

# Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy

## Introduction

THE SUPREMACY OF Parliament *is* the Constitution'. So wrote Sir Ivor Jennings in *The Law and the Constitution*, a claim repeated as late as 1959.<sup>1</sup> Such bold rhetoric might today appear rather antiquated. For in the contemporary UK constitution, this fundamental legal doctrine is increasingly challenged in stark terms: it is archaic,<sup>2</sup> infelicitous,<sup>3</sup> immature,<sup>4</sup> outdated,<sup>5</sup> austere,<sup>6</sup> a spectre,<sup>7</sup> a puzzle,<sup>8</sup> a shadow,<sup>9</sup> a myth,<sup>10</sup> a pretence,<sup>11</sup> a prison,<sup>12</sup> a relic,<sup>13</sup> a straitjacket,<sup>14</sup> even an impossibility.<sup>15</sup> Changes in the constitutional architecture of the UK, from membership of the European Union to devolution,

<sup>1</sup> WI Jennings, *The Law and the Constitution*, 5th edn (London, University of London Press, 1959) 314.

<sup>2</sup> G Letsas, 'Lord Sumption's Attack on Strasbourg: More Than Political Rhetoric?', *UK Constitutional Law Association Blog* (9 December 2013): [www.ukconstitutionallaw.org](http://www.ukconstitutionallaw.org).

<sup>3</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford, Oxford University Press, 2013) 133.

<sup>4</sup> See M Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54 *Northern Ireland Law Quarterly* 25, 40, describing the decision in *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151—which poses a potentially profound challenge to the doctrine of parliamentary sovereignty—as the 'the UK constitution's coming of age'.

<sup>5</sup> J Laws, 'Law and Democracy' [1995] *PL* 72, 82.

<sup>6</sup> A Lester, 'The Utility of the Human Rights Act: a reply to Keith Ewing' [2005] *PL* 249, 252.

<sup>7</sup> NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144.

<sup>8</sup> *ibid* 148.

<sup>9</sup> J Mitchell, *Devolution in the UK* (Manchester, Manchester University Press, 2009) 221.

<sup>10</sup> *ibid* 219.

<sup>11</sup> I Leigh and R Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford, Hart Publishing, 2008) 130.

<sup>12</sup> V Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32 *OJLS* 179.

<sup>13</sup> See Lord Steyn in *R (on the application of Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, [102]: '[t]he 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'. For praise of this 'modern hypothesis of constitutionalism', see J Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' [2006] *PL* 562, 570.

<sup>14</sup> AW Bradley, 'The Sovereignty of Parliament—Form or Substance?' in J Jowell and D Oliver (eds), *The Changing Constitution*, 7th edn (Oxford, Oxford University Press, 2011) 68.

<sup>15</sup> See the analysis of A Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 *OJLS* 61; discussed chapter 3 of this volume, n 136.

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have prompted reassessment of the Westminster Parliament's claim to possess a legislative authority which is unlimited by law. Academic reverence for the doctrine is certainly diminished, with many scholars increasingly convinced that the rule of law and basic human rights are too valuable to remain subject to the will of an elected legislature. Doubtlessly influenced by these trends, some of the UK's most senior judges have attempted to craft a more expansive vision of the judicial role, which could ultimately provoke a direct confrontation between the courts and Parliament.<sup>16</sup> Against this backdrop, we might wonder not whether the doctrine of the legislative sovereignty of Parliament *is* the constitution, but whether it is even still *in* the constitution.

At a time when the future of parliamentary sovereignty may look less than assured, this book argues that the doctrine remains a fundamental part of the contemporary UK constitution. Despite the constitutional change which has been experienced in the modern era, and despite the challenges which have been developed from the perspective of political or moral principle, the UK Parliament continues to possess legally unlimited legislative authority. Yet to be able to sustain this claim, we must reassess what it means to possess sovereign legislative power. In this respect, we must return to Jennings, and his understanding of the implications of legally unlimited legislative authority. For AV Dicey, recognised as the most authoritative exponent of this legal doctrine, while Parliament could enact law on any substantive matter whatever, there was one limit on its sovereign power: Parliament could not bind its successors.<sup>17</sup> This claim was crucially challenged by Jennings, whose manner and form theory of legally unlimited legislative power offered to Parliament an expanded law-making authority. Parliament's legally unlimited power was to be understood not only to allow the creation of law relating to any subject-matter, but also to permit the lawful enactment of legislation which altered the legislative process itself. For, as Jennings argued, so long as legislation was enacted in accordance with the 'manner and form' prescribed by law at a particular time—the legal rules establishing how legislative power was lawfully to be exercised—an Act of Parliament which changed the future 'manner and form' would itself be recognised as legally valid.

