Introductory Note by Francis Bennion

The article below is a further addition to my writings on hunting. Others are included within the Topic 'Hunting Act 2004'. The Topic can be found on this website at *www.francisbennion.com/topic/huntingact2004.htm*.

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Is the New Hunting Act Valid?

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Introduction

On 18 November 2004 the Hunting Bill received Royal Assent under the procedure laid down by the Parliament Acts 1911 and 1949. In a recent article[1] I suggested, mainly on human rights grounds, that the Bill was unconstitutional. Now the Act is being challenged in the courts by the Countryside Alliance (of which I am a member) on a different ground. This is that it was passed in the shorter period of time laid down by certain amendments to the 1911 Act which were purportedly made by the 1949 Act, and that these amendments were ineffective because the 1949 Act was unlawfully passed.

The 1949 Act was passed without the consent of the House of Lords, using the procedure laid down by the 1911 Act as originally passed. The Countryside Alliance say that the original 1911 Act procedure was not available for amending the 1911 Act itself because that Act merely delegated legislative powers to the House of Commons acting alone, and a delegate cannot enlarge the powers delegated to it (known as pulling oneself up by one's own bootstraps). In this article I examine that contention, but first I will set the scene.

Britain lacks a constitution, or perhaps has an unwritten constitution. The judges 'seem to have in their minds an ideal constitution'.[2] Parliament has limitless sovereignty, yet 'Acts of Parliament derogatory from the power of subsequent parliaments bind not'.[3] 'Just as there can be no safeguard against express repeal by a later statute, so there can be none against implied repeal'[4]. Yet Lord Wilberforce doubted that an Act of such constitutional significance as the Union with Ireland Act 1800 is subject to the doctrine of implied repeal.[5] In Britain there is said to be no such thing as a constitutional Act, yet British courts 'though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document'.[6] Parliament 'cannot according to our constitution, bind itself as to

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[1] 'Why the Hunting Bill is Unconstitutional', 168 JP (9 October 2004) 790.

[2] D. L. Keir and F. H. Lawson, *Cases in Constitutional Law* (4th edn, 1954) p. 10.

[3] W. Blackstone, *Commentaries on the Laws of England* 1 p. 90.

[4] Keir and Lawson, n. 2 above, p. 5.

[5] See Report by the Committee of Privileges on the Petition of the Irish Peers (1966) HL Session Papers (53).

[6] Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131. See also *R v Rezvi* [2002] UKHL 1, [2002] 1 All ER 801, at [19].

the form of subsequent legislation'.[7] When recourse is had to the Parliament Acts 1911 and 1949 'the sovereign body amounts to no more than the Crown and the Commons'.[8]

If the last of these suggestive constitutional snippets is correct, which I believe it is, then it cannot be true that when acting under the Parliament Acts 1911 and 1949 the House of Commons is merely a delegate. Yet as we shall see some academic lawyers have maintained that to be the case, and have moreover persuaded Lord Donaldson of Lymington, the former Master of the Rolls, that they are right. On that view the House of Commons would not by itself have power to alter the instrument by which the delegation was effected, a principle akin to that expressed in the Latin maxims *delegatus non potest delegare* and *vicarius non habet vicarium*.[9]

Text of the 1911 Act

The question is solely one of statutory interpretation. It depends, as it always does (or as it always used to do before the European Communities Act 1972, *Pepper v Hart*[10] and the Human Rights Act 1998), on the intention of Parliament as manifested in the text of the relevant Act, in this case the Parliament Act 1911. Certain provisions of that Act as originally enacted have especial relevance here. The first is section 2(1), which runs-

> 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 (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, 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: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.[11]

The italicised words show that the Parliament Act 1949, which was passed in exact accordance with this procedure, was intended by the 1911 Parliament to become, and incontrovertibly did indeed become, on the Royal Assent
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being signified to it, something known as an Act of Parliament, the characteristics of which are to be gleaned from our constitutional history and practice.

Clearly a measure so passed was not intended by the 1911 legislators to be anything less than an Act of Parliament just because it had not been passed by the second chamber. On the contrary it was intended to have exactly the same force and effect as if the second chamber had passed it.

