Chapter 4: Parliamentary sovereignty

Problem scenario

Parliament passes the (fictitious) Foreign and Domestic Taxes Act 2024 with the aim of protecting the UK economy following years of recession. This provides that all British citizens residing in the UK and all those who have expatriated abroad within the last five years must pay a standard £250 yearly tax to the British Government, on top of other existing tax provisions. In addition, to ensure long-term financial security and to protect the Act from being repealed too easily, it provides that 'this Act is only subject to repeal in the event that a two-thirds majority is achieved in the House of Commons'.

Consider the constitutional validity of this Act of Parliament, thinking in particular about the following factors and circumstances, which we will discuss as the chapter progresses:

- If the UK Government were to sign an International Treaty, setting out rules concerning the payment of taxes, would the enactment be deemed thereafter invalid if it were contrary to that Treaty?
- Can Parliament require that a two-thirds majority be achieved before repeal?
- What if a later Parliament were to enact legislation that conflicted with the Foreign and Domestic Taxes Act 2024 but which did not expressly address its repeal?
- If the Foreign and Domestic Taxes Act 2024 is repealed by a simple majority and not with a two-thirds majority, would the courts be able to challenge the parliamentary process?
- While Parliament has the power to legislate with regards to British nationals residing in the UK, what about expatriates?

Imagine being presented with this scenario that raises a number of issues with regard to the operation of orthodox parliamentary sovereignty, which are explored alongside consideration of the constitutional validity of the (fictitious) Foreign and Domestic Taxes Act 2024. We look at each of the issues presented in the scenario in turn.

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The first point raised questions the validity of the 2024 Act in view of the UK Government's signing of an International Treaty that contains provisions that are contrary to the Act. This point goes to the heart of the orthodox theory and relates specifically to Parliament's ability to pass laws contrary to international law. It was noted, above, that the UK is a dualist state, which means that when the UK Government signs international treaties – as per its prerogative power – then the provisions of those treaties only have domestic legal force once the UK Parliament passes legislation 'incorporating' them into UK law. Until that point, Acts of the UK Parliament remain superior to any treaty by virtue of the fact that the sovereign legislature is superior to the government that signed the treaty. It follows, therefore, as in the case of *Mortensen v Peters*, that the UK could pass legislation contrary to any international treaty that the UK Government had signed. In this instance, therefore, such a treaty would not affect the validity of the Foreign and Domestic Taxes Act 2024.

The second point, which asks whether Parliament can require that a 2/3^{rds} majority be achieved before the 2024 Act is repealed, goes to the very heart of Dicey's conception of parliamentary sovereignty. Specifically, it highlights the problem that derives from Parliament's ability, on the hand, to pass any law on any subject matter and, on the other, the limitation that Parliament cannot bind future Parliaments. Under the positive limb of Dicey's principle Parliament could easily include in the Foreign and Domestic Taxes Act a provision that stipulated the need for a 2/3^{rds} majority before it could be repealed. However, if it sought to do so, future Parliament's would be bound by this requirement, and therefore limited in their ability to pass 'any law'. Parliament would only be able to repeal the 2024 Act *if* they met the requirement stipulated in the Act. It is this conundrum that has inspired a great deal of discussion and debate, as this chapter has explained, most notably through the opposing arguments of Wade and Jennings. If we accept that the provision of the 2024 Act, requiring a 2/3^{rds} majority for repeal, can be seen as an attempt by Parliament to alter the terms of the settlement and change the basis on which its Acts are regarded as sovereign, then Wade and Jennings reach different conclusions about the validity of this particular provision of the 2024 Act. Wade, on the one hand, argues that parliamentary sovereignty is a political fact that can only be changed by an alteration in the political settlement established by the Bill of Rights 1689; it cannot be changed by Parliament alone. As such, the provision requiring a 2/3^{rds} majority would not be required to be followed by subsequent Parliaments, since it is merely Parliament seeking to alter its own sovereignty. It would not, on this view, be valid. Jennings, by contrast, stresses that, since the courts ultimately give Parliament its sovereignty through their

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recognition of Acts as sovereign, then Parliament can simply use its superiority over the courts to change the terms of its sovereign. It could be argued that this is what Parliament is seeking to do here. This particular feature of the 2024 Act, therefore, raises a particularly thorny issue, rife with academic debate and discussion.

The third part of the scenario considers implied repeal. According to the orthodox principle, if Parliament enacted legislation that conflicted with the Foreign and Domestic Taxes Act 2024, but which did not expressly address its repeal, then under the authority of the *Vauxhall Estates* and *Ellen Street Estates* cases, the new Act would have impliedly repealed the 2024 Act. This being so, however, implied repeal of the Act would also mean that the requirement that a 2/3^{rds} majority has not been achieved, in that sense taking us back to the discussion in respect of the second point.

The fourth part of the scenario, which asks whether the courts would be able to challenge the validity of any legislation that purported to repeal the 2024 Act through a simple majority, refers to an issue that is presented, on the one hand, by the debate already highlighted concerning whether or not Parliament could impose a condition requiring a heightened majority be achieved before legislation is repealed and, on the other hand, the negative limb of Dicey's orthodox conception. The issues concerning whether or not Parliament would be able to ignore a requirement for a 2/3^{rds} majority and pass repealing legislation through a simple majority has already been addressed. This particular point asks whether the UK courts could question the validity of such an Act and deem it to be invalid on the basis that the requisite 2/3^{rds} majority has not been met. The negative limb of Dicey's orthodox principle states that no body, including a court of law, can question the validity of Acts of Parliament. This is buttressed by the aforementioned 'enrolled bill rule', which operates on the basis that, provided an Act has been passed by the House of Commons, the House of Lords and received Royal Assent, then it is regarded as an Act of Parliament and, therefore, cannot be questioned by the courts. On this view, legislation repealing the 2024 Act through a simple majority would be seen as valid and could not be challenged by the courts. The alternative argument, however, rests on two points. Firstly, the view put forward by Jennings, set out above, and supported by the manner and form cases, suggests that Parliament could enact a provision requiring a 2/3^{rds} majority be achieved before repeal, thereby altering the nature of its sovereign power. Secondly, and this being so, under the authority of *Jackson*, where the House of Lords assessed the legality of the Parliament Act 1911 procedure, the courts could assess the lawfulness of the provision set out in the 2024 Act requiring that heightened majority be achieved.

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The fifth and final aspect of the scenario – concerning the imposition of taxes on expatriates – takes us back to the positive limb of Dicey's principle, namely the apparent ability of Parliament to pass any law, including laws that apply before British shores. Whilst there are examples, cited throughout the chapter, such as the Australia Act 1986, the Canada Act 1982 and the Continental Shelf Act 1964, that demonstrate Parliament's ability to legislate on matters that are relevant beyond the shores of Britain, the question of whether Parliament could impose taxes on expatriates is more uncertain. Jennings has already been quoted as hypothesising that Parliament could ban smoking on the streets of Paris.[1] Whilst this is indeed the case in form – Parliament could easily pass such a law – the enforceability of such legislation is less likely. French police and the French courts would not give effect to that particular law because they do not recognise the authority of the UK Parliament. They exist to enforce and uphold French law. Similarly here, then, expatriates would be susceptible to the laws of the country in which they resided, not laws passed by the UK Parliament.

The problem scenario therefore raises a number of issues relevant not only to the orthodox principle of parliamentary sovereignty, but also to the challenges that have presented themselves over the years.

[1] See note 56, above.

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