

The Retransfer of Legislative Competences by the UK Parliament

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Abstract

Westminster Parliament is not bound to a constitution in a formal sense in contrast to many other legislators. As a consequence, a transfer of powers to other institutions by the UK Parliament does not require a legal basis in form of an enabling norm since it is the highest authority within its jurisdiction. While the competences of Westminster to delegate powers are undoubted, it is not always clear under which conditions delegated powers can be retransferred.

The first part of this article will give a short introduction to the phenomenon of delegation in order to set the legal theoretical framework for the subsequent analysis; the second part turns to three specific examples of delegations by the UK Parliament in order to elaborate conditions for and against existing competences to retransfer powers. By using three case studies of delegations by Westminster Parliament, the article will show that, in absence of an enabling norm to retransfer, the question, whether delegated

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competences can be retransferred, has to be answered by interpretation of the delegating norm.

I. The Delegation of Competences

1. Definition

A delegation is the act-based transfer of a competence.¹ In this article, this definition will be narrowed down in certain respects: the object of delegation, a competence, is regarded as the empowerment of state organs or privates to exercise powers of public authority.² Thus, delegating and delegated institution are primarily state authorities, only exceptionally privates. To differentiate delegations from other legal phenomena, it is necessary to point out that a competence is only transferred, when the delegated institution has the power to create law under its own responsibility. This is not the case, when an institution is only empowered to act *on behalf* of an authorising institution. In this case, the entrusting institution remains competent and responsible for the legal acts taken by the entrusted organ. Such forms of entrustment predominantly occur within civil service when, for instance, decisions of civil servants, made in the Minister's name, are regarded as the Minister's own decision.³

¹ In contrast to statements on legal terms, the conception of scientific terms is not based on considerations about truth; rather, it is based on the premise of usefulness and appropriateness. Thus, the scientific term "delegation" is used in many different meanings by researchers. For the German-speaking countries see the influencing works of Z. *Giacometti*, *Verordnungsrecht und Gesetzesdelegation*, FS Schweizerischer Juristentag, 1928, 73; Ch. *Eisenmann*, *Die Theorie von der "délégation législative" und die französische Rechtslehre*, ZÖR 11 (1931), 334; H. *Triepel*, *Delegation und Mandat im öffentlichen Recht*, 1942; W.-R. *Schenke*, *Delegation und Mandat im öffentlichen Recht*, VerwArch 68 (1977), 118; K. E. *Heinz*, *Delegation und Mandat. Eine rechts- und verfassungstheoretische Untersuchung*, Der Staat 36 (1997), 495. For the Anglo-American judicial area C. T. *Carr*, *Concerning English Administrative Law*, 1941, 31 et seq.; J. O. *Freedman*, *Delegation of Power and Institutional Competence*, U. Chi. L. Rev. 43 (1976), 307; A. *McHarg*, *What Is Delegated Legislation?* Public Law 2006, 539; M. *Stephenson*, *Legislative Allocations of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, Harv. L. Rev. 119 (2005-2006), 1035.

² Undoubtedly, private law-making of individuals is also based on legal empowerment; see H. L. A. *Hart*, *The Concept of Law*, 2nd ed. 1994, 41. Further, enabling norms do not necessarily transfer law-making powers but also competences to take other actions which are legally relevant but which do not result in the creation of legal norms. However, these phenomena do not have to be taken into account in the context of this article.

³ In the UK, this form of entrustment is known as "Carltona principle"; see D. *Oliver*, *Constitutional Reform in the UK*, 2003, 207 et seq.

The act-based establishment of a competence can be distinguished from the automatic establishment which brings about change in the system of competences when circumstances laid down in a superior legal norm are fulfilled. Such circumstances can be the expiry of a time limit or other conditions, e.g. that the transfer of residence of an individual implicates a change of competences. In these cases of automatic establishment, there is no separate delegating norm.

The delegation of a competence can regularly be described as a three-stage process: First, according to an enabling norm, an institution has the competence to delegate law-making power to another institution. Second, in applying this enabling norm, the delegating institution creates a norm which transfers the law-making power to the delegated institution. Third, in applying the delegated competence, the delegate adopts a legal norm. Thus, since every empowerment to create a legal norm is already a delegation, a legal system is composed of many different enabling as well as delegating norms. These delegations appear as vertical branches:⁴ the constitution enables the “ordinary”⁵ legislator to enact laws;⁶ in applying these norms, parliaments create laws in form of acts of parliament. Primarily because of deliberations concerning efficiency,⁷ parliaments confer the authority to legislate to executive bodies which – in applying the enabling/delegating statute – enact delegated legislation.⁸ Courts apply acts of parliament and delegated legislation and deliver judgements etc. The different stages of law-making form part of a dynamic process of applying and creating norms⁹ which leads to specification and individualisation of law.¹⁰ From a functional point of view, legislative law-making by enacting a statute is the same process as law-making by formulating a decision: parliaments apply constitutional law and

⁴ *A. J. Merkl*, Prolegomena einer Theorie des rechtlichen Stufenbaues, FS Hans Kelsen, 1931, 252, and the critical analysis by *J. Raz*, *The Concept of a Legal System*, 2nd ed. 1980, 93 et seq.

