ON THE NATURE OF AND SOME CHALLENGES TO PARLIAMENTARY SOVEREIGNTY IN THE UNITED KINGDOM: A JURISPRUDENTIAL PERSPECTIVE[*]

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ABSTRACT

The article ultimately claims that the classical formulation of parliamentary sovereignty, properly understood, survives the most contemporary and relevant challenges it faces. The first part is reserved for the examination of the content and the source of the principle. The Diceyan conception of the principle is elaborated and defended against Wade's version. Then, based on the Allan – Goldsworthy argument, the article determines that it is theoretically more appropriate to conceive of the principle as the rule of recognition. The second part focuses on the most contemporary and relevant challenges to the principle. These are the Parliament Acts 1911 and 1949, the European Communities Act 1972, and the Human Rights Act 1998. The challenge posed by the Parliament Acts fails because the Acts do not legally restrict the Parliament. Similarly, based on the distinction between normative hierarchy and the primacy of application, the European Communities Act needs to be conceived of as relating to the obligations of the law-applying officials and not the Parliament. Lastly, the four challenges raised by the Human Rights Act fail based on discussions surrounding the doctrine of implied repeal, the concept of normative collision, and the distinction between constitutional and ordinary statutes.

Keywords: parliamentary sovereignty, normative hierarchy, the rule of recognition, common law, implied repeal.

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BİRLEŞİK KRALLIK'TA PARLAMENTONUN ÜSTÜNLÜĞÜNÜN MAHİYETİ VE KARŞILAŞTIĞI BAZI GÜÇLÜKLER ÜZERİNE: HUKUKBİLİMSEL BİR PERSPEKTİF

ÖZET

Makale en nihayetinde doğru biçimde anlaşılan parlamentonun üstünlüğünün klasik formülasyonunun, karşılaştığı en yeni ve alakalı zorluklara galip geldiğini iddia etmektedir. İlk bölüm ilkenin içeriği ve kaynağının incelenmesine ayrılmıştır. İlkeye dair Dicey'nin anlayışı detaylandırılmış ve Wade'in versiyonuna karşı savunulmuştur. Sonrasında, Allan – Goldsworthy tartışmasına dayanılarak, ilkeyi tanıma kuralı olarak anlamanın teorik açıdan daha uygun olduğu belirlenmiştir. İkinci bölüm ilkenin karşılaştığı en yakın tarihli ve alakalı zorlukları ele almaktadır. Bunlar 1911 ve 1949 tarihli Parlamento Kanunları, 1972 tarihli Avrupa Toplulukları Kanunu, 1998 tarihli İnsan Hakları Kanunudur. Parlamento Kanunlarının teşkil ettiği güçlük bu kanunlar Parlamentoyu hukuken sınırlandırmadığı için atlatılabilir. Benzer biçimde, normlar hiyerarşisi ve uygulama önceliği arasındaki farka dayanarak, Avrupa Toplulukları Kanunu'nun da Parlamento'nun değil, hukuk uygulayıcılarının görev ve sorumluluklarına ilişkin olduğunu düşünmek gerekir. Son olarak, İnsan Hakları Kanunu'nun teşkil ettiği dört güçlük, zımnî ilga, normatif çatışma kavramı ve anayasal kanunlar ile sıradan kanunlar arasındaki ayrım etrafındaki tartışmalar temelinde atlatılabilir.

Anahtar Kelimeler: parlamentonun üstünlüğü, normatif hiyerarşi, tanıma kuralı, *common law*, zımnî ilga.

INTRODUCTION

Parliamentary sovereignty is a fundamental feature of British[1] constitutional law. However, the principle is thought to be challenged by some constitutional developments. It is argued that these challenges altered the original principle considerably, even if they did not altogether abolish it. The paper aims to refute the most relevant and significant of these challenges by making use of a jurisprudential and theoretical approach.

[1] I will employ the expression 'British' as the adjective form of 'the UK'.

The first part of the paper will deal with the content and the source of parliamentary sovereignty. The Diceyan conception of the principle will be presented. It will be demonstrated that the principle essentially concerns the legal regime of Acts of Parliament. As such, it stresses the normatively superior nature of statutes within the British constitutional system. Then I will briefly examine Wade's understanding of parliamentary sovereignty and ultimately argue that Dicey's conception is theoretically less problematic. Lastly, I will comment on the legal character and the source of the principle by drawing on the discussion between Jeffrey Goldsworthy and T. R. S. Allan. I will conclude that it is theoretically less problematic to conceive of the principle as the rule of recognition. As such, I will have established the meaning and the nature of the principle that is allegedly affected by the challenges to be examined later on.

The second part of the paper will be reserved for the discussions of the 'challenges' to the classical formulation. The challenges to be examined here are constituted by the existence of some special Acts of Parliament that seem to influence the legal regime of other statutes. Some examples are the 1707 Act of Union with Scotland, the 1931 Statute of Westminster, the 1911 and 1949 Acts of Parliament (the 'Parliament Acts'), the 1972 European Communities Act (the 'ECA'), and the 1998 Human Rights Act (the 'HRA'). I will not have the space to comment on all of these challenges separately. I will discuss the challenges posed by the latter three, which are more contemporary and widely discussed in the literature.

The supposed challenges to the principle will be refuted based on a largely jurisprudential perspective. The first subsection will argue that the Parliament Acts cannot be considered true challenges to the original meaning of parliamentary sovereignty because they do not restrict the Parliament by requiring it to comply with a specific procedure while issuing statutes. This subsection will also reply to an alternative refusal of the challenge, which conceive of norms passed under the Parliament Acts as delegated legislation. I will make use of a jurisprudential account regarding the taxonomy of legal norms to reject this route. I will argue in relation to the ECA that the difference between the primacy of application and normative hierarchy helps demonstrate that normatively, Section 2(4) of the ECA affects not the obligations of the Parliament but those of the courts. Therefore, it cannot be argued that the lawmaking powers of future Parliaments are restricted by the ECA. The last section will deal with four challenges imposed by the HRA. The supposed challenges will be refuted largely based on jurisprudential discussions such as the difference between legal and factual restrictions

on lawmaking powers; the connection between the doctrine of implied repeal and the concept of normative collision; and the distinction between constitutional and ordinary statutes.

I. ON THE NATURE OF THE PRINCIPLE: THE CONTENT AND THE SOURCE

A) THE CONTENT OF THE PRINCIPLE: DICEY VS. WADE

First, let me make a short comment on what parliamentary sovereignty does not mean. The principle does not concern the supremacy of the Houses over other governmental powers. This supremacy is attributed to the Acts of Parliament issued through a triad of wills: House of Commons, House of Lords, and the Crown[2]. Secondly, the principle does not merely imply the supremacy of statutes over other acts. It also stresses the unlimited law-making power of the triad[3]. This is why I prefer the expression of 'parliamentary sovereignty' over 'parliamentary supremacy'. In other words, the principle has two facets, one relating to the supreme hierarchical power of statutes, and the other to the unrestricted scope of such acts[4]. Let me now move on to the formulation of the principle.

The history of parliamentary sovereignty in legal literature can be traced back to Francis Bacon. Bacon argued that acts that are by their nature revocable cannot be made immune to revocation or amendment and that a supreme power cannot end its own existence[5]. He, therefore, articulated perhaps for the first time a tenet of the classical understanding of the principle, which adopts the restriction that the Parliament cannot give up its unlimited sovereignty as the only restriction that the Parliament is subject to. Sir Edward Coke is another author who contributed a lot to the formulation of the principle with his determination that legal acts contrary to the will of the Parliament cannot be binding[6]. William Blackstone took over the flag in the formulation of the principle, stressing the limited powers of courts when they

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[2] Andrew Le Sueur, "Fundamental Principles", *in* David Feldman (ed.), *English Public Law*, Oxford, Oxford University Press, 2nd Edition, 2009, p. 43.

[3] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, London, Palgrave Macmillan, 10th Edition, 1979, p. 39-40.

[4] It is also useful to mention for readers who are more familiar with the Continental legal systems that the phrase 'Parliament' in the British legal system does not refer to the duo of the Houses but to the triad mentioned above (see Anthony Wilfred Bradley and Keith David Ewing, *Constitutional and Administrative Law*, Harlow, Pearson, 14th Edition, 2007, p. 55).

[5] Francis Bacon, "The History of the Reign of King Henry the Seventh", *in* James Spedding, Robert Leslie Ellis, and Douglas Dennon Heath (eds.), *The Works of Francis Bacon*, Harlow, Longman & Co, 1838, Volume VI, p. 160.

[6] Edward Coke, *Institutes of the Laws of England*, London, W. Rawlins, 6th Edition, 1681, Volume IV, p. 42.

encounter Acts of Parliament[7]. Although it is argued that Blackstone has largely misunderstood Coke's account of the supremacy of the High Court of Parliament[8], his understanding has been crucial to Dicey's formulation of the principle, which is compatible with the meaning accorded by the legal practice to the principle. Blackstone also reserves a certain discretion for the courts, where they may refuse to apply a statute whose formulation is not clear[9]. This is in conformity with the actual practice of the courts in the UK: courts may interpret statutory provisions in such ways that ensure the compatibility of the statute with common law or with human rights. In what follows, I will mainly examine Dicey's account of the principle. Nevertheless, it is impossible to avoid commenting on Sir William Wade's conception of parliamentary sovereignty and how it differs from Dicey's.

Albert Venn Dicey indicates that parliamentary sovereignty has a twofold meaning: First, it means that the Parliament has the authority to make law with any content. Second, it propounds that no other body has the right to abrogate or precede over Acts of Parliament[10]. This is true regardless of the level of injudiciousness or oppressiveness exhibited by the will of the Parliament[11]. The fact that statutes are not restricted in content is called the positive aspect of parliamentary sovereignty, while the fact that they cannot be annulled by courts is named as the negative aspect[12]. Also, the Parliament does not need authorization to make statutes and its statute-making power is not subject to procedural limits other than the ones imposed by the standing orders. Lastly, the Parliament is not bound by previous parliaments[13].

Dicey also stresses that the only limitation to the law-making powers of the Parliament is the reaction of the electorate (the public)[14]. This could be mistaken for a condition on the validity of statutes. Kelsen believed that a legal norm had to be minimally efficacious[15], the

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[7] William Blackstone, *Commentaries on the Laws of England*, London, A. Strahan, 15th Edition, 1809, Volume IV, p. 91.
[8] Roy Stone de Montpensier, "British Doctrine of Parliamentary Sovereignty: A Critical Inquiry", *Louisiana Law Review*, Volume 26, Issue 4, June 1966, p. 753.
[9] See generally Howard L Lubert, "Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England'", *The Review of Politics*, Volume 72, Issue 2, Spring 2010, p. 284-286.
[10] Dicey, *op. cit.*, p. 40. See also Gil Anav, "Parliamentary Sovereignty: An Anachronism", *Columbia Journal of Transnational Law*, Volume 27, Issue 3, 1989, p. 631-632.
[11] Christopher Forsyth, "The Definition of Parliament After Jackson: Can the Life of Parliament Be Extended Under the Parliament Acts 1911 and 1949?", *International Journal of Constitutional Law*, Volume 9, Issue 1, January 2011, p. 132-133.
[12] Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act*, Oxford, Hart, 2009, p. 2.
[13] Hilaire Barnett, *Constitutional and Administrative Law*, Abindgon, Routledge, 10th Edition, 2013, p. 117. See also Rivka Weill, "Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power", *Hastings Constitutional Law Quarterly*, Volume 39, Issue 2, Winter 2012, p. 458.
[14] Dicey, *op. cit.*, p. 76-85.
[15] Hans Kelsen, *Pure Theory of Law*, New Jersey, The Lawbook Exchange, 2nd Edition, 2008, p. 213.

persistent violation of the norm by the public *could* lead to its invalidity. However, I think it must be clear that Dicey had in mind not a normative but a factual claim. Accordingly, although the Parliament's lawmaking power is not subject to normative content restrictions, the reaction of the public could act as a factual limit on the exercise of such power.

Another important issue related to the principle concerns whether it is applicable to all acts of the Parliament. The British legal system, in a similar fashion to its Continental counterparts, has two kinds of acts issued by the Parliament. One is an Act of Parliament issued by the wills of both Houses and the Crown. The other is a resolution of the Parliament. These resolutions are not issued by the triad. The will of a single House is sufficient for passing a resolution. As indicated above, the principle purports to grant supremacy to the Acts of Parliament issued by the combination of the two Houses and the Crown, not to the resolutions of the Houses. Resolutions regulating the relations between the Houses and the Crown or standing orders in relation to the internal functioning of the Houses are excluded from the scope of the principle[16].

It appears, then, that parliamentary sovereignty can be formulated as follows: 'The Acts of Parliament are not subject to content restrictions, are supreme and revocable only by another Act of Parliament'. The final remark regarding the meaning of the principle is that the normative supremacy of the Acts of Parliament over other legal norms as implied by the principle does not require that powers used by governmental bodies and courts must originate from an Act of Parliament. It merely suggests that such powers could be overridden by the Acts of Parliament[17].

The attempt to bind a 'future' Parliament might take two forms. The attempt is either about the manner and form of future legislation or it concerns the content of future statutes. The content of a norm is the 'ought' created by the norm. It can always be expressed by a normative proposition. All (practical) normative propositions have the elements of an addressee, an action, and a prescription, i.e. a prohibition or permission, regarding the action. In this sense, content restrictions concern what sort of normative propositions could constitute the contents of the norms.

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[16] John Alder, *General Principles of Constitutional and Administrative Law*, London, Palgrave MacMillan, 4th Edition, 2002, p. 195.

[17] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*, Oxford, Hart, 2015, p. 23.

The manner and form of norms, on the other hand, concern which facts need to obtain for the existence of the norm. The manner and form of a norm are not normative propositions but a collection of empirical facts. Whether the simple majority of the members present in a parliament have voted in favour of a draft, whether the president has signed the presidential decree, or whether the text of the norm has been published in the Official Gazette: all of these exemplify the empirical facts that make up the manner and form of a norm.

