of the 1949 Act (and consequently of the Acts passed in accordance with its provisions, i.e. the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004) originates in doubts expressed by various constitutional lawyers as to the legality of using the 1911 Act procedures to enact an amendment to that Act itself, whilst others have expressed the contrary view.

This Lords Library Note gives a summary of events leading to the Parliament Act 1949, then gives a bibliographical guide to the legal literature on both sides of the argument, goes on to consider Lord Donaldson of Lynton's Parliament Acts (Amendment) Bill [HL] 2000/01, which sought to clarify the legal position, looks at other proposals for reform of the Parliament Acts, continues with parliamentary statements during the passage of the Hunting Bill 2003/04 and then concludes by summarising the decision of the House of Lords in *Jackson v. Attorney General* [2005] UKHL56.

2. Events leading to the Parliament Act 1949

A succinct account of the events leading to the Parliament Act 1949 is given in *O. Hood Phillips and Jackson on Constitutional and Administrative Law* (8th ed., 2001) at pages 169-170:

In the general election of 1945 the Labour Party said that they would not allow the House of Lords to thwart the will of the people, but they did not ask for a mandate for its abolition or reform. There was a mandate for the nationalisation of certain industries, not including iron and steel. The House of Lords did not reject the Labour Government's nationalisation measures in 1945-47: they suggested a number of useful technical amendments, but did not insist on any amendments to which the Commons did not agree. It seemed likely, however, that the Lords would reject the Iron and Steel Bill.

In 1947 the Commons passed a Parliament Bill (in the form which eventually became the Parliament Act 1949) designed to reduce the period of the Lords' delaying power in the case of public Bills other than Money Bills from two years to one year, spread over two sessions instead of three. [The Second Reading was on 11 November 1947 and the Third Reading on 10 December 1947.] The object of introducing this Bill at that stage was to ensure the passing of the Iron and Steel Bill, and perhaps further nationalisation measures, in spite of the opposition of the Lords in the fourth year of the existing Parliament. The Conservative majority in the Lords opposed the Parliament Bill on the grounds that (*inter alia*) it did not reform the membership of the upper House, the nation had expressed no desire for it, and it would go far to expose the country to the dangers of single chamber government.

(*O. Hood Phillips and Jackson on Constitutional and Administrative Law* (8th ed., 2001), page 169)

The Second Reading in the Lords began on 27 January 1948, continued on 2, 3 and 4 February 1948 and was then interrupted for a Conference of Party Leaders which took place in February and April 1948.

O. Hood Phillips and Jackson continue:

It was agreed that the discussion should treat the composition and powers of the House of Lords as interdependent, but as far as concerned powers the terms of reference were limited to the delaying power. The Conservative leaders regarded 12 months from the third reading in the Commons as the shortest period acceptable. The Labour leaders regarded the maximum period acceptable as nine months from the third reading in the Commons or one year from the second reading, whichever might be the longer in a particular case. The difference between the parties was more than a matter of three months, for it revealed a cleavage of opinion as to the purpose of the delaying power. The Labour view was that each House should have a proper time for the consideration of amendments to Bills proposed by the other. In effect this meant that the Commons should have time to think again. The Conservative view was that in the event of serious controversy between the two Houses on a measure on which the view of the electorate is doubtful, a significant time should elapse to enable the

electorate to be properly informed of the issues involved and for public opinion to crystallise and express itself. This does not necessarily involve a general election. The Conference therefore broke down, and the Lords then rejected the Parliament Bill [when the Second Reading was resumed on 8 June 1948].

(*O. Hood Phillips and Jackson on Constitutional and Administrative Law* (8th ed., 2001), pages 169-170)

An extra short session (14 September - 25 October 1948) was then held for the purpose of considering the Parliament Bill for the second time. The Bill (which contained the original provision for a 12 months delaying period from Second Reading) was given a Second Reading in the Commons on 20 September 1948 and a Third Reading on 21 September 1948. It was rejected by the Lords at Second Reading on 23 September 1948.

In the third session, the Bill was given a Second Reading by the Commons on 31 October 1949 and a Third Reading on 14 November 1949. It was then rejected by the Lords at Second Reading on 29 November 1949 and finally received Royal Assent under the provisions of the Parliament Act 1949 on 16 December 1949.

The Parliament Act 1949 included a retroactive provision (the proviso to section 1) extending to Bills introduced before the Parliament Bill itself. This would have enabled the Iron and Steel Bill to have been passed under the 1949 Act's provisions, but in the event they were not used as a compromise was reached whereby the proposed corporation would not be appointed until after the next General Election.

A more extensive account of the above events is given in Sir Ivor Jennings' classic work, *Parliament* (2nd ed., 1969), at pages 414-434, which also includes an account of the events leading to the 1911 Act.

3. Doubts as to the validity of the Parliament Act 1949

Doubts as to the validity of the 1949 Act have been expressed by eminent constitutional lawyers, particularly Sir William Wade, Professor Hood Phillips and Professor Zellick.

The original suggestion came from H. W. R. Wade (later Sir William Wade) in 'The basis of legal sovereignty' (*Cambridge Law Journal*, 1955, pp. 172-197) which he further developed in successive editions of his book, *Administrative Law*. Thus he argues that Acts passed under the Parliament Acts are delegated and not primary legislation:

The sovereign legal power in the United Kingdom lies in the Queen in Parliament, acting by Act of Parliament. An Act of Parliament requires the assent of the Queen, the House of Lords, and the House of Commons, and the assent of each House is given upon a simple majority of the votes of members present. This is the one and only form of sovereign legislation, and there is no limit to its legal efficacy. It is true that Acts may be passed without the assent of the House of Lords under the procedures provided by the Parliament Acts 1911 and 1949; but these confer delegated, not sovereign, powers, for legislation passed under them owes its validity to their superior authority, and this is the hallmark of delegated legislation. Sovereign legislation owes its validity to no superior authority: the courts accept it in its own right. Furthermore, no Act passed under the Parliament Acts can prolong the life of a Parliament beyond five years, whereas the power of a sovereign Act is boundless.

(Sir William Wade, *Administrative Law* (8th ed., 2000), pages 25-26)

Hood Phillips took the same approach in *Reform of the Constitution* (1970, pages 91-94) which he re-stated in the 7th edition of *Constitutional and Administrative Law*, basing his reasoning on the principle of *delegatus non potest delegare* (a delegate cannot enlarge on his own power). Thus he states:

It is a mistake to suppose that Parliament in 1911 "conferred" on the House of Lords power to "delay" legislation for certain periods, and that "Parliament" in 1949 reduced this period. At common law the consent of the Lords was essential to the passing of any legislation. In 1911 the power of the Lords to reject Bills was restricted, but the upper House retained thereafter any power that was not expressly abrogated. The Parliament Act 1911 may be said to have delegated a lawmaking power to the Monarch and the Commons under certain specific conditions, and it is submitted that it is not open to them as delegates to enlarge that power as they purported to do in 1949. If this argument is sound in relation to a reduction of the delaying period, it may also apply to a Bill to abolish the Second Chamber (the existence of which is implied by the provisions of the Parliament Act 1911), and possibly also to a Bill to alter the composition of the House of Lords. It may be that the consent of the Lords would be necessary for the validity of any of these measures.

(O. Hood Phillips, *Constitutional and Administrative Law* (7th ed., 1987), page 149)

Hood Phillips further argues that:

The provision of section 3 of the Parliament Act 1911 that the Speaker's certificate shall be conclusive for all purposes, and shall not be questioned in any court of law, certainly appears to raise a difficulty; but the House of Lords in its judicial capacity has decided that where a statute states that an instrument such as an order or certificate shall be "conclusive evidence" or words to that effect, this implies that the instrument has been properly made, and does not extend to some purported order or certificate which was beyond the power of the maker to make. This principle could be applied to a certificate signed by the Speaker in misconstruction of the power conferred on him by the Parliament Act 1911.