⁵ The term “ordinary” is used to distinguish between constitutional and sub-constitutional legislation.

⁶ Art. 70 et seq. German Basic Law (Grundgesetz [GG], 23.5.1949, Federal Law Gazette [BGBl.] p. 1); Art. 163 et seq. Swiss Federal Constitution (Bundesverfassung [BV] 18.4.1999, AS 1999, 2556).

⁷ *C. T. Carr* (note 1), 37; *M. Stephenson* (note 1); *Z. Giacometti* (note 1), 78.

⁸ See, e.g., Art. 80 para. 1 GG: “The Federal Government, a Federal Minister, or the Land governments may be authorized by a law to issue statutory instruments.”

⁹ *A. J. Merkl*. Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes, JBl 1918, 425, 444, 463 (also published in: *D. Mayer-Maly/H. Schambeck/W.-D. Grussmann* (eds.), *Adolf Julius Merkl. Gesammelte Schriften*, Vol. I/1, 1993, 227).

¹⁰ *M. Jestaedt*, Das mag in der Theorie richtig sein ... Vom Nutzen der Rechtstheorie für die Rechtspraxis, 2006, 21 et seq.

create acts of parliament; courts apply acts of parliament and create judgments.

2. Conditions for and Consequences of a Delegation

a) Conditions

Generally, the conditions under which a competence can be delegated are set out in the enabling norm or other superior legal provisions. However, it is possible to elaborate some conditions which are frequently laid down in modern legal systems.

The transfer of a competence usually requires the form of a legal norm because changes of institutional competences affect the legal position of individuals. Until the period of constitutionalisation in the 19th century, it was common that the sovereign had the power in regard to legal proceedings to choose a person as judge whose devotion was undoubted. The up-coming idea of a *Rechtsstaat* intended to abolish the absolute powers of monarchs in calling for a fixed distribution of competences among state institutions. The determination of powers in form of published enabling norms was expected to give individuals the opportunity to recognise the competent institution in advance.

Changes in the system of competences which are brought about by a delegating norm require a corresponding enabling norm. Regularly, these norms are subject to determination requirements because unrestricted empowerment would open the flood gates to misuse of law-making powers.¹¹ In a legal system with a constitution in a “formal” sense,¹² “ordinary” legislators are often enabled by constitutional law to delegate legislative powers or to enable administrative authorities and courts by an act of parliament to transfer decision-making competence to another institution. These empowerments by the “ordinary” legislator regularly have to lay down the conditions according to which legislative powers can be exercised or the transfer of a competence can be made, failing which the act of parliament would be unconstitutional.

¹¹ C. T. Carr (note 1), 50 et seq.

¹² The term “formal” refers to procedural aspects; changes of constitutional law are brought about by another procedure than changes of “ordinary” law.

Such as legal norms in general, delegating norms regularly have to be published.¹³ Thus, legal certainty is guaranteed for individuals with regard to the competent state institution. Further, both requirements – determination and publication – ensure controllability of norms made by the delegated institution when it exercises powers transferred. The delegating norm provides the standard against which the norm created by the delegated institution can be measured.

A further requirement which legal systems usually adopt concerns the scope of a transferred competence. The delegated institution is not allowed to go beyond the limits of the enabling norm unless the parental norm enables it to do so. Such a provision seems problematic, since the delegated institution eventually has the power to determine the scope of its competences. However, such cases occur in the UK legal system in form of the so-called “Henry VIII clauses”. In the first report of 1992-93, the House of Lords Select Committee on the Scrutiny of Delegated Powers defined a “Henry VIII clause” as: “a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny”.¹⁴ From a legal point of view, these empowerments by Westminster Parliament are unproblematic due to its unlimited legislative sovereignty. The UK Parliament is not limited in its legislative powers and as a consequence, it is free to transfer such powers as well as it is free – in general terms – to keep the competence to retransfer these powers. From a political perspective, however, such delegations undoubtedly entail a risk.¹⁵

Other forms of delegations such as sub-delegations (*delegata potestas non potest delegari*) or redelegations can be made under the same conditions as a “regular” delegation.

b) Consequences

A delegation is the transfer of a competence. As soon as it is effective, the delegated institution is the competent authority concerning the powers transferred.¹⁶ As a consequence, the delegate is from now on responsible for

¹³ J. E. Kersell, Parliamentary Supervision of Delegated Legislation. The United Kingdom, Australia, New Zealand and Canada, 1960, 6; C. T. Carr (note 1), 56 et seq.