Nor does this apply only to some conjectural species of relatively unimportant Act passed by the 1911 Act procedure. It quite clearly applies to each and every Act so passed. No glimmer

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[7] Maugham LJ in *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 at 597.
[8] Keir and Lawson, n. 2 above, p. 7.
[9] I regret falling into what Gibbon called the obscurity of a learned language, but if my observation had merely been that a delegate cannot delegate, this would have concealed the fact that it is an ancient truism.
[10] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.
[11] Emphasis added.

of a test is offered in the terms of the 1911 Act for drawing a line between constitutional Acts and others, the latter only being valid. Nor is there any suggestion (as is currently being argued) that the procedure was intended only for weighty measures of great national importance, or for manifesto commitments.

Confirmation of all this is furnished by two other provisions of the 1911 Act. The first is the preamble, which runs-

> Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament; and whereas *it is intended to substitute for the House of Lords as it at present exists a second chamber constituted on a popular instead of hereditary basis*, but such substitution cannot be immediately brought into operation; and whereas *provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new second chamber*, but it is expedient to make such provision as in this Act appears for *restricting the existing powers* of the House of Lords:[12]

The first two italicised passages make clear one aspect of the intention of the 1911 Parliament; indeed the very word 'intended' is used. And how would this legislative intention be carried out at some future time? Why by Act of Parliament, since there was no other available method. In other words the very Parliament whose legislative intention we are investigating, for the purpose of ascertaining whether delegation was meant, contemplated that a future Act of Parliament would be used for the major constitutional remodelling involved in replacing the hereditary second chamber by 'a second chamber constituted on a popular instead of hereditary basis'. Since a House of Lords composed of hereditary peers would in the early part of the twentieth century be very likely to withhold its consent to a measure removing those peers from power it was probable that the Act in question, necessarily amending the 1911 Act, would have to be one passed under the 1911 Act procedure.[13]

The third italicised passage in the preamble makes it clear that the intention of the 1911 Parliament was to restrict the powers of the Lords, not delegate powers to the Commons.

The other confirmatory provision is section 4(1) of the 1911 Act, which runs-

> In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say: —
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> > '*Be it enacted* by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows.'[14]

The italicised words confirm that the 1949 Act, which included this formula, was, in constitutional terms, *enacted*. In the context, this word can have only meaning, namely that its text was turned by Royal Assent into an Act of Parliament and nothing less.

Since the passing of the 1911 Act there have been two ways to legislate, the old way and the new way. The product is exactly the same in either case – a full-blown Act of Parliament. That

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[12] Emphasis added.

[13] Admittedly this did not in fact happen with the passing of the House of Lords Act 1999 with its provision (section 1) that 'No one shall be a member of the House of Lords by virtue of a hereditary peerage', but by the end of the twentieth century the hereditary principle had become generally discredited.

[14] Emphasis added.

surely means, as we used to say before Lord Woolf placed his interdict on the use of Latin in the law, *cadit quaestio.*[15]

However I can't leave it there. For one thing, we are permitted by the aforesaid *Pepper v Hart* to investigate the debates on the Bill for the 1911 Act. We find from them that the question whether the new procedure could be used for amending the 1911 Act itself was in fact considered. The then Prime Minister, Mr Asquith, told the Commons that his Government did not wish to see the liberty of a future House of Commons 'in any way impaired or restricted' by an exception proscribing 'any amendments [to the 1911 Act] which experience may show to be necessary'.[16]

The argument for invalidity

The argument for the invalidity of the Parliament Act 1949 was put by Lord Donaldson when moving the second reading of his Parliament Acts (Amendment) Bill 2001-

> '. . . it is a fundamental tenet of constitutional law that, prima facie, where the sovereign Parliament - that is to say, the Monarch acting on the advice and with the consent of both Houses of Parliament - delegates power to legislate, whether to one House unilaterally, to the King or Queen in Council, to a Minister or to whomsoever, the delegate cannot use that power to enlarge or vary the powers delegated to him. The only exception is where the primary legislation, in this case the 1911 Act, expressly authorises the delegate to do so. In other words, there has to be a Henry VIII clause.'[17]