Jennings' manner and form theory has been much debated since it was first advanced in 1933.<sup>18</sup> Yet such debates have had a speculative air, in that Parliament has generally refrained from using its legislative power in such a way as to put these ideas to the test, while the Diceyan proposition that a sovereign legislature cannot bind its successors has retained the status of constitutional orthodoxy. In the contemporary UK constitution, however, these debates have moved rapidly

<sup>16</sup> See especially *R (on the application of Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [107].

<sup>17</sup> See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (London, Macmillan, 1915).

<sup>18</sup> See WI Jennings, *The Law and the Constitution*, 1st edn (London, University of London Press, 1933).

from being academic to active. A series of recent developments prompt us to re-engage with the manner and form theory: first, ongoing attempts to understand the constitutional basis of the UK's membership of the European Union (EU); secondly, the decision of the House of Lords in *Jackson* as to the status of the Parliament Act 1949, and the state of the doctrine of parliamentary sovereignty more generally; and thirdly, the enactment, in the European Union Act 2011, of a scheme of statutory 'referendum locks' applicable to future legislative attempts to authorise the transfer of power or competence from the UK to the EU.

These developments pose critical challenges to the orthodox understanding of parliamentary sovereignty. Indeed, I will suggest that they demonstrate that the Diceyan conception of legislative sovereignty can no longer be maintained. Instead, Jennings' manner and form theory provides us with by far the best explanation of contemporary constitutional practice in the UK. And, as such, I will argue that a modern shift has occurred to the manner and form theory of parliamentary sovereignty: it must now be understood to represent the new constitutional orthodoxy in the UK.

Yet this book does not simply seek to defend the empirical claim that the manner and form theory has now been embraced in the UK constitution, and that the doctrine of parliamentary sovereignty persists, but in this shape. In light of the range of challenges to which the doctrine has been subjected in recent years, discussion of the sovereignty of Parliament has become increasingly defensive. It is has been enough, it often seems, to try to sustain the doctrine in the face of potent objections that it is no more. Much less attention, in contrast, has been given to consideration of the value or purpose of parliamentary sovereignty in a constitutional order. While necessarily engaging in defensive discussion of the continuing existence of parliamentary sovereignty, this book attempts at least to ensure that a more positive case for the doctrine is also explored from the very outset. It is all too easy to foresee the possibility that parliamentary sovereignty may be gradually eroded by future constitutional progress; in setting out clearly the function and virtue of the doctrine, at least what is at stake may more readily be appreciated.

This is of particular importance in relation to the manner and form theory, in light of its contemporary constitutional salience. To many, it will be less than obvious how the manner and form theory's status as the new constitutional orthodoxy should be received. This conception of parliamentary sovereignty may be thought to lack any clear normative justification. This is in part because Jennings failed to develop such an account, but also because subsequent manner and form scholars have generally viewed the theory as a way of tempering the absolutism of legally unlimited legislative authority.<sup>19</sup> As such, this book develops a new normative justification for the manner and form theory; one which is rooted in the democratic virtue of parliamentary sovereignty itself.

<sup>19</sup> See especially RFV Heuston, *Essays In Constitutional Law*, 2nd edn (London, Stevens and Sons, 1964) ch 1.

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This democratic justification of the manner and form theory explains why it is appropriate to allocate to Parliament the legislative power to alter the future legislative process; using the theory of political constitutionalism as a framework, I argue that while legally unlimited, this power can, and will, be strongly conditioned by democratic politics. While it may appear that Parliament has the capability to abuse the power to alter the future legislative process—and bind its successors in the way that Dicey’s orthodoxy sought to prevent—we should not, on this basis, feel compelled to withhold such power as a matter of law. Instead, concerns about the misuse of power—in this context, just as in relation to the substantive legislative authority of Parliament—can be comprehensively addressed at the level of political justification, rather than prohibited entirely as a matter of legal validity. Moreover, this democratic justification does not only serve to illustrate why the modern shift to the manner and form theory need not be a matter for regret, but also provides a basis on which that power might positively be used in the future. In an age of democratic disillusionment, the potential utility of the manner and form theory will be explored, and the possibilities it opens up for constitutional reform considered. In providing a number of ways in which citizens could be more directly engaged in the law-making process, I argue that the manner and form theory offers Parliament the potential—through legislating to alter the legislative process—to reinvigorate the democratic foundations of the UK’s political constitution.