The orthodox formulation of the principle rejects the possibility of binding future parliaments in either sense. Just as it cannot give up its power to regulate certain matters, it also cannot dictate how future legislation is to be made. This is the original conception. This claimed impossibility of binding future parliaments in terms of the manner and form in which they express their lawmaking will is a normative and not a factual or logical issue[18]. Both factual and logical issues are uninteresting and there is no real or coherent reason to think why the self-restriction of the Parliament by manner and form requirements should not be possible. Of course, a parliament that is unrestricted with regard to its lawmaking procedures cannot logically be the same as a parliament that has been so restricted by a prior parliament in terms of the unrestricted nature of their lawmaking powers. However, one does not encounter any logical incoherencies unless one tries to claim that both parliaments are identical. On the other hand, the factual question of whether a parliament can succeed in *binding* a future parliament with regard to its lawmaking procedures is entirely contingent[19]. A prior parliament could do so if the future parliament indeed follows the restrictions put in place (this is, after all, the factual meaning of "binding"). The question the principle deals with, at least in my perspective, is whether the Parliament has the legal power to subject future parliaments to manner and form restrictions. As such, it is a normative question.

Here is how I will dodge the difficulty posed by the alleged manner and form restrictions: The Parliament, as the supreme political and legal body within the constitutional system, possesses the power to determine how it will express its will to lay down a statute. In other words, it may determine when the citizens and legal officials should deem it to be the case that the Parliament has laid down a statute. The introduction of additional forms to make statute are not contrary to the principle. This, however, presupposes an original procedure of lawmaking: if there are additional ways, there must be an original way. Furthermore, it is

[18] For a misunderstanding regarding the meaning of "cannot" in "the Parliament cannot bind its successors" please see Vernon Bogdanor, "Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty", *Oxford Journal of Legal Studies*, Volume 32, Issue 1, Spring 2012, p. 182-183.
[19] *Ibid.*, p. 183.

logically impossible for this original way of lawmaking to be determined by a statute. It is only when this original manner and form of lawmaking is claimed to be eliminated by a statute that problems with respect to manner and form restrictions arise. This is because the additional ways of lawmaking are alternatives and they do not restrict the Parliament by making it necessary that it conforms to any procedure other than the original one. I will discuss below, with respect to the challenge posed by the Parliament Acts that the introduced method for lawmaking cannot be conceived as restricting or abolishing of the original lawmaking method. Therefore, any restrictions existing with respect to the alternative lawmaking method are unproblematic for the principle of parliamentary sovereignty. But where does this original method come from? This is a question related to the nature of the principle. The two candidates are common law or the rule of recognition. I will argue in the following section that it is theoretically more coherent and less problematic to hold that the original method is provided by the rule of recognition[20].

Jeffrey Goldsworthy argues that the Parliament can be accepted as sovereign even when it can exercise a normative power to change its composition, procedure or form of legislating. The sovereignty continues unless content-based restrictions are introduced[21]. Goldsworthy seems to think that the original lawmaking procedure that is the Crown in Parliament can be altered by an Act of Parliament and that this would not be problematic for parliamentary sovereignty unless substantive limits on the Parliament's lawmaking powers are imposed. I, on the other hand, argue that while alternative lawmaking procedures can be envisaged, no Act of Parliament can eliminate the Crown in Parliament as a valid lawmaking method. The Crown in Parliament defines the Acts of Parliament that the rule of recognition originally establishes the superiority of. The changing of this procedure defining the ordinary lawmaking procedure of the Parliament implies the changing of the rule of recognition. Of course, the rule of recognition may be changed. However, this requires the participation of all legal officials and the Parliament's will alone is not sufficient. Hence, the Parliament does not possess the legal power to prevent making of statutes through the Crown in Parliament.

Dicey's parliamentary sovereignty is a legal account of sovereignty. Dicey explicitly separates legal sovereignty from political sovereignty[22]. As such, Dicey's parliamentary

[20] One may want to argue that in case an Act of Parliament provides a new method for making Acts of Parliament and restricts the range of matters that can be regulated by Acts made by such procedure, it means that an Act of Parliament, that is one that has been created by the alternative procedure, is subject to content restrictions. How is this not against the principle of parliamentary sovereignty? Indeed, this is partly the challenge posed by the Parliament Acts. I will answer this question below where I consider whether the Parliament Acts constitute a problem for the classical conception of the principle of parliamentary sovereignty.

[21] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Oxford, Clarendon, 1999, p. 16.

[22] Dicey, *op. cit.*, p. 70-76.

sovereignty is a legal fact[23]. Roy Stone de Montpensier understands a legal fact as '… *a fact, a particular or series or group of particulars of which the law takes notice*'[24]. However, this would be a strange meaning to take as the basis of Dicey's theory, as this would amount to presupposing a law that takes note of the fact that is parliamentary sovereignty, a law that Dicey never mentions. Perhaps, then, Dicey meant, whether in a justified or unjustified manner, something else by a 'legal fact'. Sometimes the word 'fact' is used to denote that something is the case, i.e., something either exists or is true. One way of interpreting Dicey's 'legal fact' as something other than pure nonsense is by assuming that Dicey wanted to stress that parliamentary sovereignty is legally valid (existent). This way, the fact is understood as the existence of the norm and the truth of the normative proposition expressed by the norm.

Henry William Rawson Wade is another lawyer who conceived of parliamentary sovereignty as a fact. However, his fact cannot be interpreted as the existence of a norm. Wade observed that Dicey's classic conception of the principle started to be widely controverted[25]. Wade's mission was to demonstrate that the principle was still in place while providing a new explanation for it.[26] I cannot provide an in-depth examination of Wade's account here. Instead, I will present the main tenets of Wade's understanding and express my reasons for doubting the aptness of this conception.

Wade believed that the final resting point of all law was to be found outside the law[27]. While commenting on whether a Parliament could bind its successor, he notes that the courts' duty to obey statutes cannot be created or abolished by statutes[28]. This is because that rule is the basis for the legal validity and binding force of statutes.[29]

I think that Wade's conclusion is mistaken. First, note that not all forms of self-referencing sentences are problematic. The problem only occurs when the content of the sentence relates to the meaning of or proposition expressed by the sentence. For instance, a sentence in the form of 'This sentence is false' is problematic because it concerns the truth value of the proposition it expresses[30]. However, there is nothing problematic with a law that

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[23] *Ibid.*, p. 38.
[24] Montpensier, *op. cit.*, p. 774.
[25] H. W. R. Wade, "The Basis of Legal Sovereignty", *Cambridge Law Journal*, Volume 13, Issue 2, November 1955, p. 172.
[26] Richard Kay, "Constitutional Change and Wade's Ultimate Political Fact", *University of Queensland Law Journal*, Volume 35, Issue 1, 2016, p. 32.
[27] *Ibid.*, 33.
[28] Wade, *op. cit.*, 187.
[29] *Ibid*.
[30] Patrick Fitzgerald, "The Paradox of Parliamentary Sovereignty", *Irish Jurist*, Volume 7, Issue 1, Summer 1972, p. 38.

reads 'Parliament can make and unmake any law' even if it refers to itself[31]. There is no logical contradiction involved. If this is the case, then N_1 (Act of Parliament) might first establish the legal validity of N_2 (precedent) and then confer on N_2 the power to alter or abolish N_1. The self-reference of N_1 would not constitute a logical difficulty in the sense implied by Wade's argument[32].

Wade understands the rule establishing the legislative authority of the Parliament not as a legal rule or a legal fact but as '*…the ultimate fact upon which the whole system of legislation hangs*'[33]. Later, he characterizes this fact as a 'political reality' established by a revolution[34]. In a similar fashion, it could, according to Wade, only be altered by a subsequent revolution[35].

Wade also recognizes that this 'political fact' cannot be altered by any legal act. In fact, it can only be altered by the courts[36]. This may be a strange conclusion for anyone even remotely familiar with how revolutions take place. Regular courts of the legal system that is about to be revolutionized can play an important role in completing the revolution. However, this is only the case if they join the revolutionary movement. It is just as likely that, being the guardians of the former legal system, they would resist the revolution, in which case any successful revolution will simply dispose of the established courts. This means that they cannot contribute the changing of the ultimate political fact, and this would render Wade's determination that it can only be changed inside the courts false. Could it be that Wade was not talking about the courts of the old legal system but rather about the courts in general? If it were so, then perhaps it could be argued that a revolution is only complete i) if it can make the existing courts recognize the new ultimate political fact or ii) if it can establish new courts recognizing its ultimate political fact. Then a revolution is always complete with some form of recognition of the ultimate fact by regular courts, whether they were established under the new ultimate political fact or not.

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[31] *Ibid.*, p. 44.

[32] Note that this is the case even if it is true that the statute could not have established the principle in the first place: No norm can create a legal situation before another norm first determines the conditions for its validity. This does not *ipso facto* mean that the said basis of normativity cannot be altered by the norm. Wade's explanation of why a Parliament cannot change the legal characteristics of its own law-making seems to be mistaken.

[33] Wade, *op. cit.*, p. 188.

[34] *Ibid*.

[35] *Ibid*, p. 188-189. Also see generally H. W. R. Wade, "Sovereignty: Revolution or Evolution?", *Law Quarterly Review*, Volume 112, October,1996, p. 568-571, where Wade sticks with the idea that revolution is how the ultimate fact can be altered.

[36] Wade, "The Basis of Legal Sovereignty", *op. cit.*, p. 189.

Wade's ultimate political fact has been a source of inspiration for Hart's rule of recognition[37]. Both the ultimate political fact and the rule of recognition are in a sense non-legal starting points on which whole legal systems hang. However, the rule of recognition is understood, at least by many, as a rule to be adopted from an internal perspective by all senior legal officials[38]. Wade has been criticized on the grounds that courts alone cannot change the ultimate political fact (the rule of recognition)[39]. This seems to be a valid criticism. Perhaps then Wade's argument should be revised to mean that the ultimate political fact cannot be revolutionized without the participation of the courts. In other words, the courts are not sufficient but necessary elements of such a revolution.

As I noted, Wade's explanation regarding why the British legal system cannot accommodate the idea of entrenched legislation seems to be wanting. This is, however, no reason to reject his analysis altogether. After all, it is disputed if the principle allows its own alteration by a statute. However, the determination of the courts as the only place where the principle can be altered seems to be problematic and not only because of the difficulties noted above. This determination also suffers from some form of self-contradiction. Accordingly, regardless of whether parliamentary sovereignty is understood in legal or political terms, it cannot be based on a decision or the acceptance of the courts. This would amount to the rejection of the same principle that is trying to be affirmed. If the legal power of the Parliament is established by common law, which is to be understood as the precedent of the courts, it cannot be normatively supreme as the principle suggests. Similarly, if the political supremacy of the Parliament is subject to the recognition of the courts, it is difficult to see how the courts are not the sovereign actors of the political system. Yes, they are currently submitting themselves to certain limitations by recognizing that they ought to give effect to the Acts of Parliament, but they remain the only actor capable of abolishing these limitations through their practice.

Another potential problem pertains to the factual character of parliamentary sovereignty in Wade's account. Since it is a political fact, its meaning is not in normative terms. What it determines cannot be the duties and powers of the Parliament. It can only determine, given the political setting, what the Parliament can and cannot do. It sets the limits of the political capacity of an organ. This is all acceptable unless it is claimed that the said limitations are legal. Legal

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[37] Neil MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 2002, p. 80.
[38] Hart is partly responsible for the difference of opinion on which officials will adopt the rule of recognition (see Scott J Shapiro, "What is the Rule of Recognition (And Does It Exist?)", *in* Matthew D. Adler and Kenneth Einar Himma (eds.), *The Rule of Recognition and the U.S. Constitution*, Oxford, Oxford University Press, 2009, p. 241).
[39] See MacCormick, *op. cit.*, p. 86.

limitations are supposed to be normative. Parliamentary sovereignty, at least as it appears in Dicey's account, has normative content. How could such normative content be sufficiently explained by a political fact? Of course, political facts may sufficiently explain what the judges believe the powers and duties of the Parliament to be. It is true that according to Wade, the courts have the last say on if a statute is valid or not[40]. Before accusing Wade of the naturalistic fallacy, one must note that Wade's determination as to the authority of the courts can have normative meaning, according to which courts are legally authorized to determine the limits of and the conditions for the legislative activities. However, if this is the case, then there is no reason to characterize parliamentary sovereignty as a political fact. It is rather a norm of common law constituted by the legal decisions of the courts as to what an Act of Parliament is.

The following section will reiterate the contradictory nature of holding that the principle is based on the authority of the courts while discussing T. R. S. Allan's view of parliamentary sovereignty. Dicey's conception, on the other hand, does not suffer from any such logical difficulties. Both conceptions, however, encounter a problem in explaining the normativity of law. Both authors characterize their versions of parliamentary sovereignty as some sort of a fact and without the intervention of a norm it is impossible for facts to account for the normative status of law in general and Acts of Parliament in particular. I believe, however, that the problem of normativity can be resolved without fundamentally altering both accounts, with reference to some outside, even non-conclusive source of normativity. This is not the place to venture into such a project but, to give an idea about the core idea, it could be argued that not all legal or political facts but only those that necessarily relate to some, conclusive or inconclusive, legal or political value could constitute parliamentary sovereignty. Therefore, it could be guaranteed that legal officials have at least some reason[41] to heed the principle. This would not in any significant way modify Dicey's and Wade's accounts of parliamentary sovereignty. The same cannot be said for the problem of incoherence that is only encountered by Wade's conception of parliamentary sovereignty. In what follows I will adopt Dicey's conception because its theoretical difficulties are surmountable without any major modification. This is also expedient because it is the conception that is widely recognized by legal scholars and officials in the UK.

[40] Wade, "The Basis of Legal Sovereignty", *op. cit.*, p. 189.
[41] I am relying here on the Razian idea that reasons stem from values (Joseph Raz, *Engaging Reason: On the Theory of Value and Action*, Oxford, Oxford University Press, 1999, p. 323).

B) THE SOURCE OF THE PRINCIPLE: ALLAN VS. GOLDSWORTHY

T.R.S Allan argues that the source of the principle of parliamentary sovereignty is common law[42]. Common Law can be summarily described as judge-made law[43]. The British courts have referred to the principle in several decisions. In the *Jackson* case[44] it has been established by reference to parliamentary sovereignty that the Parliament could even regulate the procedure for the making of Acts of Parliament[45]. The problem is to ascertain if the courts merely refer to the principle or also constitute it. In the first scenario, what the courts do is not different from when they refer to a positive legal rule. The rule is not valid because it is referred to in a court decision. In the second scenario, the referred norm does not have an external source but is created by the court as it is referred to.