(*ibid.*)

In the 8th edition of *Hood Phillips*, 2001, written by Paul Jackson and Patricia Leopold, these arguments are posited as follows:

Indeed, we may doubt whether the measure calling itself "the Parliament Act 1949" is valid. The Parliament Act 1911, of course, received the consent of the House of Lords; but the "Parliament Act 1949" – designed to reduce still further the period during which the Lords might delay a public Bill other than a Money Bill – did not receive the consent of the Lords but purported to be passed in accordance with the provisions of the Parliament Act 1911. It therefore offended against the general principle of logic and law that delegates (the Queen and Commons) cannot enlarge the authority delegated to them. We are not, of course, arguing – as it is impossible in English law to argue – that an Act of Parliament is invalid; what we are questioning is whether the measure called "the Parliament Act 1949" bears the character of an Act of Parliament. In other words we are contending that the Parliament Act 1911, as an enabling Act, cannot itself be amended by subordinate legislation of the Queen and Commons. ...

It has been suggested that the argument raised in earlier editions has been undermined by the decision of the House of Lords in *Pepper v. Hart*. It is true that an examination of Hansard reveals the belief of government ministers that the procedures of the 1911 Act could be used to amend the 1911 Act itself. But it is equally clear that section 4 of the Act – which required legislation passed without the consent of the House of Lords to be introduced by the special words of enactment which explicitly refer to the 1911 Act – was introduced by peers who did not wish to see its procedures used to further reduce the powers of the House.

(*O. Hood Phillips and Jackson on Constitutional and Administrative Law* (8th ed., 2001, by Paul Jackson and Patricia Leopold), page 80)

Graham Zellick also considers that the 1949 Act is delegated legislation:

The courts say they will apply whatever Parliament enacts; so although Parliament may be able to alter its own structure – though even this is denied by some authorities – it must do so in the manner prescribed at the time ... But of course, Parliament can authorise other bodies to legislate and more legislation today is the product of powers delegated by Parliament than of Parliament itself. And this is what the Parliament Act

1911 does: it says that in certain circumstances a body consisting of Queen and Commons alone may legislate, and may legislate on any topic, except to extend the duration of Parliament (s. 2(1)), but only after the Lords have rejected the Bill. What is then enacted is in fact a species of delegated legislation.

(Graham Zellick, 'Is the Parliament Act *ultra vires*?', *New Law Journal*, 1969, page 716)

Consequently he argues that:

If the legislative body under the Act of 1911 is not the Queen-in-Parliament, but a body distinct and subordinate, it can have no power to amend its constituent instrument, the Act of 1911, unless that Act itself expressly provides for it, which it does not. Amendment of the parent Act, then, can be accomplished only by the delegating authority, the Queen-in-Parliament.

(*ibid.*)

Therefore he contends that the 1949 Act is invalid:

Any statute passed according to the provisions of the Act of 1911 is as good as any statute receiving the assent of the Queen, Lords and Commons, unless it purports either to amend the Act of 1911, or to extend the length of Parliament. Since the Act of 1949 attempts to do the former, it has attempted the impossible, and is, therefore, no statute at all, for it has exceeded the powers conferred on the law-making body.

(*ibid.*)

A similar approach was adopted by Michael Shrimpton in his *Counsel's Opinion on the House of Lords Bill* (8th April 1999) in which he advised a number of hereditary peers on various constitutional questions arising from the House of Lords Bill 1998-99. Adopting arguments similar to those advanced by Wade, Hood Phillips and Zellick he advised that the 1949 Act and the Acts passed under it were *ultra vires* the 1911 Act and therefore if the House of Lords Bill were passed under the provisions of the Parliament Acts it also would be *ultra vires* (paragraphs 3, 43-66).

Earlier, Peter Mirfield advanced similar arguments in relation to a House of Lords abolition Bill using the Parliament Acts ('Can the House of Lords lawfully be abolished?', *Law Quarterly Review*, 1979, pages 36-58).

4. Opinions accepting the validity of the Parliament Act 1949

Opinions contrary to those in the previous section have been advanced by other eminent constitutional lawyers who consider that the Parliament Act 1949 (and consequently any legislation passed in accordance with its provisions) is valid.

Thus Stanley de Smith and Rodney Brazier in *Constitutional and Administrative Law* (8th ed., 1998) argue that legislation passed under the 1911 Act is primary, as “Parliament is capable of redefining itself for particular purposes. It did so by the Parliament Acts, which provided a simpler, optional procedure for legislation on most topics” (page 93).

A. W. Bradley and K. D. Ewing in *Constitutional and Administrative Law* also argue that the Parliament Acts have provided an alternative legislative procedure to that recognised at common law:

In respect both of the Regency Acts and the Parliament Acts, it has been argued that measures which become law thereunder are not Acts of the supreme Parliament but are Acts of a subordinate legislature to which the supreme Parliament has made a limited delegation of its powers; such measures are thus no more than delegated legislation. But in other contexts, courts have been reluctant to apply the principle *delegatus non potest delegare* to a legislature and a preferable view is that, for all but the purposes excluded, Parliament has provided a procedure for legislation which is alternative to the procedure of legislation by the supreme Parliament recognised at common law. On this view, the legal definition of an Act of Parliament may already differ according to the circumstances, as it may where a written constitution requires special procedures or special majorities for certain purposes.

(A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (13th ed., 2003), page 65)

Trevor Tayleur notes that in nineteenth century cases the courts were reluctant to apply the principle of *delegatus non potest delegare* to colonial legislatures:

A further argument in favour of the validity of the 1949 Act can be found in nineteenth century cases in which the courts did not apply the principle *delegatus non potest delegare* to colonial legislatures.

In *R v. Burah*, it was argued that the Indian legislature was a delegate of the United Kingdom Parliament and so could not delegate its powers. The Privy Council rejected this argument, Lord Selborne saying: “The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can ... do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of parliament itself”.

Legislation passed by the colonial legislatures was original, not delegated. Similarly, in enacting the Parliament Act 1911 parliament did not create a delegate, but intended to give full legislative power to the Queen and House of Commons where they used

the procedure permitted by the Act, subject to certain well defined limits. Only if the Queen and Commons exceeded those limits, for example by purporting to enact a measure under the Parliament Acts extending the duration of a Parliament without the consent of the Lords, would the courts be willing to intervene.

(Trevor Tayleur, 'A valid Act?', *New Law Journal*, 1995, pages 1328, 1343)

Sheena McMurtrie in 'A challenge to the validity of the Parliament Act 1949: an opportunity lost?' (*Statute Law Review*, 1997, pages 46-57) usefully reviews the arguments for and against validity referred to above and goes on to consider the validity of the War Crimes Act 1991, although she does not reach a firm conclusion.

Similarly, in her earlier article 'The constitutionality of the War Crimes Act 1991' (*Statute Law Review*, 1992, pages 128-149) she considers the validity of the War Crimes Act 1991 and also gives some of the political background to that Act.

5. Parliament Acts (Amendment) Bill [HL] 2000/01

On 11 December 2000 Lord Donaldson of Lynton introduced the Parliament Acts (Amendment) Bill in the House of Lords (*HL Hansard*, col. 103). The *Explanatory Notes*, prepared by Lord Donaldson, refer (paragraph 2) to the doubts expressed by constitutional lawyers as to the validity of the Parliament Act 1949 (as discussed above) and consequently also as to the validity of the Acts passed in accordance with its provisions. Further, the *Explanatory Notes* refer to the “extra-legal consideration underlying and perhaps reinforcing these doubts” based upon “the widespread belief that the 1911 Act ensures that, in the absence of consent from the House of Lords, the House of Commons cannot extend the life of a Parliament beyond five years. If the Parliament Act 1949 has validly amended the Parliament Act 1911, the House of Commons can use the same procedure in order to pave the way for just such an extension or, indeed, for any unilateral variation of the constitution or powers of the House of Lords” (paragraph 4).

The Bill’s purpose was to confirm the status of the 1949 Act and the Acts passed under it (Clause 1) and to ensure that the provisions of the 1911 and 1949 Acts could not be used in the future to affect the constitution or powers of the House of Lords (Clause 2(b)) and could not themselves be amended except by Act of Parliament passed by both Houses in the conventional way (Clause 2(d)).