In developing this argument as to the contemporary constitutional authority of the manner and form theory, and a democratic justification for this conception of legally unlimited legislative power, I engage critically with a range of different accounts of the present status of parliamentary sovereignty, from common law constitutionalist claims that the doctrine is now subject to the overarching constraint of judicially articulated principle,<sup>20</sup> to attempts to sustain a more orthodox model of continuing sovereignty.<sup>21</sup> Most significant to the argument developed in this book, however, is the seminal work of Jeffrey Goldsworthy. For while the manner and form theory has received relatively little attention in recent years, and what it has received has been sporadic rather than systematic, Goldsworthy’s work provides a powerful exception. Goldsworthy’s procedure and form conception of parliamentary sovereignty bears similarity in many respects to the manner and form theory, in that it holds that Parliament’s legislative authority extends to permit the lawful enactment of some legislation which alters the future ‘procedure and form’ for valid law-making.<sup>22</sup> Yet Goldsworthy does not accept in full the implications of the manner and form theory, instead seeking to preclude, as

<sup>20</sup> See especially Allan, *The Sovereignty of Law* (2013) n 3 above.

<sup>21</sup> See especially AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2009).

<sup>22</sup> See J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010), expanding lines of argument initially established in J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford, Oxford University Press, 1999).

a matter of law, the enactment of legislation making procedural changes which would diminish the substantive power of Parliament in future to legislate.

In seeking to reassert the manner and form theory, this book necessarily engages at length with the alternative ‘procedure and form’ model of parliamentary sovereignty, departing from the conclusions reached by Goldsworthy in a number of respects. First, I critique Goldsworthy’s attempt to limit the scope of the procedural change which the manner and form theory lawfully permits, and argue instead that the concerns which prompt the development of this limitation—that Parliament might too readily restrict its future legislative capability—should be dealt at the level of (democratic) political justification, rather than legal validity. Secondly, I challenge the reliance of Goldsworthy (among others) on Hart’s rule of recognition<sup>23</sup> as a practical explanatory tool to rationalise change to Parliament’s legislative authority, rejecting as both unnecessary and undesirable the argument that we can characterise the change which has occurred to the doctrine of parliamentary sovereignty as change to the UK’s rule of recognition. Thirdly, these differences in approach combine with respect to the crucial issue of statutory referendum requirements—of great contemporary significance in light of their inclusion in the European Union Act 2011—where I draw an alternative conclusion to that suggested by Goldsworthy’s procedure and form model, in defending the legal permissibility of such legislative change to the future law-making process. As such, while there is a great deal to recommend Goldsworthy’s important work on the doctrine of parliamentary sovereignty, my argument suggests that, in these respects, the manner and form theory, rather than the modified procedure and form model, provides a stronger account of the legislative authority of the UK Parliament.

My argument as to the present position of the doctrine of parliamentary sovereignty in the UK constitution develops in three parts. Throughout, I favour the terminology of the legislative ‘sovereignty’, rather than ‘supremacy’, of Parliament. While these terms can, in effect, be understood to be interchangeable, the language of sovereignty is preferred because it clearly indicates that the legislative power of Parliament is legally *unlimited*, rather than simply *ultimate*. As Hart noted, ‘[i]t is plain that the notions of a superior and a supreme criterion merely refer to a *relative* place on a scale and do not import any notion of legally *unlimited* legislative power’.<sup>24</sup> As such, the language of legislative sovereignty is more specific and establishes clearly the proper legal scope of the UK Parliament’s law-making authority. While some—perhaps most notably Jennings<sup>25</sup>—have criticised the language of sovereignty as misleading, if we keep in mind that this is a legal concept rather than a claim to omnipotence, any such difficulties are avoided.