According to Jeffrey Goldsworthy, the principle constitutes the rule of recognition of the legal system[46]. According to Hart, what distinguishes a legal system from primitive social orders are secondary rules[47]. Primitive social orders are entirely composed of primary rules. Primary rules are rules regarding the behaviors of the persons subject to the order. Secondary rules, on the other hand, are rules about primary rules[48]. Secondary rules are divided into three distinct categories as the rule(s) of recognition, rules of change and rule of adjudication. A legal order is constituted by the unity of primary and secondary rules. The secondary rules remedy the uncertainty and the static nature of the primitive social orders[49]. The rules of recognition determine the criteria by which the membership of other rules in a legal system is assessed[50]. A legal rule is valid only if it conforms to the criteria in the rule of recognition[51].

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[42] T. R. S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford, Clarendon, 1995, p. 10; Alex Carroll, *Constitutional and Administrative Law*, Harlow, Pearson, 10th Edition, 2021, p. 44; Ergun Özbudun, "İngiltere'de Parlâmento Egemenliği Teorisi" [The Theory of Parliamentary Sovereignty in England], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Volume 25, Issue 1, March 1968, p. 59; Ines Weyland, "The Application of Kelsen's Theory of Legal System to European Community Law", *Law and Philosophy*, Volume 21, Issue 1, January 2002, p 4.

[43] See for instance William Minor Lile, "Judge-Made Law", *Virginia Law Review*, Volume 15, Issue 6, April 1929, p. 527.

[44] See *Regina (Jackson and others) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

[45] Pavlos Eleftheriadis, "Parliamentary Sovereignty and the Constitution", *Canadian Journal of Law and Jurisprudence*, Volume 22, Issue 2, July 2009, p. 267.

[46] See generally Goldsworthy, *op. cit.*, p. 238-279.

[47] H. L. A. Hart, *The Concept of Law*, Oxford, Clarendon, 3rd Edition, 2012, p. 94.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid.*, p. 100.

[51] Nicholas W. Barber, "Sovereignty Re-examined: The Courts, Parliament and Statutes", *Oxford Journal of Legal Studies*, Volume 20, Issue 1, Spring 2000, p. 135.

1- T.R.S. Allan and Parliamentary Sovereignty as a Common Law Principle

Allan believes that the principle should be understood as being based on common law principles. In other words, it is a judge-made principle, the validity of which again depends on the continuity of the precedent. He also offers reasons against perceiving the principle as the rule of recognition. This section will summarize his arguments and comment on the soundness thereof.

According to Allan, the reason for attributing supremacy to the laws enacted by the parliament of the UK is the belief or confidence that the parliament shall conduct lawmaking activities to establish a liberal European democracy based on the common law traditions and principles[52]. This is why regardless of how broadly it is interpreted; it is logically impossible for the Parliament to legislate in a way that violates the common law principles and traditions without at the same time destroying the moral basis for parliamentary sovereignty[53]. Therefore, Allan sees a conferral in the foundation of the principle. Courts accept parliamentary sovereignty because they believe that the Parliament will not legislate in violation of certain political principles or common law traditions. Note, however, that it is not merely a belief that judges hold. It is thought of as a valid restriction on the exercise of the sovereignty. Allan must believe that the restriction here is moral because the conferred power originally belongs to the courts. Anyone else exercising the power instead of the courts, with their conferral, ought to be bound by the restrictions put into place. Note that the argument may only work if such conferral is historically accurate. I will not elaborate on the issue as we will encounter the issue of historicity later.

Since common law lies at the foundation of the principle, it is limited by the interpretation of the judges. Allan relies on examples in the decisions of the British courts where judges interpret the statutes in such a way that they do not contradict existing common law precedents[54]. Behind this interpretation lies the belief that the Parliament would not contradict a common law principle without express intent[55]. Allan concludes that since such an interpretation disregards the literal meaning of an Act of Parliament, any understanding which

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[52] T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, Oxford, Oxford University Press, 2013, p. 139.
[53] *Ibid.*
[54] Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, *op. cit.*, p. 17.
[55] Jason N. E. Varuhas, "The Principle of Legality", *Cambridge Law Journal*, Volume 79, Issue 3, November 2020, p. 578.

finds the foundation of the principle outside the common law, rendering the Parliament the unrestricted and the sole sovereign would not be acceptable[56].

This argument is hardly forceful. If Acts of Parliament are supreme, such supremacy is accorded to the norm that is the meaning of the text[57] conveying it. Texts often, although not always, have multiple meanings even if the differences between these meanings are slight. Interpretation, therefore, should generally be understood as the act of determining the possible meanings that are norms[58]. Moreover, as long as the act of interpretation continues to concern the eligible meanings, the interpreter has discretion regarding which meaning to choose and apply[59]. Sure, an argument can be made in favor of one act of interpretation against another. Perhaps one interpretation is in conformity with an urgent societal need while the other is not. However, the interpreter has the power to choose any of the alternative meanings as they are all signified by the text. Disregarding the better fulfilment of societal needs would not necessarily affect the validity of the interpretation. Now, as long as judges stick to one of the eligible meanings in their interpretations, they cannot be said to deny the wording of the Act of Parliament. True, sometimes the meaning that is disregarded by the judges may be the one that is immediately implied by the text; however, it must be kept in mind that norm is not the text but the meaning thereof. So long as the chosen meaning can be extracted from the text, it cannot be said that the judges are disregarding the statute or limiting the principle in any way. Also, when judges interpret a statutory provision so that it is not contrary to a common law principle or precedent, they claim to give effect to the implicit intention of the Parliament[60]. From this, it can be inferred that where the Parliament's intent to override a common law principle or precedent is explicit, the judges do not have the authority to disregard such explicit intention. Therefore, in case the wording chosen by the Parliament does not allow the inference of a meaning that is in conformity with common law, the judges must apply statutes in common law's stead. Ultimately, the cases where a statute is said to be interpreted in conformity with common law cannot demonstrate that the principle of parliamentary sovereignty exists due to or as restricted by common law.

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[56] Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, *op. cit.*, p. 17.
[57] See Giorgio Pino, "Positivism, Legal Validity, and the Separation of Law and Morals", *Ratio Juris*, Volume 27, Issue 2, June 2014, p. 200.
[58] See for instance Kelsen, *op. cit.*, p. 351. Kelsen speaks of meanings that the norms have. However, this should be understood only as a figure of speech. As he clarifies elsewhere (see Hans Kelsen, *General Theory of Norms*, Oxford, Clarendon, 1991, p. 26), norms are the meanings themselves and therefore they do not have meanings. The meaning is to be ascribed to an act of will.
[59] Kelsen, *Pure Theory of Law*, *op. cit.*, p. 349-350.
[60] Goldsworthy, *op. cit.*, p. 250.

Allan indicates that the common law tradition cannot tolerate absolute principles[61]. Therefore, problems such as the meaning and the scope of parliamentary sovereignty cannot be settled once and for all[62]. Whether a legal act is truly an Act of Parliament cannot be determined solely based on the issuer of the act. Rather, factors such as compatibility with common law principles and traditions, which have moral foundations, need to be taken into consideration[63]. Accordingly, any understanding of law necessarily involves moral reasoning because proper reasons that must ground official practice are moral reasons[64]. Allan notes that "The interpreter cannot divorce her construction [of law and legal system] from her own moral opinions. She proceeds on the assumption that the purpose of law is to instantiate some scheme of justice…"[65]. Allan seems to be claiming that anyone, even legal positivists, trying to understand how a legal system's sources fit together must refer to some moral idea/argument/reasons because the law is ultimately related to the ideal of justice. All this is to reject Goldsworthy's idea that legal obligation and moral obligation are different[66]. Shortly, Allan declares that "…what is not legitimate is not law, and so binds no one"[67].

A comment to refute or support Allan's ideas would require a detailed treatment of the old discussion between natural law theories and legal positivism. This is not the place to do that. I will still refer to certain points that need to be kept in mind while attempting to evaluate Allan's claims regarding the relationship between morality and law. Allan seems to assume rather than demonstrate that one must refer to moral considerations/reasons/evaluations while attempting to interpret the legal system as a consistent whole. Also, even if reference to some evaluative outside source is required, morality is not the only source for the normativity of law. Prudence is also a suitable outside provider of normativity. The reason Allan disregards prudence is probably because he thinks that it is somehow inferior to morality or that it is not a proper source of obligations. The relationship between morality and prudence is highly controversial[68]. I will only say that the categorical superiority of morality seems contrary to

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[61] Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, *op. cit.*, p. 143.
[62] See T. R. S. Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", *in* Cheryl Saunders (ed.), *The Courts of Final Jurisdiction: The Mason Court in Australia*, Alexandria, The Federation Press, 1996, p. 161.
[63] Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, *op. cit.*, p. 141-142.
[64] *Ibid.*, p. 145.
[65] *Ibid.*, p. 157.
[66] *Ibid.*, p. 157-158.
[67] *Ibid.*, p. 158.
[68] There are views holding either morality or prudence as categorically superior. There are also views that refuse to settle the relationship between morality and prudence categorically by allowing reasons stemming from either to defeat the other (see generally Roger Crisp, "Prudential and Moral Reasons", *in* Daniel Star (ed.), *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press, 2018.

common sense and prudential reasons must be allowed to defeat moral reasons at least when they are considerably weightier. Allan is perhaps right regarding prudence not being a source of obligations, as obligation is considered as a duty towards someone else[69]. It is not clear, however, why one must refer to an obligation to explain legal normativity. Obligations are constituted by special kinds of reasons called second-order reasons. Accordingly, these are not only reasons to act in a certain way but also reasons to refrain from acting based on certain reasons[70]. Joseph Raz called such reasons exclusionary reasons[71]. However, normativity is not made up of such obligations in the form of exclusionary reasons. Prudence is a perfectly fit candidate to explain how law provides first-order prudential reasons. Therefore, unless the stronger claim that law must be capable of creating *obligations* is true, I do not see how it is only morality as the proper source of obligations that must account for legal normativity. It is perfectly rational to hold that legal normativity is genuine without asserting that the law may obligate.

Lastly, Allan notes an important criticism regarding the possibility of understanding parliamentary sovereignty as the rule of recognition. Allan notes that Dicey's parliamentary sovereignty as a "legal fact" cannot remain a plain social fact. Knowing the content of the law, in other words knowing what it prescribes always requires an understanding of the ideal of the rule of law, which is ultimately dependent on morality. Allan concludes that the normative dimension of the law is inescapable[72] and hints that Hart's rule of recognition may be missing the important connection between legitimacy and legality[73].

Allan is not alone in his doubts regarding the normativity of the rule of recognition. Naturally, I can neither examine nor resolve the issue here. However, since the existence of the rule of recognition is a fact[74], deriving legal normativity based on this rule turns into a seemingly irresolvable puzzle. A strict abider of Hume's Law would straightaway conclude that legal normativity cannot be explained by reference to the existence of the rule of recognition. The failure of Hart's practice theory of rules in explaining normativity has also been recognized by his pupil Joseph Raz[75]. Some other legal positivists, however, believe that Hart has abandoned

[69] See for instance, Kenneth Einar Himma, "The Ties That Bind: An Analysis of the Concept of Obligation", *Ratio Juris*, Volume 26, Issue 1, March 2013, p. 29.
[70] Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Oxford, Oxford University Press, 1979, p. 34-55.
[71] Regarding the concept of an exclusionary reason see Raz, *op. cit.*, p. 22.
[72] Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, *op. cit.*, 137.
[73] *Ibid.*, p. 140.
[74] Hart, *op. cit.*, p. 110.
[75] Joseph Raz, *Practical Reason and Norms*, Oxford, Oxford University Press, 1999, p. 53.

a pure practice theory of rules in favor of conventionalism[76]. Conventionalism is largely the idea that the most fundamental rules of a legal system are conventions[77]. Conventions, in turn, form a subcategory of customs. What makes them different is the reason they are followed and their arbitrariness. They are at least partly followed because others follow it[78]. They are also arbitrary in that the content of the convention could be different and it would serve the population just as well[79]. Arbitrariness may require a little elaboration and usually the example that is given is the convention regarding which side of the road must be used for driving. It could either be right or left but it does not essentially matter which side of the road is picked as long as one side is picked[80]. Doubts about conventionalism's ability to account for legal normativity, however, persist.

The foundations of law are problematic. The rules and norms we seek to base whole legal systems on seem unsatisfactory from multiple angles. The basic norm can merely account for a make-believe legal normativity. The rule of recognition, on the other hand, seems incapable of establishing its own binding force and the normativity of other rules within the legal system. I think the strongest criticism to be extracted from Allan's account can be formulated as follows: If the principle is the rule of recognition[81], then it can never be genuinely binding. How can we argue that a principle without binding force can establish the legal supremacy of the Acts of Parliament?

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[76] See for instance Andrei Marmor, *Social Conventions: From Language to Law*, New Jersey, Princeton University Press, 2009, p. 156.

[77] Leslie Green, *The Germ of Justice: Essays in General Jurisprudence*, Oxford, Oxford University Press, 2023, p. 85.

[78] *Ibid.*, p. 83-84.

[79] *Ibid*, p. 84.

[80] Green, *op. cit.*, p. 81.

[81] It must be kept in mind that the ultimate rule of recognition within a legal system provides the criteria for the validity of *some legal norms* within the system and obligates the judges to accept norms fulfilling those criteria as binding. It is not necessary that an ultimate rule of recognition provides the criteria for all the rules of the system. It is sufficient that it provides the criteria for the supreme norms. The criteria for other norms can be provided by non-ultimate rules of recognition (for the separation between the ultimate rule of recognition and non-ultimate rules of recognition please see Andrei Marmor, *Philosophy of* Law, New Jersey, Princeton University Press, 2011, p. 50). The idea that the principle of parliamentary is the (ultimate) rule of recognition does not necessarily exclude the ultimate rule of recognition from expressing the criteria of validity for other norms within the system. Therefore, if the powers of the British courts have an independent origin and do not directly depend on their being recognised by the Acts of Parliament, it is possible for the ultimate rule of recognition to include criteria for the powers of the courts as well. Then, it must be possible for the ultimate rule of recognition to provide a hierarchy between the recognized sources for although the principle of parliamentary sovereignty does not require the powers of the courts to stem from the Acts of Parliament, it does require their decisions to be null on the face of an Act of Parliament on the contrary. Hart thought that the rule of recognition could incorporate an order of precedence in cases of conflict (H. L. A. Hart, "The Morality of Law", *Harvard Law Review*, Volume 78, Issue 6, April 1965, p. 1293). I assume that by "order of precedence" Hart meant normative hierarchy and not merely a primacy of application. The fact that Hart talks about statutes depriving precedents of their legal status (see *ibid.*) seems to support my interpretation (see *ibid*.).