Paragraphs (a) and (e) of Clause 2 reproduce the existing exceptions to the Parliament Act procedure, i.e. Money Bills (which under s. 1 of the 1911 Act can only be delayed by the Lords for one month) and a Bill to extend the life of a Parliament beyond five years. Paragraph (c) seeks to vary the existing law by excepting from the Parliament Act procedure “a Bill not all of whose provisions have been fully discussed and considered by the House of Commons in the last Session in which the Bill was passed by that House before being presented to her Majesty”. The *Explanatory Notes* state (at paragraph 4) that the purpose of paragraph (c) of Clause 2 is to ensure full discussion and consideration by the Commons “at least at a time when the views of the Lords will be known. This requirement of full discussion and consideration involves obvious difficulties of definition ...” but the solution adopted in the Bill is to leave the issue of whether the condition is satisfied to the Speaker of the House of Commons as one of the matters he must take into account in deciding whether to issue a certificate of compliance under s. 2(2) of the 1911 Act.

Second Reading Debate

The Bill was given a Second Reading by the House of Lords on 19 January 2001 (*HL Hansard*, cols. 1308-1332). Opening the debate, Lord Donaldson of Lynton stated that the 1949 Act was fatally flawed, developing his argument as follows:

As your Lordships well know, it is a fundamental tenet of constitutional law that, *prima facie*, where the sovereign Parliament - that is to say, the Monarch acting on the advice and with the consent of both Houses of Parliament - delegates power to legislate, whether to one House unilaterally, to the King or Queen in Council, to a Minister or to whomsoever, the delegate cannot use that power to enlarge or vary the powers delegated to him. The only exception is where the primary legislation, in this case the 1911 Act, expressly authorises the delegate to do so. In other words, there has to be a Henry VIII clause.

The 1949 Act purported to vary the powers delegated to the Commons by curtailing the timetable. This could have been authorised by a Henry VIII clause in the 1911 Act, but there was no such clause. It follows that the other place, in enacting the 1949 legislation, exceeded its authority.

What is the result? That Act is not void; nor is it a nullity. But is flawed. As it is subordinate legislation - that is to say, legislation under delegated powers - the courts can be asked to exercise their power of judicial review. If, as in my view is undoubtedly the case here, the 1949 Act was made in excess of authority, the courts have the power to set aside the Act itself or anything done in reliance upon it. But - this is important - unless and until the courts take action, the flaw does not matter. Life goes on as if nothing were amiss.

(*HL Hansard*, 19 January 2001, cols. 1308-1309)

He continued:

I should not expect the courts at this time to grant any application for judicial review of the 1949 Act, or of any of the legislation enacted on the basis of its amended timetable. They would say that it was all too late, or that the applicant had insufficient interest, or both.

However, a wholly different situation would arise if the other place again legislated without the consent of this House using the 1949 Act timetable and if that new legislation - I have little doubt that this might happen - were challenged promptly by someone with a sufficient personal interest. ... I would forecast that the court would set aside the new Act on the basis that the 1949 Act was flawed and could not be relied upon to authorise a new Act using that timetable. This would leave the 1949 Act on the statute book, but it could never thereafter be relied upon by the other place to justify legislation using its timetable.

As I say, I cannot forecast when that challenge will come. But, at present, the front-runner must be the Hunting (with dogs) Bill, if and when it is rejected by this House for a second time and one year has elapsed since its first Second Reading. But let me make it abundantly clear that the mischief at which this Bill is directed is not the Hunting Bill, or any other change in the substantive law.

What has troubled me and given birth to this Bill is something wholly different. One of the foundations of our unwritten constitution is a respect for the separation of powers. This involves Parliament avoiding criticising judicial decisions - and quite often it does so - and vice versa. The courts are also very strict about not criticising parliamentary decisions. Unfortunately, the scenario that I foresee will involve the judiciary being obliged to pass judgment on one aspect of the work of the other place. There will be no escape, even if it is only an application for leave to move for judicial review; indeed, no escape whatever. It will be misrepresented by the media and by some politicians as a major constitutional crisis.

I want to avoid that situation. Clause 1 achieves just that aim. It “confirms” the 1949 Act and everything done under its authority. The use of the word “confirm” will, I hope, satisfy those who, like me, are wholly convinced that the 1949 Act is deeply

flawed. It will convince us that the flaw has been repaired. I hope that it will satisfy those who could not detect the flaw that all doubts on the part of others have been silenced. Either way, if this Bill becomes law no question of judicial review will arise in the context of the use of the 1949 Act timetable - either in the past or in the future.

(HL Hansard, 19 January 2001, cols. 1309-1310)

Lord Donaldson then went on to consider Clause 2 of the Bill (listing the exceptions to the Parliament Act procedure) which, he said, made express what he believed to be implicit in the 1911 Act. The one exception was Clause 2(c) which sought to vary the existing law. He explained:

This provides that the Commons shall have an opportunity fully to consider this House's views before it can proceed to pass an Act without our consent. If this proves controversial, I shall be perfectly happy to abandon it. As I say, it is designed to ensure that timetable Motions in the other place do not deny that House an opportunity of fully discussing and considering the views of this House before imposing its own view. At the same time it was necessary to avoid providing a charter for Members of the other place seeking to mount a filibuster. I took the view that it was impossible to draft a precise definition of "fully discussed and considered" which would be appropriate in all circumstances. The concept was clear enough but its detailed application called for judgment rather than legislative precision.

Conveniently, Section 2(2) of the 1911 Act requires the Speaker to certify that the provisions of the section have been duly complied with. If the present Bill becomes law, he would need, before certifying, to exercise his own judgment as to whether there had been full discussion and consideration of all the provisions of the Bill concerned at a stage when the views of this House would be available.

(HL Hansard, 19 January 2001, col. 1312)

Lord Donaldson concluded his speech by stressing that the Bill was "designed to remove doubts as to the past and to avoid doubts for the future. It is designed to avoid a collision between the courts and the other place" (*HL Hansard, 19 January 2001, col. 1313*).

Lord Strathclyde welcomed the Bill and supported its proposals. He said:

It is ironic that I do not think we would have discussed this matter if it had not been for the fact that since 1997 the Government have either used, or threatened to use, the Parliament Act as frequently as they have done. That action has led to this debate.

Why is this occasion so important? It is because this Bill goes to the very heart of the issue of bicameral government in our parliamentary system. There is no point in an upper Chamber if the executive dominating the other place is not prepared to listen to it and sometimes change its mind.

(HL Hansard, 19 January 2001, col. 1313)

He then went on to mention that he had been urged at the time of the House of Lords Bill (abolishing the right of most hereditary peers to sit in the House) to take that Bill through a

two-year battle and force use of the Parliament Act so that its validity could be tested in the courts. He decided that was not the right route then, but nevertheless the law still required clarification.

Lord Strathclyde then turned to Clause 2 of Lord Donaldson's Bill (listing the exceptions to the Parliament Act procedure) which, he thought, clarified and toughened the restrictions on the use of the Parliament Acts. He explained:

First, it entrenches what has been understood to be the position: that the Parliament Acts could not be used to pass a Bill to extend the life of a Parliament beyond five years. Can there be anyone in your Lordships' House who would not agree that that is a thoroughly sensible and prudent provision?

Secondly, it would provide that the Parliament Acts could not be used to amend the Parliament Acts, or, indeed, this Bill. As the noble and learned Lord explained, the 1911 Act was used to carry the 1949 Act, which is the origin of the doubt that the noble and learned Lord identified. Given that it is unlikely that any executive would want to impose additional powers on an unwilling House of Lords, that the Wakeham Commission was against any change to the Parliament Acts to weaken the powers of this House, and that we on the Conservative Benches want a stronger, not a weaker, Parliament, I support the proposals of the noble and learned Lord on this point.

Thirdly, the Bill provides that the Parliament Acts could not be used to carry a Bill to,

“vary the constitution or powers of the House of Lords”,

or a Bill,

“not all of whose provisions have been fully discussed and considered by the House of Commons in the last Session ... before being presented to Her Majesty”.

I agree with the noble and learned Lord that constitutional change affecting this House should not be imposed unilaterally by a single party. Arrogant exertion of executive will is no basis for lasting constitutional change.

(HL Hansard, 19 January 2001, col. 1315)

Other peers supporting the Bill were Lords Campbell of Alloway, Lucas, Mayhew of Twysden and Kingsland.