In Part I of the book, the nature and implications of the doctrine of parliamentary sovereignty are considered in detail. In Chapter one, the function and

<sup>23</sup> See HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Oxford University Press, 1994).

<sup>24</sup> *ibid* 106.

<sup>25</sup> See Jennings, *The Law and the Constitution*, 5th edn (1959) n 1 above, 147.

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virtue of the doctrine of parliamentary sovereignty in general are explored, developing a positive case for a constitutional order based on legally unlimited legislative authority. The manner in which the doctrine can be challenged is first examined, and the importance of separating claims about whether Parliament *is* sovereign from claims about whether Parliament *ought to be* sovereign—with respect to legal validity, as opposed to political justification—established. With respect to function(s), I suggest that the doctrine of parliamentary sovereignty is the central organising principle of the UK constitution, while also operating as a constitutional focal point—an overarching principle which serves as an access point to citizens for obtaining an understanding of constitutional rules, while also transmitting a symbolic (and contestable) message as to the potential legitimacy of the political system. The core virtue of parliamentary sovereignty, I argue, is that it ensures the constitutional primacy of (majoritarian) democratic decision-making, a claim which is then defended against a range of potential challenges, both practical and principled in nature.

In Chapter two, the manner and form theory of parliamentary sovereignty in particular becomes our focus. Jennings' account of the manner and form theory is discussed, and a number of minor difficulties with it are resolved, to establish a definition of this reconfigured understanding of legally unlimited legislative power. This account of the manner and form theory is then tested against four key objections. Two classic challenges, informed crucially by the work of Wade,<sup>26</sup> are initially assessed: first, that the manner and form theory is conceptually incoherent; and secondly, that the theory is unsupported by classic authority. Two modern challenges are then explored: first, that it is inappropriate to conflate considerations of manner *and* form in a common theory; and secondly, that the distinction between (lawful) procedural conditions and (unlawful) substantive limits on which the manner and form theory depends is unsustainable. These objections are rejected in turn, to establish that the manner and form theory provides a coherent potential account of the legally unlimited legislative power possessed by the UK Parliament.

The potential coherence of the manner and form theory having been demonstrated, in Part II we move on to consider the modern challenges posed to the doctrine of parliamentary sovereignty by contemporary constitutional developments in the UK. In Chapter three, a range of non-critical challenges, which do not serve to displace the doctrine of parliamentary sovereignty, are explored. The challenges posed by devolution and the enactment of the Human Rights Act 1998 are considered, and I argue that these significant constitutional developments are compatible with the doctrine. The challenge posed by common law constitutionalist theory is then addressed; I reject this as an unsustainable interpretation of the foundations of the UK constitution, which is both empirically unsound, and—because it is undemocratic and imprecise—normatively unattractive. While

<sup>26</sup> See especially HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 *CLJ* 172.

I argue on this basis that common law constitutionalism cannot serve to limit or qualify the legally unlimited legislative authority of Parliament, the possibility of the theory nevertheless obtaining further traction is acknowledged, with this issue providing a theme which runs throughout the remainder of Part II.

The three critical contemporary challenges to parliamentary sovereignty are then considered. In Chapter four, the constitutional challenge posed by the UK's membership of the EU is assessed. A number of potential explanations of the domestic constitutional basis of EU law are evaluated, and I argue that a manner and form reading of the European Communities Act 1972 provides the best account of the reconciliation which has been achieved between the sovereignty of Parliament and the supremacy of EU law. The starting point that Parliament has, in effect, created a new manner and form for the enactment of valid legislation which is substantively incompatible with EU law is taken further in Chapter five. Here, the legal status of the Parliament Acts 1911 and 1949, as examined by the House of Lords in the leading modern case of *Jackson*,<sup>27</sup> is addressed. In rejecting a common law constitutionalist analysis of *Jackson*, and attempts to reconcile the decision with the orthodox Diceyan understanding of parliamentary sovereignty, I suggest that we find further evidence here of the contemporary salience of the manner and form theory. For in *Jackson* we have confirmation from the Law Lords that Parliament has explicitly altered the manner and form required to produce valid future legislation, albeit in a way which creates an alternative law-making process, rather than modifies the traditional legislative formula.