There is more to be said about Allan's claim that common law lies at the foundation of the principle of parliamentary sovereignty. However, I will first present Goldsworthy's arguments because his assessment includes a large part of what could be said about perceiving common law as the source of parliamentary sovereignty.

2- Jeffrey Goldsworthy: The Principle as the Rule of Recognition

Goldsworthy analyzes that the idea that common law must be the source of the principle proceeds by way of eliminating alternatives[82]. Bradley summarizes the argument in the following manner[83]: The sovereign cannot be determined by an act of self-conferral: The sovereignty of the Parliament may not be based on an Act of Parliament. This would amount to a self-declaration of sovereignty which is insufficient. By the same logic, it is not possible for the courts to be sovereign due to a court decision. However, the argument goes, it is possible to think of parliamentary sovereignty as conferred upon the Parliament by common law. Goldsworthy argues that the argument is doomed to fail. If parliamentary sovereignty stems from common law, what is the origin of the courts' powers? The answer cannot be statute as this leads to a vicious circle. Arguing that common law is the source for the courts' power, on the other hand, would be as problematic as arguing that an Act of Parliament is the basis for the principle[84].

I believe that the strength of Goldsworthy's argument must be recognized. After all, if all legal powers must stem from an act of conferral, one cannot regress infinitely and must arrive at a source of the original power which was never conferred[85]. In a Kelsenian view of a legal system, such an organ with the original power is the primary constituent power, not because it naturally or religiously possesses the power of constitution-making but because it is presupposed to have this power by virtue of the basic norm. A similar authority is bound to be determined for the British legal system. Even if the power of the parliament is based upon the decisions of the courts, the question regarding the source of the courts' decision-making power remains. As explained by Goldsworthy, the argument cannot find this source without embracing circularity or self-contradiction.

It must also be noted that there is something wrong with deriving parliamentary sovereignty from common law. The fact that common law is the source of the principle is the

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[82] Goldsworthy, *op. cit.*, p. 238.
[83] Anthony Bradley, "The Sovereignty of Parliament: Form or Substance?", *in* Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, Oxford, Oxford University Press, 7th Edition, 2011, p. 39.
[84] Goldsworthy, *op. cit.*, p. 240.
[85] Goldsworthy is aware of the problem of infinite regress. See *ibid.*, p. 237. See also Kelsen, *op. cit.*, p. 16.

indication of common law's supreme normative position. However, the content of the principle holds the Acts of Parliament as the supreme norms within the legal system. Thus, we are faced with a contradiction: A principle establishing one of the legal sources[86] as the supreme norm of the system cannot itself be based on any of these legal sources.

Goldsworthy also propounds a historical objection against the idea that it is common law that lies at the foundation of parliamentary sovereignty. Accordingly, judges have always been subordinates to the Crown and the Parliament. Therefore, Goldsworthy finds the claim that the sovereignty has been conferred upon the Parliament by the courts absurd[87]. The Parliament's sovereignty has been established as the result of a sequence of political struggles. Among these were the destruction of papal jurisdiction and the controlling of royal prerogatives of the Crown. Judges were compelled to accept both consequences, even if in the latter case it was necessary to impeach many judges and to overturn their decisions by statutes[88].

I think that the importance of the historical argument should not be overstated. Parliamentary sovereignty is a principle about the normative force of the Acts of Parliament. The principle does not necessarily say anything about the politically sovereign organ, class, or group. While the legal sovereign is almost always determined by the political sovereign, the two do not have to align. In other words, the legal sovereign is not always a "representative" of the political sovereign. Over time the legal sovereign may come to act in the interests of a class or group other than the political sovereign. Let me come up with an example to illustrate. A parliament established following the bourgeoisie revolution against noblemen is expected to represent the interests of the bourgeoisie which is the political sovereign. However, such representation is always indirect and flawed. It is possible for the communists to gain the majority and thereby end the relationship of representation between the legal and political sovereigns *without themselves becoming the political sovereign*[89]. Now, the legal sovereign is still the Parliament which no longer represents the political sovereign. This may happen but of course, one would not expect this separation to last long: either the political or the legal

[86] By conventional legal sources I mean those sources, the validity of which could be explained either by reference to another conventional source or to the ultimate source of validity within the legal system. This ultimate source of validity would be the rule of recognition in a Hartian conception of the legal system, and the basic norm in a Kelsenian conception.
[87] Goldsworthy, *op. cit.*, p. 242-243.
[88] *Ibid.*, p. 243.
[89] One may get the impression that by earning the majority in the parliament the proletariat became the new political sovereign. However, political power is much more complex than that. More than legal authority, it comprises economic power. Also bearing in mind the complexity of election systems and the possibility of coalitions, it is not difficult to find scenarios where the politically weaker group gains the majority in the Parliament.

sovereign must change. Either the proletariat will become the new sovereign, or the Parliament will lose its status as the legal sovereign as a result of the struggle between the proletariat and the bourgeoisie. In this sense, Goldsworthy's claims regarding the subordinate situation of the courts seem to be of a political nature. The reference made to the judges' being compelled by other political powers implies that what he has in mind is political subordination. As I tried to explain, while it generally is, it does not have to be the case that the legal sovereign reflects the political sovereign. The final legal decision-making power may belong to an organ or body that cannot be perceived as the political sovereign. Therefore, even if judges and courts have never been political sovereigns, it is possible to argue that they were legal sovereigns at least during some of the political struggles that took place between the courts and the Parliament. Furthermore, it could be argued that although they are still not political sovereigns, the courts started to become legal sovereigns. It is not that I want to claim this is the case. I just want to stress that the historical argument cannot be conclusive against Allan's claims.

Goldsworthy also replies to Allan's argument based on the fact that judges interpret statutes in a way that is compatible with the principles of common law. Goldsworthy notes that according to Allan the matter is not merely about interpretation because the difference between interpretation and application is not in kind but in degree[90]. Therefore, questions regarding interpretation could potentially turn into questions of validity[91]. Accordingly, when judges restrictively interpret a statute so that it is compatible with common law principles, they are, or they may be deciding on questions regarding the validity of the statute. Goldsworthy finds this argument far from being persuasive based on a very simple reason. Accordingly, behind such an interpretative move is the courts' belief that the Parliament would not want to legislate in a way contrary to common law principles unless explicitly[92]. However, this also means that the courts are eliminating those meanings of the text that would result in a collision with common law principles not because they believe they have the authority to restrict the legislative powers of the Parliament. On the contrary, they want to make sure that they reflect the genuine will of the Parliament in their decisions by eliminating meanings that would only be meant by the Parliament in an explicit way[93]. If anything with regard to the principle of parliamentary

[90] Goldsworthy, *op. cit.*, p. 250. For Allan's remarks see Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, *op. cit.*, p. 17.
[91] See T. R. S. Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution", *Law Quarterly Review*, Volume 113, April 1997, p. 447.
[92] Goldsworthy, *op. cit.*, p. 250.
[93] See *ibid.*, p. 250-252.

sovereignty is to be inferred from this interpretative tendency of the courts it is that they endorse the principle of sovereignty not that they restrict it.

Goldsworthy relies on the distinction between a legal and a moral obligation in order to argue that judges' moral obligations do not necessarily ground their authority to reconsider the principle of parliamentary sovereignty when the need arises. Accordingly, judges might have moral duties and some of these duties might as well constitute the *content* of a common law principle[94]. In some cases, therefore, judges may be morally obligated to refrain from applying a statute. However, this obligation is not sufficient to conclude that the judge is legally authorized to invalidate the statute in question[95].

Now, before continuing I must touch upon the idea of a "legal obligation" as distinct from a "moral obligation". It has been long claimed by legal positivists, especially those that follow Hart, that legal obligation is a distinct kind. Hart determined the existence of a legal obligation by reference to the existence of a strong social pressure to comply with a legal rule[96]. Legal positivists such as Matthew H. Kramer and Kenneth Einar Himma rightly reject the existence of legal reasons as a category, recognizing moral and prudential reasons as the only available law-related reasons for action[97]. Therefore, if there is a kind of "legal" obligation distinct from a "moral" obligation, it seems like prudential reasons are the only option to explain this sort of obligation. The requirement of social pressure for the existence of legal obligations can be understood in light of this explanation, although it is highly unlikely that Hart meant to define legal obligation with reference to prudential reasons. The only remaining problem then is the impression that the concept of obligation seems to concern the other-regarding and exclusionary normativity, like something that is owed to someone else or to society. Prudential requirements concerning the well-being of the agent cannot be owed to someone else, or when the agent is thought of as taking care of her well-being as an obligation to someone else (for instance there is sense in claiming that a child studying abroad is obligated to take good care of herself as any harm to her health would upset her parents) the said requirement seems to have transformed into a moral requirement because of its other-regarding nature[98]. It looks like unless

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[94] *Ibid.*, p. 254.
[95] *Ibid.*
[96] Hart, *The Concept of Law*, *op. cit.*, p. 86.
[97] Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings*, Oxford, Oxford University Press, 1999, p. 82, fn. 4; Kenneth Einar Himma, "Towards a Comprehensive Positivist Theory of Legal Obligation", *Ankara Law Review*, Volume 9, Issue 2, Winter 2012, p. 115-116.
[98] The concept of an exclusionary prudential reason, however, seems perfectly reasonable. After all, some authorities may know what is best for the agent better than the agent herself. When this is the case, complying better with the reasons that the agent has requires that she treats the directive of the authorities regarding her own

one can argue that obligation is not always owed to another and that it is reasonable to have an obligation towards oneself, it is difficult to separate legal and moral obligation. This may be possible. However, there is another strategy available to the legal positivist. As I have argued in the previous section, the term obligation does not have to be the central concept when explaining legal normativity. There is a non-exclusionary sense of normativity at our disposal that can be expressed by "requirements" rather than "obligations". Accordingly, just because judges are morally required to refrain from applying a statute it cannot be inferred that this is what the judges ought to do, all things considered, because prudential reasons provided by the law on the contrary may outweigh the moral reason in favor of disregarding the statute. This way, judges would not be under an obligation to disregard the statute due to a non-moral requirement provided by the law. This would, in turn, be sufficient to argue that moral requirements and legal requirements do not have to coincide. The success of this latter strategy, in turn, depends on demonstrating that prudential reasons are capable of defeating moral reasons. I believe that either strategy is promising[99].

Lastly, Goldsworthy stresses the need for a legal organ with ultimate authority. This is because, in an environment where every person or organ is authorized to invalidate the decision of the other, the legal system cannot function. There are certain benefits expected from a legal system such as the promotion of social coordination and cooperation or an increase in predictability, and so on and so forth. Unless there is a legal organ with final authority, one cannot reap such benefits expected from having a legal system[100]. While Goldsworthy notes that it is not logically necessary for the functioning of the legal system that the Parliament has the ultimate authority, he notes first that it is not clear in any way if it would be better that the judges exercise this authority[101]. He then provides a strong reason for thinking that it is more suitable for the Parliament to have the ultimate authority. This is because democratic participation is one of the most fundamental rights of the citizens[102]. Granting the ultimate authority to the judges would mean that people would not be able to participate in the formation

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health as exclusionary. This seems to be in congruence with Raz's account of legal directives as exclusionary reasons.

[99] Regarding obligations to oneself please refer to Daniel Muñoz, "Obligations to Oneself", *in* Edward N. Zalta (ed.), *Stanford Encyclopaedia of Philosophy*, 2022, URL = https://plato.stanford.edu/archives/sum2022/entries/self-obligations/, Date of Access: 14 August 2024. One does not have to follow rational egoism (see Roger Crisp, *Sacrifice Regained: Morality and Self-interest in British Moral Philosophy from Hobbes to Bentham*, Oxford, Clarendon, 2019, p. 6-9) and establish the categorical superiority of prudence over morality. It is sufficient that the opposite claim regarding the superiority of morality is rejected based on views allowing prudential reasons to defeat moral reasons.

[100] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, *op. cit.*, p. 261-262, 265.

[101] *Ibid.*, p. 262-263.

[102] *Ibid.*, p. 263.

of this authority directly, thus preventing the reaping of many benefits of a functioning democracy.

The first point that Goldsworthy makes regarding the functioning of a legal system does not affect Allan's argument. After all, he sees courts as the organs with final authority within the legal system. There is no doubt that the argument Goldsworthy makes regarding why the Parliament, instead of the courts, should be conferred this final authority is going to be forceful for many. Accordingly, it is more in line with a theory of democracy that the final authority rests with the Parliament rather than the unelected courts. I would call for some caution regarding this argument. While this argument does not weaken the rest of the arguments put forward by Goldsworthy, it is different in kind. He no longer tries to demonstrate that it logically cannot be or historically is not the case that the principle of parliamentary sovereignty is judge-made. Rather, the point is that it is more desirable for the Parliament to hold the final authority rather than the courts. This is claimed by reference to people's right to political participation. The argument is not that the Parliament's authority derives from such right but rather that considering the existence of the right, it is better that the Parliament has it. It may be true that the legal system would be more democratic if the Parliament had supreme control. However, this hardly means that it is better that the (simple) majority of the population is handed unlimited power. The tension between constitutionalism and democracy is well known. In a constitutionalist understanding, it might be wise to limit the authority of the simple majority and one way of doing this allocating more power to the courts even if this meant allocating to them powers to determine the ultimate limits of the parliamentary powers. In fact, this is the case in many constitutional democracies of continental Europe. This is usually perceived as non-problematic because the judiciary is perceived as the least dangerous branch[103]. The judiciary cannot move on its own, but its authority needs to be activated by the filing of the cases. Moreover, despite the principles guaranteeing the impartiality and independence of the judges, the judiciary is largely dependent upon the legislature and the executive in its organization and functioning. All this is to say that it is far from established that it is better for the simple majority to exercise the final authority. Many legal systems, convinced that the simple majority's rule could mean only another form of oppression, chose to install limitations on the authority of the popular organs of the state. Ultimately, we do not have conclusive reasons to accept that it is better for the Parliament to exercise this final authority.