Lord Goodhart, however, thought the Bill was unnecessary, believing that the argument for the Bill rested on a narrow and untenable base, i.e. the argument that Parliament does not have unfettered power to change the procedures by which it enacts statutes. He said:

Plainly, Parliament has the power to change its own composition and to exclude Members. It did so most recently in the House of Lords Act 1999, which excluded most hereditary Peers. It did so in 1917 by excluding a number of Peers who were found to have been fighting on the German side in the First World War. It did so by the Welsh Church Act 1914 which excluded from your Lordships' House bishops holding sees in Wales. That part is particularly significant because Sir William Wade suggests that a change in the composition of your Lordships' House cannot be

brought about by a Bill passed under the Parliament Acts. The Welsh Church Act was passed under the Parliament Act 1911 and, if that argument is correct, then Welsh bishops are still entitled to sit in your Lordships' House.

More important, of course, even than the composition of your Lordships' House is the identity of the sovereign. By the Act of Settlement of 1700 Parliament conferred the Crown, in succession, on to Queen Anne when she succeeded King William III, on the Electress Sophia of Hanover and her heirs.

The identity of the sovereign plainly goes to the bedrock of the constitution. It is as significant, if not more significant, than any restriction of the powers of your Lordships' House. But there is no suggestion that the assent to legislation of a monarch who owes his or her Crown to the Act of Settlement is in any sense delegated legislation or that the Act of Settlement itself could not be changed by an Act of Parliament assented to by a sovereign who owes his or her Crown to the Act of Settlement itself.

(HL Hansard, 19 January 2001, col. 1323)

Lord Goodhart continued that any conclusion that legislation passed under the Parliament Act 1911 is delegated legislation is fanciful, arguing that if Parliament can change the descent of the Crown why could it not enable the Crown and the Commons to enact legislation having equal validity to legislation enacted by the normal process, including power to amend the Act which created the new process. It was true, he said, that the exclusion from the Parliament Act process of power to extend the life of a Parliament was not entrenched in the sense that that power could itself be removed by legislation under the Parliament Act, and he confessed that there was a strong argument for such entrenchment. But he suspected that the probable reason was that the Parliament Act 1911, as the preamble made clear, was seen as an interim step leading shortly to a full revision of the composition and powers of the House of Lords. He did not believe that those involved in the 1911 Act thought that Acts passed under it were in any sense "second-class legislation". Unlike Lord Donaldson, he believed that nothing in the 1911 Act suggested that it could not be used for a Bill to alter the composition and powers of the House of Lords and, as he had already indicated, this was done in the Welsh Church Act (*HL Hansard, 19 January 2001, cols. 1323-1324*).

Lord Goodhart then concluded as follows:

I turn briefly to the wider issues which appear to lie behind the Bill. The underlying issue is the powers of your Lordships' House. It can be regarded as an attempt to claw back some of the powers that have been taken away by the Parliament Acts. The Bill seeks to raise doubts about the validity of the Parliament Act 1949. It proposes to recognise the validity of that Act and of Acts subsequently passed under it in exchange for the surrender of powers under both the 1911 and 1949 Acts for the House of Commons to override the veto of your Lordships House on the constitution and powers of the House. As I have indicated, that is an objective which we would not support.

(HL Hansard, 19 January 2001, col. 1325)

Lord Wedderburn of Charlton also did not support the Bill and Lord Shore of Stepney, whilst welcoming Clause 1, thought that Clause 2 would unnecessarily restrict the use of the normal provisions of the Parliament Acts.

The Attorney-General, Lord Williams of Mostyn, said that the Government's position was coincident with that of Lord Goodhart. He stated that there was no ambiguity in the Parliament Acts which needed to be corrected. The Parliament Act was a valid Act of Parliament and had been for the past 51 years. He went on:

I turn briefly to the 1911 Act. These issues were discussed in the House of Commons and in your Lordships' House when the Parliament Act went through both Houses. In relation to an amendment which had an effect similar to Clause 2(d) of the Bill, the then Prime Minister, Mr Asquith, said that the Government did not wish to see,

“the liberty of a future House of Commons in any way impaired or restricted by the means of an exception proscribing any Amendments which experience may show to be necessary”.

He added that it would be reasonable not to submit the Government to,

“the possibility of our not being able, whatever experience we may show, to amend in particular this measure”. - [*Official Report*, Commons, 24/4/11; cols. 1473 and 1494.]

In other words, at that time he had the foresight to think 36 years ahead to 1949. The issue was perfectly well ventilated then and perfectly well understood.

Indeed, in your Lordships' House a similar amendment was proposed and then withdrawn. The mover plainly said that the amendment, if carried,

“would have the effect of keeping out any amending Bill to lessen the suspensory period of two years”. - [*Official Report*, 29/6/11; col. 1184.]

Again, it was perfectly well understood and I submit that there is no doubt about the validity of the 1949 Act.

(*HL Hansard*, 19 January 2001, cols. 1328-1329)

Lord Williams of Mostyn then turned his attention to Clause 2 of the Bill (listing the exceptions to the Parliament Act procedure). Whilst paragraphs (a) and (e) simply recited the present constitutional arrangement, he believed paragraph (b) (excepting any Bill varying the constitution or powers of the House of Lords) was entirely objectionable, reasoning that if the Salisbury convention were not abided by, an elected Government, even with a manifesto commitment to reform, could be endlessly defied by the House of Lords on any of their proposals, however often endorsed by the electorate at however many successive general elections. As regards paragraph (c) (excepting any Bill whose provisions had not been “fully discussed and considered” by the House of Commons where the Speaker had so certified) Lord Williams believed that to be unworkable (*HL Hansard*, 19 January 2001, col. 1330).

After a brief Committee stage the Bill was reported without amendment (*HL Hansard*, 28 February 2001, cols. 1268-1272) and received a formal Third Reading on 28 March 2001 (*HL Hansard*, col. 271). The Bill was then lost in the subsequent 2001 dissolution of Parliament.

6. Parliament Act 1949 (Amendment) Bill [HL] 2001/02

A year after Lord Donaldson's Bill was considered by the Lords, the House gave a Second Reading to the Parliament Act 1949 (Amendment) Bill [HL], which was introduced by Lord Renton of Mount Harry (*HL Hansard*, 16 January 2002, cols. 1154-1176). The Bill sought to disapply the 1949 Act except to bills introduced in the third or subsequent session of a Parliament, from the date on which the first popular election to the House of Lords was held, and also to confirm Acts passed before that date under the provisions of the 1911 and 1949 Acts. In effect, this would mean that after the House of Lords became wholly or partly elected the delaying power would be two years for bills introduced in the first or second session of a Parliament and one year only for others.

The Bill made no further progress.

7. Other proposals for reform

Other proposals for reforming the Parliament Acts have been made in the context of proposals for House of Lords reform.

Thus the Royal Commission on the Reform of the House of Lords, chaired by Lord Wakeham, recommended that the Parliament Acts should be amended as follows:

Changes to the Parliament Acts

5.13 The current balance between the two chambers has evolved over many decades and should not be changed lightly. There is, however, one point which concerned us and which was drawn to our attention by a number of witnesses. It is a potential weakness of the Parliament Acts that they can themselves be amended using Parliament Act procedures, as was done in 1949. We recommend that this loophole should be closed, in order to protect the current balance of power between the two Houses of Parliament from being changed except with the agreement of both chambers.

5.14 The present position gives the second chamber power effectively to delay the enactment of any Commons Bill (except a Money Bill) by a few months, while requiring the House of Commons to reconsider it and to reaffirm its support for the legislation. It makes it possible for any Bill consistently supported by the Commons (except a Bill to extend the life of a Parliament) to be enacted within 13 months of Second Reading in the Commons, even in the face of objections from the House of Lords.

5.15 That seems to us to strike the right balance. Any change to the detriment of the second chamber would risk leaving it with insufficient powers to carry out its overall role effectively. We therefore recommend that the Parliament Acts should be amended to exclude the possibility of their being further amended by the use of Parliament Act procedures. This would, in effect, give the second chamber a veto over any attempt to constrain its existing formal powers in respect of primary legislation. On the basis of expert advice, we believe that this could be achieved by a

simple and straightforward amendment, for example by inserting the words “to amend this Act or” after “provision” in Section 2(1) of the 1911 Act. This would avoid opening up the whole of the Parliament Acts to debate and amendment.

