Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, by Michael Gordon, (Oxford: Hart Series in Constitutional law: Bloomsbury Hart Publishing, 2015), xii + 366 pp., hardback, £55, ISBN 978-1-84946-465-9

One might be forgiven for thinking that there was nothing new to be written about parliamentary sovereignty in the UK constitution. Any potential reader harbouring these thoughts would be wrong. Gordon's book provides fresh insight into the thorny issue of what, if anything, happened to parliamentary sovereignty following the enactment of the Parliament Acts 1911-1949, the UK's membership of the European Union, the continuing process of devolution, the enactment of the Human Rights Act 1998 and the development of common law constitutionalism. More significantly, Gordon provides a powerful defence of the manner and form theory, due to its promotion of majoritarian democracy. As such Gordon draws upon, and adds to, accounts of political constitutionalism.

Gordon's book has three parts. First, he sets out the function and value of parliamentary sovereignty as the central organising principle and focal point of the UK constitution. It plays a central role in conditioning and organising the institutions of the constitution and the relationship between these institutions. Its value lies in its connection to majoritarian democracy, enabling the principle to perform a legitimating as well as a symbolic function. Second, Gordon defends his manner and form account as a better account of the current law. He dismisses perceived challenges to parliamentary sovereignty from the devolution legislation and the Human Rights Act 1998.These 'challenges' fail to recognise that parliamentary sovereignty is a legal principle, requiring that Parliament has legally unlimited law-making power. Devolution and the protection of human rights may place political limits on Westminster. However, this is precisely the point of parliamentary sovereignty – its value lies in its use of political as opposed to legal restrictions over Parliament's law-making power. Gordon dismisses common law constitutionalism accounts due to their lack of clarity, in addition to a rejection of the normative underpinnings of common law constitutionalism.

Having rejected potential challenges to parliamentary sovereignty, Gordon provides a three-fold account of the more serious challenges to parliamentary sovereignty, each being used as a step in his argument in support of the manner and form theory. He argues that the most convincing interpretation of the European Communities Act 1972 and the *Factortame* litigation supports manner and form. Second, Gordon draws on *Jackson v AG*, concluding that the best explanation for why the courts were able to determine the validity of the Parliament Act 1949 and the Hunting Act 2004 is the move to a manner and form account of parliamentary sovereignty, drawing in particular on the statements of Lord Steyn, Lady Hale, and to a lesser extent, Lord Hope. Third, the European Union Act 2011, with its referendum locks, provides the final confirmation of the move to a manner and form account of sovereignty. It provides a clear example of Parliament establishing a different manner and form for legislation transferring more power to the European Union.

After establishing manner and form as a better account of English law, Gordon provides a normative defence. When determining the content of the doctrine of parliamentary sovereignty, we are left with a choice between two competing rational solutions to a conundrum which arises from the nature of 'sovereignty' with its reference to unlimited power. Either Parliament can bind its successors or it cannot. If Parliament cannot bind its successors, then Parliament is not unlimited as there is something it cannot do; bind it successors. However, if Parliament can bind its successors, there is then something which future Parliaments cannot do. For example, Parliament A may legislate so that future Parliaments cannot transfer more power to the European Union without holding a referendum. Therefore future Parliaments are limited – they cannot transfer more power to the European Union without holding a referendum. There is no logical solution to this conundrum. Instead, different constitutional theorists will argue for different solutions according to

the values promoted by either interpretation. For Gordon, the manner and form account, where Parliament can bind its successors as to future legislation, is preferable as this promotes democracy.

In its simplest form, Gordon's argument can be expressed as a preference for manner and form as it empowers democratically elected legislatures to do more than Dicey's conception of parliamentary sovereignty, where Parliament cannot bind its successors. Democratic institutions have the power to enact manner and form requirements which bind future Parliaments in addition to an unlimited legal power to enact substantive measures. Gordon's argument, however, is more sophisticated. Democracy is enhanced not merely by ensuring that it is the democratic legislature which has power to modify the manner and form in which legislation is enacted, but in addition it conditions the way this power should be exercised –to enhance democracy. For example, Gordon argues that manner and form requirements could make the law-making process more democratic by requiring referenda to enact important constitutional changes in order to enhance participatory democracy, or by modifying the legislative powers of the House of Lords, or removing the prerogative power of the Monarch to veto legislation.