[103] See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven, Yale University Press, 2nd Edition, 1986.

Common law did not always imply judge-made law. In fact, it was first meant to signify customary norms recognized by the judges[104]. Now, Goldsworthy finds the idea that the principle of parliamentary sovereignty is judge-made absurd, although he leaves the door open for understanding the principle as a part of common law in the old sense. Accordingly, parliamentary sovereignty is discovered and applied by the courts; however, the courts lack the power to amend it unilaterally as they are not the ones who created it. In this sense, the principle is a product of the custom between senior legal officials which is to be understood as encompassing more than only judges[105]. Still, Goldsworthy notes that characterizing the principle of parliamentary sovereignty as common law could be confusing in today's environment where common law is understood as something quite different[106].

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Allan's objections to the characterization of the principle of parliamentary sovereignty as the ultimate rule of recognition of the British legal system are all but one deflected. The argument that still stands is the one targeting the rule of recognition's capability of accounting for legal normativity. I think that the said critique is serious. However, as I noted above, the deficiency of the rule of recognition or the general analysis of legal normativity based on social facts can be mended by a minimum concession. Ultimately, such a concession does not alter, in any important way, what a rule of recognition is or what parliamentary sovereignty implies.

I believe that Goldsworthy's argument based on the self-contradictory nature of deriving parliamentary sovereignty from common law is conclusive. It is not only self-contradictory in the sense that is explained by Goldsworthy, that is in the sense that the argument is either circular or it must reject the claim it is based upon. The other arguments, based on history or desirability of locating ultimate authority within the Parliament, do not seem to be conclusive. In the best-case scenario more needs to be said before they can be accepted. However, the truth of Goldworthy's main claim does not depend on these latter arguments.

Ultimately, I conclude that it is theoretically more appropriate to consider the principle of parliamentary sovereignty as the rule of recognition of the British legal system. As such, it can be altered but only with a joined effort by all legal officials. Neither the Parliament nor the courts may alter the principle single-handedly albeit the process may be initiated by the Parliament or the courts.

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[104] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, *op. cit.*, p. 243.
[105] *Ibid.*
[106] *Ibid.*

II. THE FAILURE OF THE CHALLENGES

A) THE 1911 AND 1949 ACTS

The challenge provided by the 1911 and 1949 Acts of Parliament is that they restrict the role played by the House of Lords in making Acts of Parliament[107]. The 1911 Act of Parliament modified the House of Lords' absolute veto power concerning certain issues as a suspensive veto[108]. Section 2(1) of the Act read, before the amendments by the 1949 Bill:

> "If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions… that Bill shall, on its rejection for the third time by the House of Lords… be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill…"

In other words, although the House of Lords still played a role in the making of Acts of Parliament, the role itself was altered and restricted *by an Act of Parliament*. Moreover, the 1911 Act of Parliament was later amended by the 1949 Act of Parliament in accordance with the procedure introduced by the 1911 Act of Parliament, without the affirmative vote of the House of Lords. The 1949 Act of Parliament shortened the period for which a bill had to wait for the affirmative vote of the House of Lords before it could be presented for royal assent.

The question leading to the challenge is: How can a type of legal source[109], itself being passed in accordance with a certain procedure, envisage a different procedure for what is supposed to be the same legal source? This may seem strange at first. Perhaps, in the end, it is theoretically incoherent to hold that both the 1911 and 1949 Acts of Parliament are the same kinds of norms. However, even if it is, this is not an unfamiliar phenomenon at all. An identical phenomenon exists in all legal systems with a written/rigid constitution. These constitutions contain clauses regulating constitutional revisions. In the first constitution of a legal system, the constitutional revision clause itself, along with other constitutional provisions, are issued in a

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[107] İlhan Arsel, "Lordlar Kamarasının Salâhiyetlerini Tahdide Son Teşebüüsler" [Latest Attempts to Restrict the Powers of the House of Lords], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Volume 7, Issue 1, March 1950, p. 92.

[108] See Carroll, *op. cit.*, p. 274.

[109] I am using the term 'legal source' to distinguish it from a 'legal norm' (see Fábio Perin Shecaira, "Sources of Law Are not Legal Norms", *Ratio Juris*, Volume 28, Issue 1, March 2014, p. 15-30). In a sense, legal sources are the carriers of legal norms. They are forms containing the meaning that is to be the norm. However, they are not identical to norms, as a single norm can be constituted by several legal sources. A single piece of legal source can and usually does contain several legal norms.

way contrary to the revision clause. This is necessarily the case, for the derived constituent power that is authorized to revise the constitution did not exist by the time the first constitution was put in place. Now, assume that some constitutional provisions were revised according to the procedure introduced by the constitution. Following the revision process, the constitution will comprise provisions introduced based on different procedures[110]. One difference between the two cases is that usually after a constitution is put in place, the procedures used to issue the constitution become unavailable; from then on, the revision of the constitution is to be made in accordance with the legal limitations imposed by the constitution. In the case of the 1911 and 1949 Acts of Parliament, however, there are two different available methods for passing an Act[111]. This, however, should not make any difference in our judgment in both cases. *If* a legal source can regulate its own making[112], there is no reason why it cannot determine two different procedures for doing so. In fact, some written constitutions do precisely this: they introduce different procedures for constitution-making. The Turkish Constitution of 1982 (art. 175) envisages that a referendum is a mandatory part of the revision process in some cases but not in others. Accordingly, if a proposal for the revision of the constitution has been adopted by the Parliament by a two-thirds majority, the revision proposal does not have to undergo a referendum, and the President of the Republic may directly publish it in the Official Gazette. However, if the proposal has been adopted by a majority of more than three-fifths but less than two-thirds of the Parliament, then the revision cannot gain validity without undergoing the referendum process. This can be interpreted as follows: the public has the authority to participate in the revision of the constitution, but not always. A similar determination applies to the case of the House of Lords: the affirmative vote of the upper house is required for passing an Act of Parliament, except in cases where it is not.

I have argued, following Fitzgerald, that self-referencing legal rules are not generally problematic from a logical perspective. The foregoing demonstrates that what the Parliament

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[110] One may frown at my treatment of whatever methods were adopted for making the historically first constitution as 'procedures'. One may claim that there are no procedures for making a constitution for the first time as the primary constituent power is legally not restricted by any form of lawmaking. Such an objection would not be well-placed, however, for it is one thing to claim that the primary constituent power is not bound by any one procedure and quite a different thing to claim that the first constitution can be issued without any procedures. Procedure is always required for the creation of the law, even when it is so simple that a public declaration of a certain text by a single person would do. Ultimately, the procedures by which the revision clause and the latter revising provisions are enacted would be different.

[111] In *Jackson* Lord Bingham explicitly considered the procedure introduced by the 1911 Act as a new procedure for enacting Acts of Parliament (see Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution", *Oxford Journal of Legal Studies*, Volume 28, Issue 4, Winter 2008, p. 721).

[112] About self-regulation by constitutions, see Fitzgerald, *op. cit.*, p. 43-44.

Acts do is nothing really out of the ordinary. The only thing that remains to be considered is what effect these Acts have on the original Diceyan conception of parliamentary sovereignty. The *Jackson* case[113] concerned whether the 1949 and 2004 Acts of Parliament, which were passed in accordance with the new procedure introduced by the 1911 Act of Parliament, were truly Acts of Parliament. While the court decided that the 1949 and 2004 Acts passed in accordance with the 1911 Act were valid Acts of Parliament, therefore generally benefiting from the effects of parliamentary sovereignty, there was discussion as to whether the procedure in the 1911 Act could ever be used to alter the restrictions initially introduced by the joint wills of the two houses. More specifically, it was discussed if the House of Commons could unilaterally pass an Act so that the Parliamentary term could be extended beyond five years[114]. With Lord Bingham being the exception, most of the court rejected the idea that the House of Commons possesses the power to do this, for the restriction was initially imposed by the wills of both houses[115].

Apparently, then, at least according to the majority in the court, not all Acts of Parliament enjoyed complete freedom from content restrictions as suggested by Dicey's original account. Some Acts of Parliament passed in accordance with a certain procedure were subject to legal boundaries. I will assume until later, when I will defend Lord Bingham's point of view that the majority of the court was right. It should first be noted that the challenge posed by the case of the Parliament Acts concerns the first part of the principle of parliamentary sovereignty which is about the unrestricted nature of the content of Acts of Parliament. It does not, at least not directly, raise questions about the legal-hierarchical force of the Acts once they have been passed under the 1911 Act.

However, based on the foregoing, it cannot be argued that the first meaning of parliamentary sovereignty is not true in its fullest sense. This is because although the Parliament Acts allow for an alternative law-making procedure, they cannot be said to restrict the Parliament in any way. Indeed, the procedure introduced by the Parliament Acts cannot be used to *make or unmake any law*. This is, however, no reason to hold that the Parliament cannot pass statutes with any content through its main procedure of lawmaking, and unless this can be said, the principle can be said to be secure. Nor can the Parliament Acts be said to bind future Parliaments. A subsequent Parliament *can* indeed pass statutes based on the Parliament Acts;

[113] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[114] Lakin, *op. cit.*, p. 721.
[115] *Ibid.*

nevertheless, it is not in any way *required* or *obligated* to do so. This is why, I think, it is safe to conclude that the Parliament Acts do not necessarily conflict with the core meaning of parliamentary sovereignty.

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An alternative objection to the challenge posed by the Parliament Acts could argue that the norms passed under the Parliament Acts are not proper Acts of Parliament. Accordingly, the very fact that the Parliament Acts envisage a new procedure for law creation is sufficient to conclude that the norms produced through such a procedure cannot be properly called an Act of Parliament. Since the principle of parliamentary sovereignty concerns the normative power and the legal scope of proper Acts of Parliament, the Parliament Acts cannot be relevant in this discussion. Whether this explanation is acceptable or not depends on how legal norms are to be classified. It is impossible to cover the whole issue here. I will attempt to reject this alternative explanation by relying on a general overview of the taxonomy of legal norms.

All legal norms are created as a result of a particular *procedure* followed by an authorized *organ* or *person*. In other words, the fact that someone or a group of people followed a particular procedure creates the legal norm. The legal norm thus created has a normative force. I will define normative force as the combination of the norm's scope and the strength of the ought generated by the existence of the norm, i.e., its binding force. The scope of the norm determines the range of cases over which the norm could enjoy binding force. By binding force, I mean the hierarchical status of the norm (and not necessarily its primacy of application).

My argument here depends on the following: If the legal scopes or the binding forces of two norms are different, they cannot qualify as the same kind of legal norm. This is also usually true for the procedure for the creation of the norm: two norms are often different if the organs authorized to issue them or the procedures for their creation are different from each other. However, this is not always the case. If the scopes and binding forces of the end products of different procedures are exactly the same, one can have no reason to call these norms different kinds. They function exactly in the same way within a legal system; therefore, it would be more appropriate to think that the same norm can be issued by two different organs and/or two different procedures.

This means that the difference in the authorized organs or required procedures can only lead to a different norm if at least one of the scope or binding force elements is also different. The element of scope relates to the range of issues the norm could regulate. Let O_1 and O_2 be

the organs authorized to issue norms with procedures P_1 and P_2. Let S_1 and S_2 be the general range of matters and actions that these norms could regulate[116].

Now, S_1 and S_2 could perfectly overlap, partially intersect, or be entirely exclusive of each other. The instances of partial intersection or mutual exclusivity would mean that the norms produced as a result of P_1 and P_2 are to be categorized as different norms. Where S_1 and S_2 overlap, the binding force of the two norms needs to be evaluated. The binding force of the norms in this setting has two different meanings. The first meaning relates to the norms' capacity to end each other's validity. The norm that can end the existence of the other without its own existence being unaffected by the other norm would possess more binding force. N_1 would be normatively stronger than N_2 if it could repeal N_2, but N_2 could not repeal N_1. The binding force of the two norms in this first meaning could be different regardless of whether the scopes of the two norms overlap with, intersect with, or exclude each other. The second meaning can exist only in cases of overlapping or intersection. The effect of the two norms' binding force could also be observed in what their addressees or appliers ought to do in cases of collision. If one of the norms always must give way to the other, i.e., if it is always the case that the addressees of the norm ought to conform to or that the legal officials ought to base their decision on one of the colliding norms, then that norm has superior binding force. Since their binding forces (and, therefore, their overall normative forces) are different, two norms need to be classified as different types of norms.

However, self-imposed or tolerated scope restrictions are not sufficient to determine a difference in normative force. If the scope restrictions regarding a norm (N_1) could be revised or repealed by N_1, one cannot hold that N_1's scope is restricted in any proper sense as its potential scope does not change. Ultimately, this will mean that the scope of such a norm is determined by itself; the scope restrictions are self-imposed (if it is N_1 that initially envisaged the restriction) or tolerated (if it is another norm that initially imposes them). Such self-imposed or tolerated restrictions cannot be said to affect the general classification of the norm.

This general framework regarding why certain norms are classified as the same type could be detailed, and several examples could be provided from different legal systems. However, for our present purposes, this much will have to suffice. Now let us get back to the initial argument against the classification of norms produced as a result of the procedure

[116] It is important to note that S_1 and S_2 do not refer to the particular actions regulated by the two norms at any given time, but rather to the possible range of actions regarding which they could constitute an 'ought'.

provided by the Parliament Acts as proper statutes. The 'proper' statutes are created through the procedure known as the Crown in Parliament. This is not the case for statutes passed under the Parliament Acts. However, as explained above, the fact that the procedures for the creation of the two norms are different does not suffice to demonstrate that the two norms must be classified as different norms. One needs to see if there are scope or binding force differences. From the fact that the Parliament Acts qualify the norms produced by way of the procedure provided therein as 'Acts of Parliament' and the fact that such norms could repeal or alter 'proper' Acts of Parliament, it is fair to conclude that there are no differences of binding force between proper Acts of Parliament and norms passed under the Parliament Acts. Therefore, if the norms passed under the Parliament Acts are not proper statutes this has to be due to a difference in their scopes.