Recommendation 19: The Parliament Acts should be amended to exclude the possibility of their being further amended by the use of Parliament Act procedures.

5.16 This recommendation would also secure the second chamber’s veto over any Bill to extend the life of a Parliament, since that provision is written into the Parliament Act 1911. Our consultation exercise revealed overwhelming support, from all the main political parties and from the public, for the preservation of the House of Lords’ existing veto over any such Bill.

Recommendation 20: The second chamber’s veto over any Bill to extend the life of a Parliament should be reinforced. Our previous recommendation would achieve that.

(Royal Commission on Reform of the House of Lords, *A House for the Future*, Cm. 4534, January 2000)

Subsequently, the Government issued a White Paper responding to the Royal Commission’s report and made the following comments on the Parliament Acts:

Parliament Acts

29. The Parliament Acts provide for legislation to be passed by the Commons alone provided: it starts in the Commons; is passed by them in two successive Sessions with Second Reading in the second Session at least 12 months after that in the first; and is sent to the Lords in each Session at least a month before the end of the Session. The effect is to give the Lords a delaying power, exercised only in exceptional circumstances, but not an ultimate veto. The Government agrees with the Royal Commission that this should continue to be the case.

30. The Parliament Acts of 1911 and 1949 were responses to immediate imperatives. Accepting the principle of a reserve delaying power of about one year, the framing of the power might be rather different if it were done afresh. For example, the Royal Commission looked into the question of whether the time limits set out in the Acts were any longer appropriate. They also considered whether the Acts should be applied to Bills starting in the Lords. In both cases they concluded that the changes were far from simple to enact, and the practical effect insufficient to justify the Parliamentary time and effort required. The Government agrees. It therefore proposes no changes to the legislative or conventional framework governing the relationship between the two Houses.

(Lord Chancellor’s Department, *The House of Lords – Completing the Reform*, Cm. 5291, November 2001)

The Joint Committee on House of Lords Reform also looked at the Parliament Acts and concluded that “Subject to satisfactory assurances that carry-over arrangements could not be

used to erode the powers of the House of Lords, we do not consider at this stage that the provisions of the Parliament Acts need to be altered” (Joint Committee on House of Lords Reform, *House of Lords Reform: First Report*, HL Paper 17, HC 171, 2002-03, December 2002, paragraph 29).

In July 2004, the report of the Labour Peers Working Group on House of Lords Reform recommended the enactment of a new Parliament Act, as follows:

A New Parliament Act – Conclusion

Further detailed work on the principles of what we have put forward will be necessary – not least because a number of our recommendations have major implications for the House of Commons. A new Parliament Act will need to incorporate the following:

- Time limit for bills in the Lords
- Bills starting in the Lords to be subject to the Act
- The delay mechanism including:
 - Period when a bill has to complete its passage through both Houses on first introduction
 - Point at which a bill could be re-introduced
 - Length of time before such a bill so re-introduced could become law
- Reconciliation machinery
- Reinforcement of veto on extensions to life of parliament
- Technical defects to be addressed

Although the Parliament Acts have only been used six times since 1911, the Acts have played a crucial role in guiding the relationship between the Commons and the Lords. The Parliament Acts are the most visible sign of the pre-eminence of the Commons; their potential use can threaten enough inconvenience to the Government of the day to encourage it to take the Second Chamber seriously.

Our recommendations for a new Parliament Act embrace this essential balance and would assist the orderly process of legislation through Parliament. But they would also ensure that what seems to many an impenetrable procedure is understood. Replacing the Parliament Acts with a new act which is clear and comprehensive would undoubtedly be in the public interest.

(Labour Peers Group, Working Group on House of Lords Reform, *Reform of the Powers, Procedures and Conventions of the House of Lords*, 20 July 2004, page 11)

Most recently, a cross-party group of MPs, Kenneth Clarke, Robin Cook, Paul Tyler, Tony Wright and Sir George Young, published *Reforming the House of Lords: Breaking the Deadlock* (21 February 2005), in which they put forward a package of proposals for reform of the House aimed at developing a consensus and including a draft Bill.

The group did not recommend any immediate reform to the Parliament Acts. At page 15 they review the powers of the House of Lords and state that one of the areas where changes to the Lords’ powers have been more frequently discussed is “whether the terms of the Parliament Acts should be extended to cover Bills that start in the Lords, as well as in the Commons. We agree that the current situation is somewhat anomalous in this regard. It means that

important government Bills introduced in the Lords can potentially be vetoed altogether. However, the arrangement also reflects the tradition that the House of Commons is the primary legislative chamber, and major controversial Bills should be introduced there. The fact that ministers got into difficulties with respect to the Criminal Justice (Mode of Trial) Bill and the Local Government Bill (which included the proposals to abolish section 28) in 2000, reflected to a large extent lack of planning on governments part. Defeat on these matters in the Lords was largely predictable. Such difficulties can therefore be avoided if proper account is taken of the Lords' existing powers, and Bills introduced there are limited to less controversial matters. We note that the Royal Commission, the Public Administration Committee and the Government in 2001 all rejected extending the Parliament Acts to Bills that start in the Lords and, whilst we are sympathetic in part to the proposal, we do not think that it requires urgent action”.

(Kenneth Clarke, Robin Cook, Paul Tyler, Tony Wright and Sir George Young, *Reforming the House of Lords: Breaking the Deadlock*, 21 February 2005, page 15).

8. Hunting Bill 2003/04

During the passage of the Hunting Bill 2003/04 the issue of the use of the Parliament Acts was raised on a number of occasions in both Houses. The following exchanges illustrate the general lines of argument:

In the House of Commons on 26 October 2004 the Parliamentary Under-Secretary of State for Constitutional Affairs, Christopher Leslie, responded to a number of oral questions on the constitutionality of the Parliament Acts and their use in relation to the Hunting Bill (*HC Hansard*, 26 October 2004, cols. 1284-1286). He said that the Acts were enacted to ensure that the House of Lords could not ultimately overrule the wishes of the elected House of Commons where agreement on a Bill could not be reached. “The Government continue to believe that the Acts remain a fundamental safeguard of our democratic legislature” (col. 1284). In answer to a question from David Taylor (Labour) about whether a new Parliament Act was needed dealing, *inter alia*, with codifying the Salisbury doctrine and setting reasonable time limits for the passage of Bills through the Lords, Mr. Leslie replied that they would have to “wait and see what the other place does with the Hunting Bill. As for ... [the] more general point, the Parliament Act supports the supremacy of the House of Commons ... we shall return to the wider issues of House of Lords reform in our party manifesto. We cannot focus only on composition; we must also consider how we could retain Commons supremacy if the composition of the other place were altered” (col. 1284). When questioned by David Heath (Liberal Democrat) as to whether the Parliament Acts should be used to deal with matters that are not fundamental issues, such as the Hunting Bill, Mr. Leslie replied that “There is certainly no rush in the case of the Hunting Bill; plenty of consideration is taking place on all sides”. As to whether the Hunting Bill was or was not “fundamental” that was a matter for the House to decide (col. 1285). In answer to a further question from Oliver Heald (Conservative), Mr. Leslie stated that the Government hoped that the Lords would reach agreement with the Commons on the Hunting Bill but “we know that the Parliament Acts have been passed for a particular purpose. They are used sparingly but, from time to time, their use proves necessary” (col. 1286).

In the House of Lords, during the Second Reading of the Hunting Bill on 12 October 2004, Lord Donaldson of Lynton raised the issue of the validity of the Parliament Act 1949 (using arguments similar to those he advanced for his Parliament Acts (Amendment) Bill – see above) and questioned its use for the purposes of the Hunting Bill (*HL Hansard*, 26 October 2004, cols. 218-221). Lord Whitty, replying for the Government, rejected the views of those who thought that use of the Parliament Acts was not appropriate. “Nowhere in either Parliament Act is there a definition of what kind of legislation the Parliament Act shall apply to” and he found the “arcane arguments” of Lord Donaldson “unpersuasive ... the 1949 Act is clearly as much an Act of Parliament as any other Act” (*HL Hansard*, 26 October 2004, col. 257).