This assumes what has to be proved, namely that delegation was intended - a logical fallacy known as *petitio principii* or begging the question. There is no attempt to
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do what has to be done whenever statutory interpretation is involved, namely *examine with care every word of the enactment which is being construed.*

For the academic argument for invalidity I will concentrate on the presentation put forward by Professor Graham Zellick.[18] He says that the dispute turns on the rules descriptive of Parliament. The common law recognises the supremacy (or sovereignty) of Parliament, so that legislation whatever its content will be complied with and applied by the courts. But this cardinal principle of the British Constitution gives rise to one basic question: What is Parliament? Who is invested with the primary law-making powers? The answer the law gives is that Parliament consists of the Queen, the Lords Spiritual and Temporal, and the Commons, together termed the Queen in Parliament.

Professsor Zellick goes on to point out that mere resolutions of Parliament do not make law, unless it is so provided by statute. It is clear, he says, that the courts will not concern themselves with the procedure of Parliament and inquire, for instance, whether an Act has received the appropriate number of readings before being given the royal assent. But *The Prince's Case*[19], is authority for the proposition that what purports to be a statute is in fact no such thing if it is stated to have been passed by the King with the assent of just one House.[20]

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[15] Readers not wholly content with Lord Woolf's ukase will gain quiet satisfaction from two articles by Roderick Munday: 'Does Latin Impede Legal Understanding?' 164 JP (2000) p. 995 and 'Lawyers and Latin' 168 JP (2004) p. 775.
[16] HC Deb. 24 April 1911, col. 1473. See also col. 1494.

[17] HL Deb 19 January 2001, col. 1309.
[18] 'Is the Parliament Act Ultra Vires?' NLJ (31 July 1969) 716.
[19] (1606) 8 Co. Rep, la.
[20] *The Prince's Case* is irrelevant here because it was not decided in the context of an enabling measure

The courts, Professor Zellick goes on, say they will apply whatever Parliament enacts; so although Parliament may be able to alter its own structure - though even this is denied by some authorities - it must do so in the manner prescribed at that time. Undoubtedly the Queen, Lords and Commons compose Parliament, and it is necessary for all three to signify their consent and for that to be found in the enacting formula of the Act. But of course, Parliament can authorise other bodies to legislate and more legislation today is the product of powers delegated by Parliament than of Parliament itself. And this is what the Parliament Act 1911 does, argues Professor Zellick.[21]: It says that in certain circumstances a body consisting of Queen and Commons alone may legislate, and may legislate on any topic, except the duration of Parliament (s.2(l)), only after the Lords have rejected the Bill. What is then enacted is in fact a species of delegated legislation.

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

Thus, any statute passed according to the provisions of the Act of 1911 is as good as any statute receiving the assent of the Queen, Lords and Commons, unless it purports either to amend the Act of 1911, or to extend the length of Parliament. Since the Act of 1949 attempts to do the former, it has attempted the impossible, and is, therefore, no statute at all, for it has exceeded the powers conferred on the law-making body. Any 'statute' passed under it (such as the Hunting Act 2004) would, says Professor Zellick finally, be similarly invalid and might be set aside by the courts.

Answering the Donaldson-Zellick thesis

What might be called the Donaldson-Zellick thesis depends entirely on the contention that what the 1911 Act effected was a *delegation* of Parliament's legislative power to a body consisting of the Monarch coupled with the House of Commons. The alternative view, which I share, is that what the 1911 Act effected was a constitutional remodelling whereby, as an alternative, the legislative power could be exercised in a slightly different way to the usual. The House of Lords still has to be involved. It has to be allowed to debate the Bill in question, and ask the Commons to consider amendments it puts forward. It can delay the passage of the Bill, but in the end its consent can be dispensed with for very sound constitutional reasons.

As I have shown, the language of the 1911 Act bears this out. It nowhere speaks of delegation. It stresses that the product of the process is not a statutory instrument[22], or a byelaw, or any other familiar product of delegated legislation, but an Act of Parliament. Under the usual rules of statutory construction, full weight must be given to the use of this term. Lord Walker of Gestingthorpe recently said 'a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole'.[23] Lord Scarman said of certain provisions of the Water Act 1973: 'It is not . . . possible to determine their true

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such as the Parliament Act 1911.