At first glance, it seems as if the norms passed under the Parliament Acts are subject to a scope restriction that proper Acts of Parliament are not. Accordingly, norms passed under the Parliament Acts cannot relate to issues such as national taxation or public finances. Nor can they extend the parliamentary term beyond five years. Proper Acts of Parliament are not subject to such scope restrictions. Therefore, although the scopes of both norms largely overlap, there is a limited field of exclusion with regard to the scope of the norms passed under the Parliament Acts. However, I want to argue that it would be a mistake to view this as a genuine scope restriction that would require a separate classification of the norms passed under the Parliament Acts. This is because the said restrictions could be altered by a norm under the Parliament Acts.

Maybe it could be argued that the norms under the Parliament Acts cannot directly regulate issues relating to national taxation or public financing or extend the parliamentary term as long as the said restrictions are in force; however, there seems to be no reason to hold that the said restrictions cannot be repealed or revised by the same norms. First, nothing in the Parliament Acts directly envisages such a restriction. If the norms under the Parliament Acts are proper Acts of Parliament except for the specific restrictions envisaged, it needs to be conceded that the norms introducing the restriction are not exempt from revision by norms under the Parliament Acts.

This is where I will be challenging the majority's opinion in *Jackson* that a norm under the Parliament Acts could not alter the restrictions imposed by the Parliament Acts upon such norms. In *Jackson*, Lord Bingham makes the following remarks:

> "…there is nothing in the 1911 Act to provide that it cannot be amended, and even if there were such a provision it could not bind a successor Parliament. Once it is

> 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, I see no basis in the language of section 2(1) or in principle for holding that the parenthesis in that subsection, or for that matter section 7, are unamendable save with the consent of the Lords"[117].

The opposition's view is formulated by Lord Nicholls as follows:

> "The Act setting up the new procedure expressly excludes its use for legislation extending the duration of Parliament. 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"[118].

One thing that is not challenged by Lord Nicholls' analysis is that there is nothing within the 1911 Act as amended by the 1949 Act that forbids the revision or the repeal of the relevant restrictions within Section 2(1) by an Act passed under the Parliament Acts. As Lord Bingham stressed, because these norms are characterized by the Act itself as Acts of Parliament, they need to be conceived of as being capable of revising or repealing other Acts of Parliament unless otherwise is expressly stated by the Parliament Acts. I would like to stress that my claim here is not that norms under the Parliament Acts are proper Acts of Parliament simply because they are named so by the Parliament Acts. The will of the Parliament cannot bind the legal theorist attempting to categorize norms. The point is that such characterization by an Act must have a meaning, and it is plausible to assume that this meaning concerns the normative power of the norms passed under the Parliament Acts to revise or repeal Acts of Parliament.

Of course, I assume Lord Nicholls would not oppose any of this. The disagreement between the camps represented by Lord Bingham and Lord Nicholls concerns whether the restrictions in Section 2(1) comprise a restriction regarding the repeal or the revision of said restrictions by a norm passed under the Parliament Acts. The first answers the question in the negative while the second in the positive. It is also worth noting that Lord Bingham represents the majority view regarding this case[119]. I believe that Lord Bingham has the upper hand in this discussion. Although originally made with the participation of both Houses, the said restrictions do not exclude the possibility of a norm passed under the Parliament Acts revising Section 2(1).

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[117] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [32].
[118] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [32].
[119] Mark Elliot, "United Kingdom: Bicameralism, Sovereignty, and the Unwritten Constitution", *International Journal of Constitutional Law*, Volume 5, Issue 2, April 2007, p. 375.

The repeal of restrictions and the use of the Parliament Acts in order to prolong the parliamentary term are analytically distinct. It is conceivable that a norm passed under the Parliament Acts repeals the restrictions within Section 2(1) as to the scope of the norms that can be passed under the Parliament Acts without the House of Commons ever attempting to prolong the parliamentary term. If the House of Commons never attempts to prolong the parliamentary term, it does not act in a way that is contrary to the original restriction within the 1911 Act. Thus, it cannot be argued that the express legislative intention is ultimately defeated in two steps, as Lord Nicholls contends. However, if it is conceded that therefore the restrictions should be revisable by a norm passed under the Parliament Acts, Lord Nicholls would have no ground for holding that a later version of such a norm cannot do this.

I have indicated above that self-imposed or tolerated scope restrictions should not affect the categorization of norms. Since the scope restrictions in Section 2(1) are tolerated, they cannot be used to argue that norms passed under the Parliament Acts are not proper Acts of Parliament. Otherwise, one would have to concede when the scope restrictions are repealed by a norm passed under the Parliament Acts that now these norms are proper Acts of Parliament. How could an *improper* Act of Parliament render itself a proper Act of Parliament? This puzzling situation can only be avoided if it is acknowledged that the norms passed under the Parliament Acts were proper Acts of Parliament to start with.

B) THE EUROPEAN COMMUNITIES ACT

The ECA is no longer in force following Brexit. However, its examination may still be relevant, for it may still be the case that the Act challenged and exposed the traditional conception of parliamentary sovereignty so that it is no longer possible to defend it. It may be argued that leaving the EU would not revive parliamentary sovereignty[120]. The supposed challenge posed by the Act stems from the principle of the primacy of the EU law. I will claim that the principle, at least for the purposes of the domestic legal system, implies primacy of application and not normative hierarchy. This should save the traditional conception of the principle[121].

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[120] Nicholas W. Barber, "The Afterlife of Parliamentary Sovereignty", *International Journal of Constitutional Law*, Volume 9, Issue 1, January 2011, p. 152-153.

[121] My focus here will be on the municipal legal system. I will assume that the challenge posed by the ECA against parliamentary sovereignty is only meaningful in a dualist setting or in a monist setting where the international (or supranational) legal order is not already assumed to be superior. Whatever the challenge is, its source must be municipal, i.e., stemming directly from the existence of the ECA rather than some extra-systemic normative source.

Section 2(1) of the ECA aims to confer direct applicability to some EU norms[122]. While it is generally the EU law and its authorities that will determine which norms are to have direct applicability, the Act makes an exception to that by specifying which norms of the EU could not have direct applicability within the British legal system[123]. The part of the Act that deals with the primacy of the Union law is Section 2(4). Accordingly, domestic norms, including the Acts of Parliament, are to be interpreted in conformity with the EU law[124]. In case this is not possible, any collision between the domestic norms and the EU law ought to be resolved in favour of the EU law[125].

Section 2(4) has been interpreted by some scholars as a provision that binds future parliaments[126]. Moreover, this binding is not in terms of manner and form, but rather in terms of content: the fact that the courts are to deny legal effect to any later Act of Parliament that collides with a directly applicable provision of the EU law is interpreted as a legal restriction upon the lawmaking powers of the Parliament. Richard Ekins diverges from this group of scholars. He eventually claims that Section 2(4) imposes no legal restrictions on the lawmaking power of the Parliament. He interprets Section 2(4) as a default rule finding application unless the Parliament expressly intends the contrary. Because the Parliament retains the power to legislate in a way that collides with or overrides the EU law, Section 2(4) cannot be said to impose a legal restriction on the Parliament[127].

I generally agree with Ekins' analysis but would like to add another reason to reject that the ECA serves as a restriction upon the lawmaking powers of the Parliament. The argument relies on the distinction between applicability and existence. Accordingly, Section 2(4) introduces a legal requirement regarding the law-applying officials. It does not introduce a legal limit on how a valid Act of Parliament shall be made. What is required of legal officials is the non-application of a statute that collides with a norm of the EU law u*nless the Parliament has expressly willed the Act to derogate from the EU law*.

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[122] John Fairhust, *The Law of the European Union*, Harlow, Pearson, 8th Edition, 2010, p. 262.
[123] See Alder, *op. cit.*, p. 197.
[124] Barnett, *op. cit.*, p. 188.
[125] Carroll, *op. cit.*, p. 110.
[126] See for example, Wade, "Sovereignty: Revolution or Evolution?", *op. cit.*, p. 570; Paul Craig, "Britain in the European Union", *in* Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, Oxford, Oxford University Press, 7th Edition, 2011, p. 118 (where the author stresses that the Parliament may not even be able to derogate from its obligations under the EU while the United Kingdom is still a member of the EU).
[127] Richard Ekins, "Legislative Freedom in the United Kingdom", *Law Quarterly Review*, Volume 133, 2017, p. 590-591.

The idea that Section 2(4) constitutes a legal restriction upon the lawmaking powers of the Parliament can only be defended if no distinction is made between the applicability and the existence of a legal norm. Only a norm that exists can be applicable or inapplicable. The lawmaking power concerns the power to create a norm. A created norm then may be applicable or inapplicable. Restrictions regarding the applicability of a norm cannot be perceived as restrictions upon the lawmaking powers of the Parliament. The first reason is that it is the courts that are tasked with disapplying a statutory provision colliding with the EU law. Considering that it is a power of the courts that is restricted, it is difficult to see why this should be conceived of as a restriction on the Parliament's power to make valid statutes. Future parliaments can make any statute they like, even those with content that collides with the existing EU law. No authority can declare or render such statutes invalid. All that is required is that they rely upon the norm of the EU law while determining the contents of their decisions.

Thus, a primacy of *application* is established in favour of the EU law. Positive rules of collision are not rare sights in legal systems. Two examples are Article 25 of the German *Grundgesetz* and Article 90/5 of the Turkish Constitution. Article 25 of the German *Grundgesetz* establishes a primacy of application in favour of the general rules of international law which are to be considered integral parts of the federal legal system and have primacy over national laws in cases of collision. Article 90/5 of the Turkish Constitution fulfils a similar role by establishing that international treaties concerning fundamental rights and freedoms shall take precedence over national statutes. It is crucial to take note of the main differences between the primacy of application and normative hierarchy. Normative hierarchy concerns the validity relationships between different legal norms. That which determines the procedure or the content of the other is the superior norm within the normative hierarchy. It is usually assumed by virtue of the principle of *lex superior derogat legi inferiori* that in an instance of collision between norms of different hierarchical levels, the higher norm takes precedence. This precedence is independent of the legal requirement to invalidate the inferior norm. It is conceivable that the principle of *lex superior* finds application even when no legal organ is authorized to invalidate the colliding inferior norm or where the authorized organ fails to fulfil its obligation. Imagine that two norms of different hierarchical levels envisage incompatible duties. Assume that nobody took the issue to the authorized court or that the authorized court failed to take note of the collision and annul the lower norm. Further, assume that both norms are now candidates to be applied by a court of first instance other than the one that is authorized to annul the lower norm. It is conceivable to argue that since the court of first instance ought to render a decision

based on the higher norm as long as the incompatibility between the contents of the two norms persists. This does not mean that by virtue of being neglected in a single instance of application, the inferior norm thereby becomes invalid. It continues to exist to apply to a future case if the conditions are right, e.g. if the higher norm is repealed.

The primacy of application does not affect the existence of norms. The simple existence of a primacy of application in favour of another norm does not mean that the maker of the norm is precluded from issuing the norm. Because primacy of application and normative hierarchy are analytically separate, it is even possible for a hierarchically lower norm to enjoy primacy of application over the higher norm. There is nothing logically contradictory or otherwise inconceivable in arguing that the maker of the higher norm may envisage a primacy of application in favour of the lower norm. Moreover, it does not restrict its future self by doing so because the organ obligations of which is affected by such a provision would not be the norm creator but the law-applying officials. In other words, provisions concerning the primacy of application are not related to hierarchical criteria for the valid emergence of a norm. Unless a requirement relates to how a valid norm is to be created, it is not possible for this requirement to constitute a restriction upon the norm-creating powers of the authorized organ.

Ultimately, then, the ECA should not be understood as limiting the content of statutes to be issued by future parliaments. There has never been a legal obligation on the part of future parliaments to refrain from legislating in a way that collides with the existing EU law. This is because such colliding statutes remain valid. What is affected is not the legal power of the Parliament to make such statutes but the legal power of the courts to apply them. Since the ECA never constituted a successful challenge against parliamentary sovereignty, the principle of parliamentary sovereignty remains unaffected by it after Brexit.

C) HUMAN RIGHTS ACT

The HRA is the Act of Parliament ensuring the enforcement of the European Convention on Human Rights (the 'ECHR', the 'Convention') within the UK. It poses four challenges to the principle of parliamentary sovereignty[128]. The first challenge is rather easily parried. Section 3(1) of the HRA provides that primary legislation must be interpreted, where possible, in a way

[128] These challenges are determined by Young (see Young, *op. cit.*, p. 3-5). Young also mentions an indirect challenge arguing that the sovereign is not the Parliament, but that sovereignty is shared between the Parliament and the courts (*ibid.*, p. 5). However, as it becomes clear later (see *ibid.*, p. 11), the implied challenge concerns the interpretation of the principle rather than challenging its existence. In other words, the implied challenge argues that Dicey's original formulation never accords sovereignty to the Parliament to start with. As I chose to understand Dicey's conception as relating to the normative force of Acts of Parliament, rather than the characterization of a certain organ as the sovereign, and for concerns of brevity, I will not examine this challenge here.

consistent with the ECHR. Section 3(2)(b) adds however that this interpretative power cannot affect the validity of primary legislation. All that courts could do in cases where a provision of primary legislation cannot be interpreted in a way to conform to the ECHR, is to declare the primary legislation's incompatibility. Since the validity of primary legislation is not affected and the Parliament is not put under a general obligation to refrain from legislating in a way contrary to the ECHR, the principle of parliamentary remains unaffected by the first challenge[129].