On 25 October 2004 the Lord Chancellor, Lord Falconer of Thoroton, in answer to a written question from Lord Brightman as to whether the Government had given consideration to the doubts expressed inside and outside Parliament concerning the validity of the Parliament Act

1949, and whether in response to those doubts they would legislate to validate the 1949 Act, replied that the Government would not so legislate and stated:

The Government have of course given consideration to the doubts expressed about the validity of the Parliament Act 1949 in responding to the issue when it has been raised in debates in your Lordships' House; for example, the Bill introduced by the noble and learned Lord; Lord Donaldson of Lymington, in December 2000. The Government's view remains that expressed by the late Lord Williams of Mostyn, that "There is no ambiguity in the Parliament Acts which needs to be corrected. The Parliament Act is a valid act of Parliament" (HL (Official Report, 19/1/01;) col. 1328).

(*HL Hansard*, 25 October 2004, col. 103WA)

The Hunting Bill 2003/04 received Royal Assent on 18 November 2004 in accordance with the provisions of the Parliament Acts.

9. Jackson v. Attorney-General [2005] UKHL 56

After the Hunting Act 2004 was passed a group of individuals involved in fox-hunting, members of the Countryside Alliance, brought a legal challenge to the validity of the Act, claiming, that as the Parliament Act 1949 was itself enacted under the special procedure in section 2(1) of the 1911 Act it was invalid and ineffective to amend that procedure and that, consequently, the Hunting Act, enacted under that same procedure, was also invalid.

The Administrative Court dismissed the claim, holding that the matter was one of ordinary statutory construction: section 2(1) of the 1911 Act allowed the enactment of legislation, without the assent of the House of Lords, which amended section 2 itself and therefore the 1949 Act and the Hunting Act 2004 were valid.

The Court of Appeal also dismissed the claim, but on different grounds, holding that there were general limits to the section 2(1) power. The reduction of the delaying period referred to in section 2(1) in its original form to that contained in the 1949 Act was a “relatively modest and straightforward” amendment; but that power of amendment did not extend to making changes of a “fundamentally different nature to the relationship between the House of Lords and the Commons from those which the 1911 Act had made. The 1949 Act left the relationship between the House of Lords and the House of Commons substantially the same as it was before the 1949 Act. It reduced the length of the period for which the House of Lords could delay legislation proposed by the Commons” [2005] QB 579, 607, paras. 98-100.

In the House of Lords, the claim was heard by a nine-member Appellate Committee. On 13 October 2005 they unanimously rejected the claim. Their Lordships disagreed with the reasoning of the Court of Appeal and held that the issue was ultimately about the proper construction of section 2(1) in its historical context. They concluded that the 1949 Act was a valid deployment of the 1911 Act procedure, and consequently the Hunting Act 2004 was also valid.

Although their opinions were unanimous their Lordships in different ways made comments elucidating and setting some limits on the Parliament Act procedure. The following summarises the opinions of the nine members of the Appellate Committee (paragraph numbers refer to those in the official transcript).

LORD BINGHAM OF CORNHILL, having set out the provisions of the 1911 Act, rehearsed the historical background in detail. In particular, he referred to a Commons resolution of 26 June 1907, passed by a large majority, which called for the power of the Lords to veto Bills passed by the Commons to be removed (para.12), and then to three further Commons resolutions of 14 April 1910, also passed by large majorities: (i) to disable the Lords rejecting or amending Money Bills: (ii) to enable other measures to be enacted without the consent of the Lords if passed by the Commons in three successive sessions, spread over two years, (iii) to limit the duration of Parliament to five years (para. 15).

His Lordship then addressed the claimants' five key propositions:

1. *The status of legislation passed under the 1911 Act*

The claimants contended that legislation made under the 1911 Act was not primary but delegated legislation, in that it depended for its validity on a prior enactment and, unlike primary legislation, its validity was open to investigation in the courts. Lord Bingham rejected this submission for two main reasons (paras. 22-23).

Firstly, sections 1(1) (dealing with Money Bills) and 2(1) (dealing with other public Bills) of the 1911 Act provided that legislation made in accordance with those provisions "shall become an Act of Parliament on the Royal Assent being signified". The meaning of "Act of Parliament" was not doubtful, ambiguous or obscure. It was as clear and well understood as any expression in the lexicon of the law. It was used only to denote primary legislation. The 1911 Act effected an important constitutional change, "not in authorising a new form of sub-primary parliamentary legislation but in creating a new way of enacting primary legislation" (para. 24).

Secondly, the Act could not be understood as a delegation of legislative power or authority by the Lords, or by Parliament, to the Commons. The implausibility of that interpretation could be most readily seen in relation to Money Bills. The Lords' rejection of the Finance Bill in 1909 was a departure from convention and precedent because supply had come to be recognised as the all but exclusive preserve of the Commons." Section 1 of the 1911 Act involved no delegation of legislative power and authority to the Commons but a statutory recognition of where such power and authority in relation to supply had long been understood to lie. It would be hard to read the very similar language in section 2 as involving a delegation either, since the overall object of the Act was not to enlarge the powers of the Commons but to restrict those of the Lords (para. 25). That was clear from the historical context and from the Act itself. The statutory objective was not to delegate power; but to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a Commons majority, and thereby obviate the need for the monarch to create peers to carry the Government's programme in the Lords (para. 25).

2. *The scope of section 2(1)*

The claimants' second proposition was that the legislative power conferred by section 2(1) was not unlimited in scope; it had to be read according to established principles of statutory interpretation whereby the courts would often imply qualifications into the literal meaning of wide and general words to prevent them having some unreasonable consequence which Parliament could not have intended. They argued that general words such as section 2 (1) should not be read as authorising acts which adversely affected the basic principles on which United Kingdom law was based in the absence of clear wording in that effect; that there was no more fundamental principle of law in the United Kingdom than the identity of the sovereign body and that section 2(1) should not be read as modifying the identity of that body unless its language admitted of no other interpretation (para. 28).

Lord Bingham pointed out that the Attorney General did not take issue with those general principles but, his Lordship said, the Attorney General was correct to invite the House to focus on the language of the 1911 Act. Section 2(1) made provision, subject to three exceptions, for any public Bill which satisfied the specified conditions, to become an Act of Parliament without the Lords' consent. The first exception related to Money Bills, which were the subject of section 1 and to which different conditions applied. The second related to Bills extending the maximum duration of Parliament beyond five years, the third related to Bills for confirming a provisional order (which do not fall within the expression "public Bill" by virtue of section 5 of the 1911 Act). Subject to those exceptions section 2 (1) applied to any public Bill. His Lordship could not think of any broader expression the draftsman could have used. Nor was there any reason to infer that "any" was used in a sense other than its colloquial sense of "no matter which, or what" (para. 29). It was clear, his Lordship continued, from the historical background that Parliament intended the word "any", subject to the noted exceptions, to mean exactly what it said: see the 1907 and 1910 resolutions (above). Attempts to amend the second 1910 resolution to enlarge the classes of Bill to which the new procedure would not apply were all rejected. During the passage of the 1911 Bill those attempts were repeated, but save for the amendment related to Bills extending the maximum duration of Parliament they were uniformly rejected. The suggestion that Parliament intended the section 2(1) conditions to be incapable of amendment by use of the Act was contradicted both by the language of the section and by the historical record (para. 30). His Lordship then quoted the first edition after 1911 of Dicey's *Introduction to the Study of the Law of the Constitution*: 'The simple truth is that the Parliament Act has given to the House of Commons, or, in plain language, to the majority thereof, the power of passing any Bill whatever, provided always that the conditions of the Parliament Act, section 2, are complied with' (A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edition, 1915, page xxiii).

Lord Bingham then went on to counter the Court of Appeal's conclusion that although there was power under the 1911 Act to make a "relatively modest and straightforward amendment" of the Act, including that made by the 1949 Act, that power did not extend to "changes of a fundamentally different nature to the relationship between the House of Lords and the Commons from those which the 1911 Act had made". His Lordship thought that solution could not be supported in principle. The known object of the 1911 Bill, strongly resisted by the Conservative Party, was to secure the grant of Irish home rule. That was, his Lordship said, "by any standards, a fundamental constitutional change; as was the disestablishment of the Anglican Church in Wales" (both these pieces of legislation were passed using the 1911 Act procedure). Whatever its practical merits, the Court of Appeal solution found "no support in the language of the Act, in principle or in the historical record" (para. 31).