¹⁴ HL 57 1992-93, para. 10.

¹⁵ A. McHarg (note 1), 553.

¹⁶ This is only the general case. As far as this is laid down in an enabling norm, a competence can also be split: in these cases both, delegating and delegated authority, are competent (parallel competence).

the decision made in exercising these competences.¹⁷ Among the different forms of responsibility, it is especially accountability to the courts which is affected. In a state under the rule of law, all exercises of public authority have to be based on legal provisions and have to be in accordance with the enabling legal norms. The legal control of authoritative actions is regularly a competence of the courts which decide whether a state action is within the scope of the enabling norm or not. The legally responsible public authorities have to defend decisions made by them in front of the courts in giving explanations why the decisions are legal.

In contrast to legal responsibility, political responsibility is often split between delegating and delegated institution. Political accountability is an instrument which enables the controlling of politically motivated decisions. The ongoing process of transferring public tasks to the private sector in many legal systems raises, for instance, the question which institution is to be made accountable for the actions taken by decentralized institutions.¹⁸

3. The Redelelegation of a Delegated Competence

It has already been mentioned that the redelegation of a delegated competence can be made under the same conditions as the initial delegation itself. With regard to the enabling norm, such a retransfer of powers does not raise specific legal questions, if an enabling norm explicitly states that a competence can be retransferred by the initially delegating authority. According to Sec. 16A of the Wildlife and Natural Environment (Scotland) Act 2011 the Scottish Ministers may delegate certain functions to the Scottish National Heritage by written direction or to a local authority by order. Sec. 16A para. 5 of the Act states: “The Scottish Ministers may modify or revoke a direction under subsection (5)(a).” Such empowerments to “revoke” or “withdraw” delegated functions can be found frequently in the UK legal system¹⁹ but only rarely in German or Austrian provisions. In the context of this paper, these norms do not have to be taken into account any further.

¹⁷ See generally *R. Baldwin/M. Cave/M. Lodge*, *Understanding Regulation. Theory, Strategy, and Practice*, 2nd ed. 2012, 338 et seq.

¹⁸ In recent decades, a change in the UK state organisation, namely the introduction of agencies, caused a debate on the accountability of ministers. See for a discussion on the impacts, *D. Oliver* (note 3), 48 et seq.

¹⁹ See, e.g., Sec. 4 para. 3 lit. c Town and Country Planning Act 1971; Sec. 18 para. 4 Prevention of Damage by Pests Act 1949; or Sec. 8 para. 4 Tribunals, Courts and Enforcement Act 2007.

Besides these clear cases, it can be quite difficult to find out whether a competence to redelegate powers is given. Two examples shall illustrate the problem area: Art. 60 para. 3 of the German Basic Law (*Grundgesetz*) authorises the Federal President to transfer the competence to appoint judges and other civil servants to other authorities. The delegating norm is qualified as regulation.²⁰ Although this is not specifically regulated in Art. 60 para. 3, it is generally accepted, that the Federal President is empowered to retransfer these competences.²¹ According to § 31a of the so-called *Jurisdiktionsnorm*,²² an Austrian statute which regulates – broadly speaking – competences of courts, a criminal court can delegate a trial to another court, if certain conditions are fulfilled. If someone commits a crime in one city but lives in a town far away, it might be useful to transfer this trial from the court at the scene of the crime to the court which is located at the place of residence of the offender. It is undoubted that the criminal court which transfers such a competence has finally done so without having the power to redelegate decision-making power.

Generally, two possible cases can be distinguished: a competence is finally transferred and is thus “lost” for the delegating institution; or, it is transferred, but the delegating institution retains the competence to retransfer powers. The problem of redelegating competences can briefly be summarised with the following guiding principles:

- The question, whether an institution is authorised to retransfer a delegated competence, cannot be answered in terms of legal theory; it results from the legal provisions in force.
- A redelegation does not raise specific questions, whenever an enabling norm explicitly states that a competence can be retransferred.
- If such an explicit enabling norm does not exist, powers to redelegate competences can flow from the norm which enables an institution to (initially) delegate a competence. An implicit empowerment to redelegate can possibly be identified by interpretation of this norm.
- This interpretative analysis is regularly but not always depending on the form of the delegating act: delegations by individual norms²³ are made under the principle of *res iudicata*. For reasons of legal certainty, individual

²⁰ M. Nierhaus, in: M. Sachs (ed.), *Grundgesetz. Kommentar*, 6th ed. 2011, Art. 60, margin number 16.