Mark Elliot, on the other hand, believes that the formal compatibility between the HRA and the principle of parliamentary sovereignty is not really significant. Accordingly, the existence of the HRA is likely to expand the chasm between the legally unrestricted nature of the Parliament's lawmaking powers and the political reality, i.e. how the Parliament actually behaves while making Acts of Parliament[130]. If one is interested in predicting how the Parliament is likely to legislate, then sure, whether the HRA is compatible with parliamentary sovereignty or not is not the most significant question. There are factors besides legal restrictions or powers that determine in what direction a Parliament will legislate. All of these factors combined constitute the political reality of lawmaking. Surely, parliamentary sovereignty would be important when and if the Parliament chooses to act against its general tendencies. Therefore, Elliot's downplay of the importance of whether the HRA is compatible with the principle of parliamentary sovereignty can only be justified if it is further argued that it is the political reality that really matters, not the normative realm. I doubt that this latter argument can be made.

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The second challenge posed by the HRA concerns the creation of a new manner and form of making primary legislation. Section 19(1)(a) and (b) of the Act provides that when proposing legislation, a minister needs to make a declaration either confirming that he or she believes the bill to be in conformity with the Convention or declaring that the government wishes the House to proceed without such confirmation. The challenge is that if these procedural requirements are considered to be conditions for the validity of primary legislation, a previous Parliament can bind a future Parliament in a way contrary to the principle of

[129] See also Young, *op. cit.*, p. 4; Markus Ogorek, "The Doctrine of Parliamentary Sovereignty in Comparative Perspective", *German Law Journal*, Volume 6, Issue 6, June 2005, p. 974-975.
[130] Mark Elliot, "Parliamentary Sovereignty and the New Constitutional Order", *Legal Studies*, Volume 22, Issue 3, 2002, p. 351.

parliamentary sovereignty[131]. Young rightly points out that the principle of parliamentary privilege would still prevent the courts from reviewing primary legislation based on its compatibility by the HRA[132]. Still, the absence of judicial review should not be equated with the absence of legal restrictions. In other words, the absence of the legal consequence of nullity or annullability in case of a norm's (A) contrariness to another (B), should not be taken directly as the absence of legal requirement that A needs to be in conformity with B[133]. If the requirement introduced by the HRA constitutes a challenge for parliamentary sovereignty, many other provisions have been posing the same challenge for a long time. All norms come in certain forms. The fact that an act without royal assent is not an Act of Parliament is a restriction that is universally viewed as unproblematic for the principle of parliamentary sovereignty. Similarly, the standing orders of both Houses comprise requirements of form and manner that need to be followed while making primary legislation. They are not perceived as challenges to the principle. This is because any Act of Parliament could ultimately repeal the standing orders of the Houses while it is not possible for a provision of the standing orders to repeal an Act of Parliament[134]. It is therefore reasonable to conclude that neither should the HRA as long as failure to meet its requirements leads to the invalidity of the primary legislation. After all the manner and form requirements imposed by the HRA are similar to those posed by the standing orders of the Houses in that they do not lead to the invalidity of the statutes and that ultimately those requirements themselves can be repealed by an Act of Parliament.

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The third challenge is the one that is related to the theory of implied repeal and Henry VIII clauses. Since no future Parliament can be bound by the decision of a previous Parliament, it should always be possible for a later statute to impliedly repeal an earlier statute. Henry VIII clauses are those provisions of primary legislation that confer the government the power to amend or repeal Acts of Parliament. Henry VIII clauses can be retrospective or prospective[135].

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[131] Young, *op. cit.*, p. 5.
[132] *Ibid.*, p. 5-6.
[133] For a more detailed explanation please see Yahya Berkol Gülgeç, *Normlar Hiyerarşisi: Türk, Alman ve İngiliz Hukuk Sistemlerinde Kural İşlemlerin ve Mahkeme Kararlarının Hiyerarşik Gücü* [Hierarchy of Norms: The Hierarchical Power of Regulatory Acts and Court Decisions in Turkish, German and English Legal Systems], İstanbul, On İki Levha, 2nd Edition, 2018, p. 11, 140 (fn. 444).
[134] Again, this is not to say that the Houses are legally allowed to act in a way contrary to the provisions of the standing orders while issuing Acts of Parliament. As long as the standing orders remain valid sources of law, the Houses are required to comply with it regardless of whether non-compliance shall lead to the invalidity of the resulting act.
[135] In short, retrospective clauses only confer the power to amend or repeal statutes prior to the enactment of the clause while prospective Henry VIII clauses also concern primary legislation to be enacted in future. See Young, *Parliamentary Sovereignty and the Human Rights Act*, 6.

Section 10(1) and (2) of the HRA provides that a minister can amend a piece of primary legislation in case (i) a court has found it incompatible with a Convention right, (ii) if in the light of a violation decision of the European Court of Human Rights against the UK a piece of primary legislation appears to be incompatible with the UK's obligations under the ECHR, and (iii) the minister considers that there are compelling reasons to do so. Now, if this could be interpreted as a restriction on a future Parliament intending to pass a provision contrary to the Convention (say, a provision envisaging that citizens of a non-British origin shall not be able to carry claims against taxation to the courts) and therefore preventing the implied repeal of the relevant section of the HRA, we would have a challenge in our hands. Young disperses the appearance of a challenge by demonstrating its logical impossibility. The argument would work in the event that the following two propositions can simultaneously be true: 1) A latter statute violating the Convention collides with Section 10 of the HRA and, therefore, ought to be able to repeal it impliedly and 2) Section 10 of the HRA imposes a restriction on the future Parliament that passed the Act in violation of the Convention. Young rightly observes that only one of these can be true[136]: An impliedly repealed Section 10 according to the first proposition cannot impose any restrictions on the Parliament which, through its Act, impliedly repealed Section 10. In fact, I think that neither proposition is true. First, implied repeal only concerns the cases of collision. Collisions, in turn, involve cases where two or more norms envisage different requirements regarding the same action. To put it differently, a collision occurs when complying with one of the norms inevitably amounts to the violation of the other[137]. In our case, a provision regarding the powers of ministers cannot collide with a provision preventing citizens with non-British origins from filing lawsuits against taxation in a British court. The first concerns the powers of ministers and the other rights of certain citizens. The application of Henry VIII power does not make it impossible for citizens of non-British origin to comply

[136] Young, *op. cit.*, p. 7-8. Note, however, that I slightly changed Young's argument, hopefully without replacing anything essential, which appeared to as a little difficult to follow. In Young's terms, the first proposition should be formulated as 'A latter statute violating the Convention impliedly repeals Section 10 of the Human Rights Act'. I chose to stress that implied repeal occurs when the contents of two Acts are incompatible because I will make use of this statement soon. The second proposition would be along the lines of 'Section 10 can still be used to overturn the statute in violation of the Convention'. I changed the second proposition because I think that the powers of the ministers should not be interpreted as obligations of the Parliament. In other words, it may be the case that the Parliament is not under any obligation to refrain from passing statutes violating the Convention even if the ministers are authorized to amend such statutes. After all, nothing in the wording of the HRA seems to suggest a general obligation on the Parliament's part. The challenge to the principle of parliamentary sovereignty will not exist as long as such a general obligation against the doctrine of implied repeal is present. I assume that Young and I have the same restriction in mind. Therefore, I believe that it is not wrong to attribute this argument to Young.

[137] See Carlos E Alchourrón and Eugenio Bulygin, "The Expressive Conception of Norms", *in* Risto Hilpinen (ed.), *New Studies in Deontic Logic*, Berlin, Springer, 1981, p. 107.

with their obligations. The second proposition is also false. Section 10 concerns the powers of ministers to amend certain Acts of Parliament, not the Parliament's obligation to refrain from passing primary legislation in violation of the Convention. Nothing in the section seems to impose an obligation on the ministers to amend the primary legislation in violation of the Convention. The section simply determines the conditions for exercising such power. Therefore, it would not be possible to infer the Parliament's obligation from the minister's obligation even if such an inference could be made[138].

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The fourth challenge relies on a distinction between ordinary and constitutional primary legislation. In *Thoburn*, the Lord Justice Laws makes the distinction based on whether the content of the statute generally regulates the relationship between the citizen and the state or determines the scopes of fundamental constitutional rights while expressly stating that the constitutional statues are hierarchically superior[139]. Another difference between the two is that the constitutional statutes are protected against implied repeal while ordinary ones are not[140]. The challenge, then, is that the HRA is a constitutional statute that cannot be impliedly repealed.

Young finds a way of interpreting the existence of constitutional statutes as compatible with the existence of the doctrine of implied repeal as required by the principle of parliamentary sovereignty. The gist of the argument is that there are already established restrictions on the scope of implied doctrine such as the principle of *generalia specialibus non derogant* according to which latter general expressions cannot impliedly repeal earlier specific provisions. The existence of constitutional statutes is a further scope-related restriction on the doctrine of implied repeal. However, there is no reason to hold that implied repeal cannot be applied to constitutional statutes. The existence of constitutional statutes only requires judges to try harder to interpret the latter divergent statute in conformity with the earlier constitutional one.

[138] If a written constitution envisages that unconstitutional statutes are to be annulled by the constitutional court and if this is the only thing that a constitution says, could the Parliament be said to have an obligation to refrain from passing unconstitutional statutes? I believe that if the reverse was true, meaning that if the constitution required the parliament was required by the constitution to refrain from passing unconstitutional statutes but no judicial review was envisaged, the parliament would be obligated to refrain from making unconstitutional statutes. I do not think, however, that the mere existence of another organ's obligation to invalidate unconstitutional statutes should imply the existence of an obligation on the parliament's part. Regardless, it is not the case we are dealing with here.

[139] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] 1 QB 151 [62].

[140] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] 1 QB 151 [63].

Ultimately, this still may not be possible allowing for the doctrine of implied repeal to take effect[141].

Here I will briefly put forward some reasons for doubting the truth of the Lord Justice Laws' claims regarding constitutional statutes. In the theory of constitutional law there is a well-known distinction between a constitution in the formal sense (*Verfassung im formellen Sinn*) and a constitution in the material sense[142] (*Verfassung im materiellen Sinn*). According to the formal sense, there is no content-related criterion for qualifying as a constitutional provision. Any provision could be constitutional if it is within the legal source called the 'constitution' that is rigid and normatively supreme[143]. In its material sense, however, what matters is the content of the provision. Accordingly, a material constitution is composed of a body of rules regulating the duties and powers of state organs along with the fundamental organization of a state[144].

It makes sense to require a constitution in the material sense to be a constitution in the formal sense. In other words, since the constitution in the material sense is composed of politically and legally significant norms, it may be desirable to render it normatively supreme so that it is more stable. The most obvious defect in the reasoning of the Lord Justice Laws is that it seems to conflate the two senses of the constitution. The Lord Justice Laws defines constitutional statutes in purely material terms and then goes on to argue that there must be a hierarchy between constitutional statutes and ordinary statutes. Hierarchy must be established either by the supreme norm of the legal system or by a norm superior to both norms subject to evaluation[145]. The Lord Justice Laws' argument does not specify the norm that is the reason for the existence of the hierarchy.

This conclusion is, however, perhaps too hasty. If the supreme positive norm of the legal system is common law as developed by the courts, it may well be the case that constitutional statutes are superior, that the courts accept it so in their decision is what renders constitutional

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[141] See Young, *op. cit.*, p. 35-45.

[142] See Josef Aulehner, *Grundrechte und Gesetzgebung* [Fundamental Rights and Lawmaking], Tübingen, Mohr Siebeck, 2011, p. 264.

[143] This is the conception of a constitution in the formal sense (*Verfassung im formellen Sinn*). See Roman Herzog, *Allgemeine Staatslehre* [General Constitutional Theory], Königstein, Athenäum, 1971, p. 309.

[144] See Georg Jellinek, *Gesetz und Verordnung: Staatsrechtliche Untersuchungen auf rechtgeschichtlicher und rechtsvergleichender Grundlage* [Statute and Ordinance: Constitutional Studies on a Legal-Historical and Comparative Basis], Tübingen, Mohr Siebeck, 1887, p. 262-263. To qualify as constitutional in the material sense, it is not required that the provision is in a normatively supreme position. Theoretically, anything could be constitutional: an administrative act, a statute, or a written constitution. Similarly, a provision within a normatively superior rigid constitution may fail to qualify as constitutional in the material sense.

[145] The fact that one of the norms purports to determine the conditions for the valid enactment of the other is not sufficient. It needs to be demonstrated that such a norm has the legal power to do so.

statutes superior. First, it needs to be stressed that the superiority of common law as developed by the courts over Acts of Parliament would be in direct contradiction with the principle of parliamentary sovereignty. What is concerned here would not be a limitation upon the supreme power of the Parliament but a complete rejection thereof. Therefore, what the Lord Justice Laws' argument aims to demonstrate needs to be assumed in its most extreme form for this argument to work. A milder approach could argue that although common law as developed by the courts is not the supreme normative source within the legal system, it is still possible for the courts to modify the rule of implied repeal as it relates to the application of statutes with specified contents. Notice, first, that the Lord Justice Laws' argument makes direct reference to a hierarchy rather than a simple difference the two norms exhibit with regard to the issue of implied repeal. Hierarchy, in the original argument, is the reason for not applying the doctrine of implied repeal to the so-called constitutional statutes. Even if this approach is milder, I think that it eventually has to rest upon the problematic claim that common law is superior to the Acts of Parliament. This is because the power of altering what statutes can and cannot do each other relates to the determination of the legal regime of these norms. The norm that can determine the legal regime of another must be the superior norm and we go back to the original problem of characterizing common law as the superior norm.

The problem with Lord Justice Laws' argument persists even if it is granted that hierarchical superiority is directly implied by the content of the norm in question. First, if hierarchy exists between two norms the principle of *lex posterior derogat legi priori* cannot be applied. The doctrine of implied repeal is inapplicable to the conflicts between norms with different hierarchical levels. Regarding incompatibilities between norms of different hierarchical levels, it is the principle of *lex superior derogat legi inferiori* that finds application. Therefore, even if constitutional statutes are *ipso facto* superior to ordinary statutes the conclusion must be that ordinary statutes can *never* repeal constitutional statutes, not that they can only *expressly* repeal prior constitutional statutes.

Secondly, although the argument is that there is a hierarchy between constitutional and ordinary statutes, it seems to reach a conclusion that is valid for constitutional statutes enacted at different times. In order for the doctrine of implied repeal to apply, it must be the case that the norms in question concern, broadly speaking, the same matters. If the earlier statute is constitutional by virtue of its content, so must be the latter one. Otherwise, the occasion for implied repeal never arises. Since both these statutes would have to be of the same hierarchical level, the only way the earlier statute escapes being impliedly repealed seems to be by becoming

the more specific norm. This, in turn, is contingent and does not establish the categorical immunity of the earlier constitutional statute from implied repeal[146].