The Attorney General submitted that the 1911 Act, and now the 1949 Act, could in principle be used to amend or delete the reference to the maximum duration of Parliament in section 2(1) and that a further measure could then be introduced to extend the maximum duration. Lord Bingham thought that, although the point was academic, the Attorney General was right. There was nothing in the 1911 Act to provide that it cannot be amended, and even if there were such a provision it could not limit a successor Parliament. Once it was accepted that an Act passed pursuant to the procedures in section 2(1), as amended in 1949, is in every sense an Act of Parliament

having effect and entitled to recognition as such, there was no basis in the language of section 2(1) or in principle for holding that the parenthesis in that subsection was unamendable save with the consent of the Lords. “It cannot have been contemplated that if, however improbably, the Houses found themselves in irreconcilable deadlock on this point the Government should have to resort to the creation of peers” (para. 32).

3. *Enlargement of powers*

The claimants’ third proposition, supported by cases relating to colonial and Dominion legislatures, was that as a general principle, powers conferred on a body by an enabling Act might not be enlarged or modified by that body unless expressly authorised.

Lord Bingham rejected this proposition for three main reasons. Firstly, for the reasons given in para. 25(see above), the 1911 Act did not involve a delegation of power and the Commons, when invoking the 1911 Act, could not be regarded as in any sense a subordinate body. Secondly, the historical context of the 1911 Act was unique; the situation was factually and constitutionally so remote from the grant of legislative authority to a colonial or Dominion legislature as to render analogy of little value. Thirdly, the question was one of construction. There was nothing in the 1911 Act to preclude use of the procedure laid down in the Act to amend it; the language of the Act was wide enough (as explained above in paras. 29-32) to permit the amendment made by the 1949 Act and also to make much more far-reaching changes. For the past half century it has been generally, even if not universally, believed that the 1949 Act had been validly enacted, as evidenced by the use made of it by governments of different political persuasions; that belief was well-founded (para. 36).

4. *The scope of the power to amend the conditions to which section 2(1) is subject*

The claimants’ fourth proposition, drawn as a conclusion from those already made, was that section 2(1) did not authorise the Commons to remove, attenuate or modify in any respect any of the conditions on which its law-making power was granted.

Lord Bingham could not accept that conclusion, for the reasons given for rejecting the earlier propositions. If the claimants were correct, it would “follow that the 1911 Act could not be invoked, for instance, to shorten (or even, perhaps, lengthen) the period allowed in section 1(1) for passing Money Bills, or to provide that a Bill for confirming a provisional order should rank as a public Bill: a government bent on achieving such an object with a clear and recent mandate to do so would have either to accept the veto of the Lords or resort to the creation of peers. That would seem an extravagant, and unhistorical, intention to attribute to Parliament” (para. 37).

5. *The significance of the 1949 Act*

The claimants’ fifth proposition was that even if the Court of Appeal was right to regard section 2(1) as wide enough to authorise “relatively modest” amendments of the Commons law-making powers, the 1949 Act amendments were not relatively modest but substantial and significant.

Lord Bingham agreed with the claimants. But for the reasons given in paras. 29-32 (above) he also agreed with both parties that the breadth of the power to amend the 1911 Act in reliance on section 2(1) could not depend on whether the amendment in question was or was not relatively modest. “Such a test would be vague in the extreme, and impose on the Speaker a judgment which Parliament cannot have contemplated imposing” (para. 38).

In conclusion, his Lordship commented that it had been “a source of concern to some constitutionalists (among them the late Lord Scarman) that the effect of the 1911, and more particularly the 1949, Act has been to erode the checks and balances inherent in the British constitution when Crown, Lords and Commons were independent and substantial bases of power, leaving the Commons, dominated by the executive, as the ultimately unconstrained power in the state. There is nothing novel in this perception. What perhaps, is novel is the willingness of successive governments of different political colours to invoke the 1949 Act not for the major constitutional purposes for which the 1911 Act was invoked (the Government of Ireland Act 1914, the Welsh Church Act 1914, the 1949 Act) but to achieve objects of more minor or no constitutional import (the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and now the 2004 Act). There are issues here which merit serious and objective thought and study. But it would be quite inappropriate for the House in its judicial capacity to express or appear to express any opinion upon them...” (para. 41).

LORD NICHOLLS OF BIRKENHEAD, concurring, added that the section 2(1) procedure could not be used to force through a Bill deleting from section 2 the exception relating to any provision to extend the duration of Parliament. If that were possible, the Commons could then use the section 2 procedure to pass a Bill extending its duration (para. 58). The Act setting up the new procedure expressly excluded its use for such legislation. “That express exclusion carries with it, by necessary implication, a like exclusion in respect of legislation aimed at achieving the same result by two steps rather than one. If this were not so the express legislative intention could readily be defeated” (para. 59).

LORD STEYN, concurring, agreed with other members of the Appellate Committee that the Court of Appeal’s distinction between relatively modest and fundamental constitutional changes using the section 2(1) procedure could not be achieved “by a process of interpretation of the statute” (para. 96). His Lordship went on to comment that the material consequences of a decision in favour of the Attorney General were “far-reaching”. The Attorney General had said at the hearing that the government might wish to use the 1949 Act to bring about constitutional changes such as altering the composition of the Lords. “The logic of this proposition”, said Lord Steyn, “is that the procedure of the 1949 Act could be used by the government to abolish the House of Lords. Strict legalism suggests that the Attorney General may be right. But I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level” (para. 101).

But, Lord Steyn continued, the implications were much wider. “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 the citizens. This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear: [1991] AC 603 [A House of Lords decision concerning Spanish fishing vessels registered in the UK, the legal effect of which means that an Act of Parliament passed subsequent to the European Communities Act 1972, which provides for the recognition of all directly enforceable Community law in the UK, may be subject to judicial review if it contravenes the directly enforceable Community rights of the applicant.] The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish” (para. 102).

LORD HOPE OF CRAIGHEAD, concurring, said he would start where Lord Steyn had ended, stating that parliamentary sovereignty was no longer, if it ever was, absolute. “Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. For the most part these qualifications are themselves the product of measures enacted by Parliament” (paras. 104,105). His Lordship then gave as examples the European Communities Act 1972, quoting the second *Factortame* case in a similar way to Lord Steyn (above), the Human Rights Act 1998, and the suggestions made in some decisions of the Court of Session that some of the provisions of Acts of Union with Scotland of 1707 are “so fundamental that they lie beyond parliament’s power to legislate” (such as Article XIX of the Treaty of Union which purported to preserve the Court of Session and the laws relating to private right in Scotland) (paras. 104-106).

On the scope of section 2(1) of the 1911 Act, Lord Hope agreed with Lord Nicholls that there was an implied prohibition against the use of the section 2(1) procedure in the case of a two-stage approach to extending the life of Parliament, i.e. where “First, a Bill would be introduced deleting the reference in that sub-section to a Bill containing any provision to extend the life of Parliament. A Bill when sought to do this would not be within the terms of the prohibition. Then, a second Bill would be introduced, to run in tandem with the first, which sought to do what the provision

which was to be deleted would have prohibited..... such an obvious device to get round the express prohibition would be as vulnerable to a declaration of invalidity as a direct breach of it” (para. 122).

But, Lord Hope went on to ask, if there was room for an implied prohibition in that most extreme of circumstances, was there room for other implied prohibitions? His Lordship answered that question by referring to “the political reality of the situation in which Parliament now finds itself”, citing the three Acts which were passed by reference to the 1949 Act prior to the Hunting Act 2004. The War Crimes Act 1991 was passed under a Conservative Government and the other two Acts, the European Parliamentary Elections Act 1999 and the Sexual Offences (Amendment) Act 2000, were passed under a Labour Government. “Each of the two main parties has made use of the 1949 Act’s timetable, and in subsequent legislation passed by both Houses each of these Acts has been dealt with in a way that has acknowledged its validity..... The political reality is that of a general acceptance by all the main parties and by both Houses of the amended timetable which the 1949 Act introduced. I do not think that it is open to a court of law to ignore that reality” (paras. 123-124).