[21] See Hood Phillips, *Constitutional and Administrative Law* (4th edn., 1967), pp. 75-76 (Zellick's note).

[22] See the Statutory Instruments Act 1946.

[23] *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] UKHL 7, [2004] 2 All ER 141, at [38].

meaning save in the context of the legislation read as a whole'.[24] There are many similar dicta.[25]

This means that the legal meaning of any provision of the 1911 Act cannot be accurately ascertained unless proper weight is given to the indications in it, mentioned above, that a product of the procedure it lays down is described by it as an Act of Parliament and nothing else. 'The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act'.[26] 'On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded'.[27]

In the debate on the second reading of Lord Donaldson's Bill referred to above, Lord Goodhart for the Liberal Democrats put forward powerful arguments against what I am calling the Donaldson-Zellick thesis-

> 'I believe that the whole of the argument rests on a
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> narrow and untenable base; that is, the argument that Parliament does not have unfettered power to change the procedures by which it enacts statutes. Plainly, Parliament has the power to change its own composition and to exclude Members. It did so most recently in the House of Lords Act 1999, which excluded most hereditary Peers. It did so in 1917 by excluding a number of Peers who were found to have been fighting on the German side in the First World War. It did so by the Welsh Church Act 1914 which excluded from your Lordships' House bishops holding sees in Wales. That part is particularly significant because Sir William Wade suggests that a change in the composition of your Lordships' House cannot be brought about by a Bill passed under the Parliament Acts. The Welsh Church Act was passed under the Parliament Act 1911 and, if that argument is correct, then Welsh bishops are still entitled to sit in your Lordships' House.
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> 'More important, of course, even than the composition of your Lordships' House is the identity of the sovereign. By the Act of Settlement of 1700 Parliament conferred the Crown, in succession, on to Queen Anne when she succeeded King William III, on the Electress Sophia of Hanover and her heirs. The identity of the sovereign plainly goes to the bedrock of the constitution. It is as significant, if not more significant, than any restriction of the powers of your Lordships' House. But there is no suggestion that the assent to legislation of a monarch who owes his or her Crown to the Act of Settlement is in any sense delegated legislation or that the Act of Settlement itself could not be changed by an Act of Parliament assented to by a sovereign who owes his or her Crown to the Act of Settlement itself.'[28]

Lord Goodhart might have gone further back and cited the accession of William III in 1689 without formal legislative backing on the forced abdication of James II.[29] According to

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[24] *South West Water Authority v Rumble's* [1985] AC 609 at 617.
[25] See F A R Bennion, *Statutory Interpretation* (fourth edition, 2002), s 355.
[26] *Statutory Interpretation*, p. 992 (for authority see footnote 5 on that page).
[27] *Loc. cit*., p. 993.
[28] HL Deb 19 January 2001, cols. 1322-23.
[29] Also relevant is the accession of George VI in 1936 on the abdication of Edward VIII, but here there was a Parliament and Monarch in place to give statutory backing by His Majesty's Declaration of Independence Act 1936.

Macaulay the royal powers have been transferred, albeit temporarily, merely by the handing over of the great seal.[30]

The great constitutional lawyer A V Dicey said that the House of Lords 'cannot prevent the House of Commons from, in effect, passing under the Parliament Act [1911] any change of the constitution, provided always that the requirements of the Parliament Act [1911] are complied with'.[31] This applied when, in compliance with those requirements, the House of Commons, in effect, changed the constitution by passing the Parliament Act 1949. Now the constitution operates by allowing the House of Commons alone to secure the passing of the Hunting Bill 2004 (or any other Bill) under the reduced timetable laid down by the 1949 Act. There is no question of delegation. I quote Lord Goodhart again-