CONCLUSION

All challenges examined here are purely intra-systemic. In other words, they concern whether the existence of certain norms within the legal system, namely the Parliament Acts, the ECA, and the HRA, could ultimately undermine or significantly alter the original conception of parliamentary sovereignty. One difficulty posed by the challenges was that they lie at the top of the British hierarchy of norms. The self-regulation of norms at the ground zero of legal systems can sometimes present difficulties due to self-referentiality or circularity. I hope to have demonstrated above that although such difficulties exist in the cases of the challenges, these are not insurmountable. In fact, with the right jurisprudential orientation, it becomes obvious that the so-called challenges are in conformity with the original meaning of parliamentary sovereignty.

None of this is to say that the principle is eternal. However, the discussion above suggests that this will most probably be due to a new fundamental norm established as a result of revolutionary and not necessarily violent constitutional developments, rather than an intra-systemic norm challenging the principle. If all legal officials collectively stop recognizing the validity of parliamentary sovereignty, they would all be violating the most fundamental norm of the legal system for a while. Of course, it could be argued that the principle would eventually cease to exist: The long-term violation of the rule of recognition of the system would have to mean that it is no longer the rule of recognition. This is not the case today and if it ever becomes the case, it will not be due to intra-systemic norms made by some of the legal officials but due to extra-systemic facts concerning the internal points of view of all legal officials.

[146] Also note that it seems more appropriate for a democracy to prefer that the later constitutional statutes apply instead of the earlier ones. Democracy is the rule of the people that exist *now*. The more recent will of the parliament therefore is supposedly more in conformity with the will of the public. None of this is to say, of course, that this is sufficient to reject the Lord Justice Laws' argument. The immediate rule of the public in the now is subject to restrictions that are generally thought of as reasonable. Constitutionalism envisages such a restriction on the majority rule (see for instance Ergun Özbudun, *Anayasacılık ve Demokrasi* [Constitutionalism and Democracy], İstanbul, Bilgi Üniversitesi, 2019, p. 27-28). The point is rather that in the absence of overriding reasons on the contrary, the will of the people now ought to be held superior to the will of the people in the past.

BIBLIOGRAPHY

Alchourrón, Carlos E. and Bulygin, Eugenio, "The Expressive Conception of Norms", *in* Risto Hilpinen (ed.), *New Studies in Deontic Logic*, Berlin, Springer, 1981, p. 95-124.

Alder, John, *General Principles of Constitutional and Administrative Law*, London, Palgrave MacMillan, 4th Edition, 2002.

Allan, T. R. S., *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford, Clarendon, 1995.

Allan, T. R. S., "Parliamentary Sovereignty: Law, Politics, and Revolution", *Law Quarterly Review*, Volume 113, April 1997, p. 443-452.

Allan, T. R. S., "The Common Law as Constitution: Fundamental Rights and First Principles", *in* Cheryl Saunders (ed.), *The Courts of Final Jurisdiction: The Mason Court in Australia*, Alexandria, The Federation Press, 1996, p. 146-166.

Allan, T. R. S., *The Sovereignty of Law: Freedom, Constitution, and Common Law*, Oxford, Oxford University Press, 2013.

Anav, Gil. "Parliamentary Sovereignty: An Anachronism", *Columbia Journal of Transnational Law*, Volume 27, Issue 3, 1989, p. 631-656.

Arsel, İlhan, "Lordlar Kamarasının Salâhiyetlerini Tahdide Son Teşebüüsler" [Latest Attempts to Restrict the Powers of the House of Lords], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Volume 7, Issue 1, March 1950, p. 92-115.

Aulehner, Josef, *Grundrechte und Gesetzgebung* [Fundamental Rights and Lawmaking], Tübingen, Mohr Siebeck, 2011.

Bacon, Francis, "The History of the Reign of King Henry the Seventh", *in* James Spedding, Robert Leslie Ellis, and Douglas Demon Heath (eds.), *The Works of Francis* Bacon, Harlow, Longman & Co, 1838, Volume VI, p. 1-263.

Barber, Nicholas W., "Sovereignty Re-examined: The Courts, Parliament and Statutes", *Oxford Journal of Legal Studies*, Volume 20, Issue 1, Spring 2000, p. 131-154.

Barber, Nicholas W., "The Afterlife of Parliamentary Sovereignty", *International Journal of Constitutional Law*, Volume 9, Issue 1, January 2011, p. 144-154.

Barnett, Hilaire, *Constitutional and Administrative Law*, Abingdon, Routledge, 10th Edition, 2013.

Bickel, Alexander M, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven, Yale University Press, 2nd Edition, 1986.

Bix, Brian, "Jules Coleman, Legal Positivism, and Legal Authority", *Quinnipiac Law Review*, Volume 16, Issue 3, Fall 1996, p. 241-254.

Blackstone, William, *Commentaries on the Laws of England*, London, A. Strahan, 15th Edition, 1809, Volume IV.

Bogdanor, Vernon, "Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty", *Oxford Journal of Legal Studies*, Volume 32, Issue 1, Spring 2012, p. 179-195.

Bradley, Anthony, "The Sovereignty of Parliament: Form or Substance?", *in* Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, Oxford, Oxford University Press, 7th Edition, 2011, p. 35-69.

Bradley, Anthony W. and Ewing, Keith David, *Constitutional and Administrative Law*, Harlow, Pearson, 14th Edition, 2007.

Carroll, Alex, *Constitutional and Administrative Law*, Harlow, Pearson, 10th Edition, 2021.

Coke, Edward, *Institutes of the Laws of England*, London, W. Rawlins, 6th Edition, 1681, Volume IV.

Craig, Paul, "Britain in the European Union", *in* Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, Oxford, Oxford University Press, 7th Edition, 2011, p. 102-131.

Crisp, Roger, "Prudential and Moral Reasons", *in* Daniel Star (ed.), *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press, 2018, p. 800-820.

Crisp, Roger, *Sacrifice Regained: Morality and Self-interest in British Moral Philosophy from Hobbes to Bentham*, Oxford, Clarendon, 2019.

Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution*, London, Palgrave Macmillan, 10th Edition, 1979.

Ekins, Richard, "Legislative Freedom in the United Kingdom", *Law Quarterly Review*, Volume 133, 2017, p. 582-605.

Eleftheriadis, Pavlos, "Parliamentary Sovereignty and the Constitution", *Canadian Journal of Law and Jurisprudence*, Volume 22, Issue 2, July 2009, p. 267-290.

Elliot, Mark, "United Kingdom: Bicameralism, Sovereignty, and the Unwritten Constitution", *International Journal of Constitutional Law*, Volume 5, Issue 2, April 2007, p. 370-379.

Elliot, Mark, "Parliamentary Sovereignty and the New Constitutional Order", *Legal Studies*, Volume 22, Issue 3, 2002, p. 340-376.

Fairhust, John, *The Law of the European Union*, Harlow, Pearson, 8th Edition, 2010.

Fitzgerald, Patrick, "The Paradox of Parliamentary Sovereignty", *Irish Jurist*, Volume 7, Issue 1, Summer 1972, p. 28-48.

Forsyth, Christopher, "The Definition of Parliament After Jackson: Can the Life of Parliament Be Extended Under the Parliament Acts 1911 and 1949?", *International Journal of Constitutional Law*, Volume 9, Issue 1, January 2011, p. 132-143.

Goldsworthy, Jeffrey, *The Sovereignty of Parliament: History and Philosophy*, Oxford, Clarendon, 1999.

Gordon, Michael, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*, Oxford, Hart, 2015.

Green, Leslie, *The Germ of Justice: Essays in General Jurisprudence*, Oxford, Oxford University Press, 2023.

Gülgeç, Yahya Berkol, *Normlar Hiyerarşisi: Türk, Alman ve İngiliz Hukuk Sistemlerinde Kural İşlemlerin ve Mahkeme Kararlarının Hiyerarşik Gücü* [Hierarchy of Norms: The Hierarchical Power of Regulatory Acts and Court Decisions in Turkish, German and English Legal Systems], İstanbul, On İki Levha, 2nd Edition, 2018.

Hart, H. L. A., *The Concept of Law*, Oxford, Clarendon, 3rd Edition, 2012.

Hart, H. L. A., "The Morality of Law", *Harvard Law Review*, Volume 78, Issue 6, April 1965, p. 1281-1295.

Herzog, Roman, *Allgemeine Staatslehre* [General Constitutional Theory], Königstein, Athenäum, 1971.

Himma, Kenneth Einar, "The Ties That Bind: An Analysis of the Concept of Obligation", *Ratio Juris*, Volume 26, Issue 1, March 2013, p. 16-46.

Himma, Kenneth Einar, "Towards a Comprehensive Positivist Theory of Legal Obligation", *Ankara Law Review*, Volume 9, Issue 2, Winter 2012, p. 109-134.

Jellinek, Georg, *Gesetz und Verordnung: Staatsrechtliche Untersuchungen auf rechtgeschichtlicher und rechtsvergleichender Grundlage* [Statute and Ordinance: Constitutional Studies on a Legal-Historical and Comparative Basis], Tübingen, Mohr Siebeck, 1887.

Kay, Richard, "Constitutional Change and Wade's Ultimate Political Fact", *University of Queensland Law Journal*, Volume 35, Issue 1, 2016, p. 31-46.

Kearns, Thomas R., "Legal Normativity and Morality", *Western Ontario Law Review*, Volume 14, 1975, p. 71-104.

Kelsen, Hans, *General Theory of Norms*, Oxford, Clarendon, 1991.

Kelsen, Hans, *Pure Theory of Law*, New Jersey, The Lawbook Exchange, 2nd Edition, 2008.

Kramer, Matthew H., *In Defense of Legal Positivism: Law Without Trimmings*, Oxford, Oxford University Press, 1999.

Lakin, Stuart, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution", *Oxford Journal of Legal Studies*, Volume 28, Issue 4, Winter 2008, p. 709-734.

Le Sueur, Andrew, "Fundamental Principles", *in* David Feldman (ed.), *English Public Law*, Oxford, Oxford University Press, 2nd Edition, 2009.

Lile, William Minor, "Judge-Made Law", *Virginia Law Review*, Volume 15, Issue 6, April 1929, p. 525-536.

Lubert, Howard L., "Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England'", *The Review of Politics*, Volume 72, Issue 2, Spring 2010, p. 271-297.

MacCormick, Neil, *Questioning Sovereignty*, Oxford, Oxford University Press, 2002.

Marmor, Andrei, *Philosophy of Law*, New Jersey, Princeton University Press, 2011.

Marmor, Andrei, *Social Conventions: From Language to Law*, New Jersey, Princeton University Press, 2009.

McConalogue, Jim, *The British Constitution Resettled: Parliamentary Sovereignty Before and After Brexit*, Londra, Palgrave MacMillan, 2020.

McGarry, John, "Principle of Parliamentary Sovereignty", *Legal Studies*, Volume 32, Issue 4, December 2012, p. 577-599.

Montpensier, Roy Stone de, "British Doctrine of Parliamentary Sovereignty: A Critical Inquiry", *Louisiana Law Review*, Volume 26, Issue 4, June 1966, p. 753-788.

Muňoz, Daniel, "Obligations to Oneself", *in* Edward N. Zalta (ed.), *Stanford Encyclopaedia of Philosophy*, 2022. URL = https://plato.stanford.edu/archives/sum2022/entries/self-obligations/, Date of Access: 14 August 2024.

Ogorek, Markus, "The Doctrine of Parliamentary Sovereignty in Comparative Perspective", *German Law Journal*, Volume 6, Issue 6, June 2005, p. 967-980.

Özbudun, Ergun, *Anayasacılık ve Demokrasi* [Constitutionalism and Democracy], İstanbul, Bilgi Üniversitesi, 2019.

Özbudun, Ergun, "İngiltere'de Parlâmento Egemenliği Teorisi" [The Theory of Parliamentary Sovereignty in England], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Volume 25, Issue 1, Mart 1968, p. 59-79.

Pino, Giorgio, "Positivism, Legal Validity, and the Separation of Law and Morals", *Ratio Juris*, Volume 27, Issue 2, June 2014, p. 190-217.

Raz, Joseph, *Engaging Reason: On the Theory of Value and Action*, Oxford, Oxford University Press, 1999.

Raz, Joseph, *Practical Reason and Norms*, Oxford, Oxford University Press, 1999.

Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, Oxford, Oxford University Press, 1979.

Shapiro, Scott J., "What is the Rule of Recognition (And Does It Exist?)", *in* Matthew D. Adler and Kenneth Einar Himma (eds.), *The Rule of Recognition and the U.S. Constitution*, Oxford: Oxford University Press, 2009, p. 235-268.

Shecaira, Fábio Perin, "Sources of Law Are not Legal Norms", *Ratio Juris*, Volume 28, Issue 1, March 2014, p. 15-30.

Varuhas, Jason N. E., "The Principle of Legality", *Cambridge Law Journal*, Volume 79, Issue 3, November 2020, p. 578-614.

Wade, H. W. R., "The Basis of Legal Sovereignty", *Cambridge Law Journal*, Volume 13, Issue 2, November 1955, p. 172-197.

Wade, H. W. R., "Sovereignty: Revolution or Evolution?", *Law Quarterly Review*, Volume 112, October 1996, p. 568-575.

Weill, Rivka, "Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power", *Hastings Constitutional Law Quarterly*, Volume 39, Issue 2, Winter 2012, p. 457-512.

Weyland, Ines, "The Application of Kelsen's Theory of Legal System to European Community Law", *Law and Philosophy*, Volume 21, Issue 1, January 2002, p. 1-37.

Young, Alison L., *Parliamentary Sovereignty and the Human Rights Act*, Oxford, Hart, 2009.

Cases

Regina (Jackson and others) v Attorney General [2005] UKHL 56, [2006] 1 AC 262.

Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] 1 QB 151.

Statutes

Act of Union with Scotland 1707.

European Communities Act 1972, s 2.

Human Rights Act 1998, s 3, 10, 19.

Parliament Act 1911 (as amended), s 2.

Statute of Westminster 1931.