²¹ H. Butzer, in: H. Hofmann/A. Hopfauf (eds.), *GG. Kommentar zum Grundgesetz*, 12th ed. 2011, margin number 38.

²² Imperial Law Gazette (RGL.) 1895/111 as last amended by Federal Law Gazette (BGBl.) I 2004/128.

²³ The addressees of individual norms can be determined individually whereas general norms miss out on specific addressees.

norms regularly have the normative effect of irreversibility.²⁴ Thus, the empowerment to delegate a competence by the individual norm indicates that the enabling norm does not provide implicit powers to change or repeal the individual delegating norm, or in other words: to redelegate competences.

In contrast, the competence to adopt a general rule regularly includes the competence to amend or repeal it.²⁵ Thus, enabling norms according to which delegations by general norms can be made often implicitly empower the delegating institution to retransfer the delegated competences.

II. Case Study of Three Delegations by the UK Parliament

The results of the discussion in the previous part may be valid for the majority of delegations; however, they are only partly applicable to redelegations by Westminster Parliament. Due to the lack of a constitution in a formal sense and according to the principle of parliamentary sovereignty, Westminster Parliament has unlimited legislative powers. Thus, when it transfers powers to another institution, this exercise of a competence is not based on an enabling norm, since the Parliament is the highest legal authority in the UK legal system. Nevertheless, the question concerning the retransfer of competences also occurs in regard to the UK Parliament: with the European Communities Act 1972, the United Kingdom transferred law-making powers to the European Union. In the public debate, it is rather clear that these powers can be retransferred at any time. Legislative competences have also been delegated, for instance, to Scotland or newly established legislators in former colonies and dominions of the United Kingdom. There are strong legal arguments in favour of a competence to redelegate legislative powers from Holyrood to Westminster. But is the UK Parliament also enabled to withdraw legislative competences, for instance, from the Canadian Parliament by adopting an Act of Parliament?

²⁴ In German-language literature, these normative effects are summed up in the term “Rechtskraft”. See *A. J. Merkel*, *Die Lehre von der Rechtskraft*. Entwickelt aus dem Rechtsbegriff, 1923.

²⁵ The Austrian Constitutional Court stated in VfSlg 2976/1956 that the system of legislation as realised in the Austrian Constitution is characterised by the idea of changeable laws (“Nun ergibt sich aus den Bestimmungen des B.-VG. über die Gesetzeserzeugung die Vorstellung eines Systems abänderbarer Normen, was zur Folgerung führt, daß eine Rechtsnorm grundsätzlich so lange gilt, bis sie durch eine inhaltlich widersprechende Norm aufgehoben wird.”).

The following three case studies about delegations by the UK Parliament will show that, in absence of an enabling norm, the existence of a competence to retransfer delegated powers depends on the interpretation of the initial delegating norm. This will lead to the conclusion that a transfer of legislative competences by the UK Parliament is to be qualified either as conserving or as final delegation: regarding the former, Westminster withholds powers to retransfer the delegated competences; in the latter case, it is impossible to redelegate them since the delegation is irreversible.

1. The Canada Act 1982

During the colonial period, the UK Parliament had been the legislative authority in the nations of the Commonwealth such as Canada, New Zealand or Australia which are being sovereign states by now. The political sovereignty of these states has developed in the first half of the 20th century; it is reflected, for instance, in the membership of these states in international organisations. While their political independence was uncontested soon, the justification of legal sovereignty appeared to be somehow difficult to argue.²⁶ The debate can be summarised as follows: legislative sovereignty was transferred from Westminster Parliament to the legislators of the colonies and dominions by an Act of the UK Parliament. According to the traditional principle of parliamentary sovereignty, the powers of the UK Parliament are unlimited with one exception: it cannot restrict its own powers.²⁷ Given that such a restricting “rule” was valid, Westminster could not *finally* transfer legislative powers to the colonies and dominions, simply because such an Act would have been beyond its powers. Consequently, the power to retransfer the formerly delegated competences remained with the UK Parliament; the legal sovereignty of the states was threatened by the Damocles’ sword of a – rather theoretical – redelegating Act of the UK Parliament.