In conclusion, Lord Hope agreed with other members of the Appellate Committee that the Court of Appeal’s distinction between relatively modest and fundamental constitutional changes using the section 2(1) procedure was unacceptable. “The wording of section 2(1) does not invite such a distinction. It raises questions of fact and degree about the effect of legislation which are quite unsuited for adjudication by a court. Trust will be eroded if the section 2(1) procedure is used to enact measures which are, as Lord Steyn puts it, exorbitant or not proportionate. Nevertheless the final exercise of judgment on these matters must be left to the House of Commons as the elected chamber. It is for that chamber to decide where the balance lies when that procedure is being resorted to” (para. 127).

LORD RODGER OF EARLSFERRY, concurring, said that although he rejected the test enunciated by the Court of Appeal that the touchstone for determining the scope of the power in section 2(1) of the 1911 Act to amend the 1911 itself should be the scale of constitutional change involved, he would specifically reserve his opinion on one type of Bill: to delete from section 2(1) the exclusion of a Bill containing any provision to extend the maximum duration of Parliament. “The Attorney General acknowledged that there was room for argument here. Extending the life of Parliament is a matter of fundamental constitutional importance. Not only could it undermine the democratic basis of the British system of government, but it could also affect the dynamic which underlies section 2 of the 1911 Act, even as amended by the Parliament Act 1949. The exclusion appears to recognise this. So even though, read literally, section 2(1) seems apt to cover a Bill to delete the exclusion, I would wish to hear full argument before concluding that the safeguard of the consent of the House of Lords should not apply to such a Bill which can be said to form an integral step in a scheme of legislation to extend the maximum duration of Parliament” (paras. 131,139).

LORD WALKER OF GESTINGTHORPE delivered a short opinion concurring with the opinions of the other members of the Appellate Committee and preferred to express no view on the issue of whether there were any ultimate restrictions on parliamentary sovereignty (para. 141).

BARONESS HALE OF RICHMOND, concurring, opined that the political history surrounding the 1911 Act made the position adopted by the Court of Appeal “untenable”. The Court of Appeal had concluded that the 1911 procedure could not be used to effect fundamental constitutional change, but that the modifications to its procedure brought about by the 1949 Act were “modest” rather than fundamental. “On the contrary, it seems to me that the 1911 Act procedure can be used to effect any constitutional change, with the one exception stated. There is no hint of any other exclusions. When one looks at the mischief which the Bill was designed to cure it is clear that anything else, no matter how fundamental or controversial, is in principle included”(para. 158).

Her Ladyship continued that the argument that the procedure could not be used to amend itself had rather more substance, “although in the end it too must be rejected. The concept of parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century (I appreciate Scotland may have taken a different view) means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempts 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).

LORD CARSWELL, concurring, agreed with the reasoning of Lord Nicholls on the issue of whether section 2(1) of the 1911 Act could be used to extend the maximum duration of Parliament (para. 175). But he could not attempt to give a definite answer as to whether there were any other implied limitations upon the freedom to use section 2(1). “It is at this point that one enters the penumbra in which the boundary between political matters and legal entitlement becomes particularly indistinct. Various changes might be posed as theoretical possibilities: abolition of the House of Lords, radical change in its composition which would effect a fundamental change in its nature, substantial reduction of the powers of the House of Lords or the virtual removal of the breaking mechanism contained in section 2(1) by amending the number of times that the House of Lords can reject a Bill or reducing the time which must elapse to a minimal period. I would at once express the hope and belief that such possibilities are so unlikely to occur as to be purely theoretical. Successive governments, even those with massive majorities, have wisely recognised this in exercising the degree of moderation with which they have approached radical changes which some of their supporters ardently wished to put into effect, observing the principle expressed by Gladstone, that the constitution depends ‘on the good sense and good faith of those who work it’ It is a corollary of the principle of the sovereignty of Parliament that Parliament as ordinarily constituted can enact even fundamental constitutional changes: the Kilbrandon Commission pointed to the legislation creating the Irish Free State in 1922 (Report of the Royal Commission on the Constitution 1969-1973 (1973), Cmnd. 5460, (para. 56) and one can now add the removal of the hereditary peers from the House of Lords by the House of Lords Act

1999, which, it is to be noted was passed in the customary fashion by both Houses” (para. 176).

Although the Court of Appeal’s suggested distinction between making fundamental and less fundamental changes to the relationship between the Lords and the Commons had not found favour with any of their Lordships, Lord Carswell inclined “very tentatively” to the view that the Court of Appeal’s instinct may have been right, that there may be a limit somewhere to the powers contained in section 2(1) of the 1911 Act, though the boundaries appear extremely difficult to define. If a fundamental disturbance of the building blocks of the constitution is contemplated at some time, it may well be that no government in the real political world would attempt to use those powers for the purpose” (para. 178).

LORD BROWN OF EATON – UNDER – HEYWOOD, concurring, rejected the Court of Appeal’s approach as to whether the 1911 Act procedure could be used to effect constitutional change. But in common with the majority of their Lordships he was “not prepared to give such a ruling as would sanction in advance the use of the 1911 Act for all purposes, for example to abolish the House of Lords, (rather than, say, alter its constitution or method of selection) or to prolong the life of Parliament, two of the extreme ends to which theoretically this procedure could be put”. Although the strict logic of the Attorney General’s position suggested that the express bar on the House of Commons alone extending the life of Parliament could be overcome by a two-stage use of the 1911 Act procedure, “the Attorney General acknowledged in argument that the contrary view might have to be preferred” (para. 194).

Lord Brown concluded that there was no proper basis on which a qualification to the wide words “any public Bill” could be implied into section 2 of the 1911 Act to bar its use to achieve the particular amendments effected by the 1949 Act. It was unnecessary to resort to Hansard “to conclude that both Houses of Parliament must inevitably have recognised in 1911 the real possibility that that Act’s procedure would thereafter be used to amend itself” (para. 195).

10. References

A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (13th ed., 2003), page 65.

Kenneth Clarke, Robin Cook, Paul Tyler, Tony Wright and Sir George Young, *Reforming the House of Lords: Breaking the Deadlock*, 21 February 2005.

Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th ed., 1998), pages 93-97.

O. Hood Phillips, *Reform of the Constitution* (1970), pages 91-94.

O. Hood Phillips, *Constitutional and Administrative Law* (7th ed., 1987), page 149.

O. Hood Phillips and Jackson on Constitutional and Administrative Law (8th ed., 2001 by Paul Jackson and Patricia Leopold), pages 79-81.

Jackson v. Attorney General [2005] UKHL 56.

Sir Ivor Jennings, *Parliament* (2nd ed., 1969), pages 414-434.

Joint Committee on House of Lords Reform, *House of Lords Reform: First Report*, HL Paper 17, HC 171, 2002-03, December 2002, paragraph 29.

Labour Peers Group, Working Group on House of Lords Reform, *Reform of the Powers, Procedures and Conventions of the House of Lords*, 20 July 2004.

Lord Chancellor's Department, *The House of Lords – Completing the Reform*, Cm. 5291, November 2001, paragraphs 29 and 30.

Sheena McMurtrie, 'The constitutionality of the War Crimes Act 1991' (1992) 13 Stat. L. R. 128.

Sheena McMurtrie, 'A challenge to the validity of the Parliament Act 1949: an opportunity lost?' (1997) 18 Stat. L. R. 46.

Peter Mirfield, 'Can the House of Lords be lawfully abolished?' (1979) 95 L. Q. R. 36.

Royal Commission on Reform of the House of Lords, *A House for the Future*, Cm. 4534, January 2000, paragraphs 5.13 to 5.16.

Michael Shrimpton, *Counsel's Opinion on the House of Lords Bill*, 8th April 1999 (Library ref. HINF 99/713), paragraphs 3, 43-66.

Trevor Tayleur, 'A valid Act?' (1995) 145 N.L.J. 1328.

H. W. R. Wade, 'The basis of legal sovereignty' [1955] C.L.J. 172.

Sir William Wade, *Administrative Law* (8th ed., 2000), pages 25-27.

Graham Zellick, 'Is the Parliament Act *ultra vires*?' (1969) 119 N.L.J. 716.

Copies of all these items have been placed in a box at the Information Desk in the Queen's Room.

16th November 2005

LLN 2005/007/GRD