> 'The Parliament Act 1911 was passed by the full constitutional process of Lords, Commons and Royal Assent. The argument that this is delegated legislation depends on the conclusion that Parliament, despite its theoretically absolute sovereignty, cannot formally exclude a requirement for the consent of your Lordships to the legislation and that therefore the Parliament Act 1911 can be supported only by a constitutional fiction - it is plainly a fiction - that it was delegating its powers to the Crown and the House of Commons to the exclusion of the House of Lords.
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> 'Any conclusion that the legislation passed under the Parliament Act 1911 is in any sense delegated legislation is simply fanciful. If Parliament can change the descent of the Crown, why cannot it enable the Crown and the Commons to enact legislation having fully equal validity to legislation enacted by the normal processes? I am afraid that I see no room for the argument that Parliament cannot create an alternative process to the enactment of legislation in a way which gives legislation enacted under the new process equal validity with legislation passed under the old process, including power to amend the Act which created the new process . . . I do not believe for one moment that those involved in the Parliament Act 1911 thought that Acts passed under it were in any sense second-class legislation.'[32]

The true constitutional position

The true constitutional position, as expressed in section 32 of my book *Statutory Interpretation*, is as follows: 'An operative Act, as the expression of the will of the sovereign legislature, overrides inconsistent provisions of pre-existing law (whether statutory or not) and is itself overridden by any inconsistent subsequent Act.' Since measures passed under the 1911 Act are expressed by that Act to be Acts of Parliament they clearly fall within this rubric.

We may go a step back to section 31 of my book, which states: 'Under the doctrine of unlimited parliamentary sovereignty prevailing in the United Kingdom, an Act can lay down any proposition of law whatsoever (in the sense that that proposition will on the Act's commencement become law in the territory to which it extends).'

This allows any degree of constitutional remodelling, including remodelling whereby the supreme legislative power passes to a different body altogether. An Act of Parliament, including one passed under the Parliament Acts, could provide that the legislature, instead of

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[30] Thomas Babington Macaulay, *The History of England from the Accession of James II* (Everyman edn 1906) ii 109 (transfer to Prince of Wales in 1788 on temporary insanity of George III).
[31] *The Law of the Constitution* (8th edn 1915), p. xlii.
[32] HL Deb 19 January 2001, cols. 1323-24. The Attorney General, Lord Williams of Mostyn, said at col. 1328 that the Government's position was coincident with Lord Goodhart's.

being the Queen in Parliament (or simply 'Parliament' as Dicey condenses that phrase[33]) shall thereafter be the Queen and House of Commons, or even the House of Commons alone.

It could go further and say that thereafter the legislature shall be a new body altogether, with a new name. No one could then insist, as some do nowadays[34], that the sovereign legislature must consist of the Monarch, the House of
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Commons and the House of Lords. As it is, the identity of the Monarch, and the composition of the House of Commons and the House of Lords, have, as we have seen, been fundamentally altered over time by various Acts of Parliament. It is perhaps surprising that those two ancient names remain unchanged.

This goes along with other fundamental changes in our constitution, sometimes made by Act and at other times by the royal prerogative. Territories have been parted with, so that our legislation can no longer apply in them. Powers have been yielded to the European Union (though they could still be taken back). Under the Human Rights Act 1998 our judges have been given power to in effect overrule Acts of Parliament, though only where Parliament and the Executive submit to this and choose to go along with it. It is a constitutional kaleidoscope.

Going back further still we may consider that wider concept of sovereignty that goes beyond legislative powers. In the United Kingdom overall sovereignty is regarded as formally residing in the Crown, but the underlying power is seen to rest with the people. Thus Dicey speaks of

> '. . . the will of that power which in modern England is the true political sovereign of the State - the majority of the electors or (to use popular though not quite accurate language) the nation.[35]

This illustrates the well-known distinction between political sovereignty, the ultimate source of power in the State, which is the naked capacity for forceful action possessed by the inhabitants in the mass, and legal sovereignty, which is the power conferred by the constitutional law on certain organs of the State established under that law. Legal sovereignty must mean more than the power to make laws. It should correspond to the whole content of the political sovereignty inhering in the inhabitants, and be vested in organs fitted to channel popular power to work the ends desired by the people. If the constitutional framework is not equipped to give effect to the popular will it is not the people who will give way in the end, but the constitutional framework.

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[33] *Loc. cit.* p. 3.
[34] See Professor Zellick above.
[35] Law of the Constitution (9th edn.), 1939, p. 429.