Gordon's preference for Parliament to hold this power is based on arguments of trust and reciprocity. We can trust Parliament to exercise its power to bind as to manner and form in a legitimate manner because its power will be limited politically as opposed to legally. Parliament may legislate as it wishes, but it is sensitive to political limits over its law-making power both in terms of substantive and manner and form provisions. Moreover, political preferences change over time. The Government of one political persuasion, drawn from the majority of MPs at Westminster, may be replaced by a Government of a different political persuasion in the not so distant future. Gordon argues that any Government proposing legislation binding future Parliaments as to the manner and form of future legislation will be aware that though this may further its current interests, manner and form requirements may hinder the political powers of that Government when in opposition. This awareness ensures manner and form requirements do not undermine democracy. Gordon recognises that the manner and form theory may mean that bad policy choices are made difficult to overturn. However, he argues both that long-term commitments may be valuable and that these may arise through means other than the manner and form theory. It is therefore a disproportionate reaction to choose to reject a manner and form account of parliamentary sovereignty because of the fear of being bound to bad commitments. The manner and form account can better respond to this challenge by limiting the way in which the power to bind as to manner and form is exercised, ensuring that these mechanisms enhance democracy. Moreover, the manner and form theory does not give too much power to courts. Courts merely apply the will of Parliament A to bind future Parliaments, until future Parliaments overturn such provisions by using the requisite manner and form.

Gordon provides a powerful and sophisticated defence of the manner and form theory. In doing so he draws upon and adds to theories of political constitutionalism, specifically explaining in more detail how political constitutionalism can be used to determine legal principles. His argument also rightly recognises that arguments as to the value of particular conceptions of parliamentary sovereignty ought not to rest on whether we believe one conception is better, or more accurate, than another. Nor can we just choose a conception of sovereignty as the most accurate reading of the case law. To do so answers a different question: we are asking which conception of sovereignty has been adopted by the courts, not which conception of sovereignty is better for the UK constitution. Moreover, when faced with case law and judgments which can support a multiplicity of interpretations, it is hard to find any definitive interpretation. Any interpretation we choose requires an emphasis of some statements and a rejection of others, often influenced by our background values.

Those who, like the reviewer, prefer other values will disagree with Gordon's conclusion. Nevertheless, Gordon is right to recognise that manner and form is merely another account of parliamentary sovereignty which provides the legislature with more legally unlimited law-making power than Dicey's conception of parliamentary sovereignty. It provides the legislature with the power to modify provisions as to how law is enacted. The role of the courts is merely to ensure that the will of the legislature is fulfilled. This reviewer's defence of Dicey's conception of sovereignty – where Parliament cannot bind its successors – rests on a desire for the court to play a greater role when determining constitutional provisions. This is not to give the courts carte blanche to strike down legislation which the court believes contravenes the rule of law. Rather, it is to recognise the potential role of the court in providing a further check on the legislature – be this to ensure that its measures protect human rights or democracy. Perhaps this merely reflects a different conclusion from Gordon's evaluation that we can place more trust in the legislature than the courts to ensure that the power to enact manner and form requirements is exercised legitimately. If manner and form requirements are part of a rule of recognition as opposed to mere legal rules courts recognise changes by looking to political facts. This may ensure that any proposed changes from a Government, which rarely has the support of the majority of the electorate, have gained acceptance by that electorate in addition to the officials of the legal system, providing a better form of scrutiny over such proposed changes. It may also recognise further institutional differences between the judiciary and the legislature than their composition. Courts may recognise where general changes cause problems in specific situations, or check that the legislature's desire to override a long-standing constitutional principle is real as opposed to inadvertent. The extreme measure of striking down legislation is reserved for extreme situations – e.g. were legislation to remove the power of judicial review, or to enact a change to the manner and form of legislation which seriously undermined democracy. This does not, as Gordon appears to argue, mean such discussions are meaningless. Rather, its presence can act as a potential break to Parliament's changes to manner and form provisions. Moreover, this potential threat may encourage co-operation as opposed to conflict, acting as a pressure valve to relieve potential constitutional crises.

It may be asked whether, in practice, this account differs from Gordon's. This question hints at a second potential weakness in Gordon's account. His defence of manner and form is pitched predominantly against common law constitutionalism. Gordon regards common law constitutionalism as undermining parliamentary sovereignty, replacing it with the rule of law as the organising principle of the constitution. However, common law constitutionalism and political constitutionalism are not as distinct from each other as Gordon assumes. Some theories of the rule of law, for example, include the requirement that courts respect the wording of legislation as expressed by the legislature when interpreting legislative provisions. Moreover, both common law and political constitutionalism recognise a role for both the legislature and the judiciary when protecting human rights and controlling the executive. What appear to be stark differences are often matters of degree. Would Gordon, for example, recognise a role for the judiciary to check that Parliament's changes to manner and form provisions did not undermine democracy, perhaps with a power to refer this issue back to the legislature?

Maybe this is just a question of trust. If so, perhaps it is time to ask a different question: not whether we trust the political more than the legal elites, but whether we trust either of them on their own without the potential restraint of the other. Either way, Gordon's book makes an excellent contribution to the literature, providing food for thought for many years to come.

Alison L Young
Hertford College, University of Oxford