In Chapter six, the culmination of this constitutional pattern is identified and explored: the explicit enactment by Parliament, in the European Union Act 2011, of a scheme of statutory 'referendum requirements' which explicitly purports to alter the future manner and form by supplementing the traditional legislative process. The legal effectiveness of these statutory referendum requirements is assessed, and I argue that a manner and form analysis of the 2011 Act provides the most convincing explanation of the constitutional change which has occurred. I defend this conclusion against a number of objections—in particular, I argue that such referendum requirements must be considered *procedural* conditions, and thus legally valid (unless or until repealed), notwithstanding the impact they may have on the practical power of Parliament in future to legislate. On the basis of the arguments developed in Part II, I therefore conclude overall that a modern shift to the manner and form theory has occurred in the UK constitution: this conception of parliamentary sovereignty provides the best explanation of the contemporary change which has occurred, and must now be recognised as the new orthodoxy in relation to the legislative power of Parliament.

Finally, in Part III, the implications of this modern shift in constitutional understanding are explored; in particular, the virtue and function of the manner and form theory are evaluated. In Chapter seven, I develop a new normative

<sup>27</sup> *R (on the application of Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

justification for the manner and form theory of legally unlimited legislative authority. Rooted in a framework provided by political constitutionalist theory, this democratic justification for the manner and form theory demonstrates that, while Parliament's power to alter the future legislative process is unlimited as matter of law, it is structured and conditioned by the operation of the democratic political system. On this basis, I argue that potential concerns as to the use of the legislative power to alter the future manner and form can—and should—be dealt with as matters of political justification, rather than questions of legal validity. I then outline the normative (democratic political) framework in which these issues fall to be considered, suggesting in particular that the notion 'Parliament cannot bind its successors'—although fundamentally flawed as a statement of the legal scope of parliamentary legislative authority—can be usefully re-purposed as a strong political injunction (or perhaps even a binding constitutional convention).

The book concludes, in Chapter eight, by examining the potential utility of the manner and form theory. I argue that the democratic justification set out in Chapter seven not only demonstrates that the modern shift to this conception of parliamentary sovereignty in the UK is a welcome development, but also provides a substantive guide to the future potential use of the expanded legislative power which must now be recognised. I outline and explain the condition of use which obtains for the exercise of this power to be politically justified: that Parliament's legislative power to alter the future legislative process will be used to achieve democratic ends. A number of potential ways in which this power could be used are then sketched, including democratic reform of the existing legislative institutions, the existing legislative process, and the possibility of achieving structural change to the UK constitution itself. In light of the democratic disillusionment of citizens with the contemporary state of the UK's political constitution, I argue that change to the legislative process might be considered as part of a broader strategy to address this fundamental democratic, political and constitutional challenge. While I do not set out to demonstrate definitively the desirability of any particular change to the legislative process—such as statutory referendum requirements or standing citizens' assemblies—which might have the effect of more fully engaging citizens in the operation of the political system, that acceptance of the manner and form theory opens up a range of such possibilities to legitimate consideration is suggested to be a core part of the virtue of this conception of legislative authority. I finally reflect on the broader possibility that, if used extensively, the manner and form theory may provoke a challenge to the doctrine of *parliamentary* sovereignty. While this (very distant) prospect cannot be dismissed, I suggest that the disaggregation of sovereign law-making power from its present parliamentary location would prompt us to think carefully and creatively about how we might design future institutional arrangements which can accommodate the democratically desirable notion of legally unlimited legislative authority. Parliamentary sovereignty remains an important part of the UK's foreseeable constitutional future, but were it eventually to be displaced, the concept which underpins the

doctrine—that legislative power should be legally unlimited in a democratic political system—could, and should, I argue, be retained.

The argument across this book therefore seeks to explore, in the context of the doctrine of parliamentary sovereignty in the UK constitution, the interaction between ideas of process, politics and democracy. This is not intended to be a laudatory account of UK constitutional exceptionalism—on the contrary, there are many real deficiencies with our present arrangements. Yet the manner and form theory of parliamentary sovereignty—which makes available the possibility of lawful and democratic change to the legislative process, rather than condemns this prospect as constitutionally forbidden—should be seen as part of the solution, rather than the problem. The challenge of thinking about how this power might justifiably be used is one which we need not evade. Instead, we might freely consider how legislating to change the legislative process might help to revitalise the democratic foundations of the UK's political constitution.