To justify the foundation of separate legal systems, two main approaches have been put forward: the “revolutionary” and the “continuity” approach.

²⁶ There is extensive literature on this topic; see, e.g., *J. Finnis*, *Revolutions and Continuity of Law*, in: A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2nd ser. 1973, 44; *J. Goldsworthy*, *Parliamentary Sovereignty. Contemporary Debates*, 2010; *H. L. A. Hart*, *Self-Referring Laws*, in: H. L. A. Hart (ed.), *Essays in Jurisprudence and Philosophy*, 1983, 170; *P. Oliver*, *The Constitution of Independence. The Development of Constitutional Theory in Australia, Canada, and New Zealand*, 2005.

²⁷ *H. W. R. Wade*, *The Basis of Legal Sovereignty*, C.L.J. 13 (1955), 172 (174): “[T]here is one and only one, limit to parliament’s legal power: it cannot detract from its own continuing sovereignty”.

In the following, both ways of establishing a legal system will be considered. While the revolutionary approach seems widely accepted, the foundation of a new legal system in continuity raises difficult legal questions. In using Canada as an example, the article will try to show that there are convincing arguments that Westminster Parliament can finally transfer powers to another institution.

a) Revolutionary Foundation of a Legal System

The process towards legal independence of former colonies and dominions of the United Kingdom was accompanied by a debate on *Kelsen's* theory of a basic norm (*Grundnorm*).²⁸ Supreme Courts argued that a new legal order can be established by revolution. In such a case, the basic norm of the former legal system is exchanged with a new basic norm; thus, it is not valid anymore and a new legal order is established.²⁹ *Kelsen's* Pure Theory of Law is based on the insight that the validity of a legal norm necessarily results from another legal norm.³⁰ As one consequence, modern legal systems appear as hierarchical orders. At the apexes of these pyramids³¹ or trees,³² the historically first constitution can be identified which may be written or unwritten. This inevitably leads to the question: from which legal norm does the competence to enact the first constitution result? Since this question cannot be answered by legal science, the idea of an ultimate juridical justification of a legal system has to be abandoned. Objective validity of a legal system cannot be proven scientifically.³³ Based on this insight, *Kelsen* suggested that, in order to regard legal systems as valid, an ultimate enabling

²⁸ *H. Kelsen*, On the Basic Norm, Cal. L. Rev. 47 (1959), 107. It is not a task of this article, to discuss the conclusiveness of *Kelsen's* theory of a *Grundnorm* (for a critical discussion see e.g. *M. Potacs*, Objektive Rechtswissenschaft ohne Grundnorm, Rechtslehre 36 [2005], 5; *J. Raz*, *Kelsen's* Theory of a Basic Norm, American J. Juris. 19 [1974], 94).

²⁹ Supreme Court of Pakistan, *Dosso v. Federation of Pakistan*, P.L.D. 1958 SC 533; High Court of Uganda, *Uganda v. Commissioner of Prisons, ex parte Matovu* (1966); High Court of Rhodesia, 9.9.1966 and 29.1.1968, *Madzimbamuto v. Lardner-Burke* and the reversing decision of the Privy Council, 23.7.1968, *Madzimbamuto v. Lardner-Burke*, Appeal No. 13 of 1968 (= International Legal Material 7 [1968] 1113); Supreme Court of Nigeria, 24.4.1970, *Lakanmi v. Attorney-General*, LPELR-SC.58/69; Seychelles Court of Appeal, 11.8.1981, *Valabhaji v. Controller of Taxes*, CA 11 of 1981.

³⁰ From a positivistic point of view, what ought to be cannot be derived from facts. The validity of a legal norm necessarily can only result from another legal norm (*H. Kelsen*, Pure Theory of Law, translation from the 2nd German ed. by *M. Knight*, 1967, 193).

³¹ *A. J. Merkel* (note 4), 252.

³² *J. Raz* (note 4), 93 et seq.

³³ *R. Thienel*, Kritischer Rationalismus und Jurisprudenz, 1991, 100 et seq.

norm should be presupposed. It has the function of an axiom: by presupposing a basic norm, the historically first constitution could be regarded as valid since it is delegated by a fictional preliminary norm. The concept of a *Grundnorm* has often been misunderstood. *Kelsen's* basic norm is not valid like a legal norm, it is not created by a legal act or through custom such as legal norms; rather, it is a mere fiction and can, thus, only be presupposed but does not have to be presupposed.

According to *Kelsen*,

“[i]t is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have not such effect. All these legal norms belong to one and the same legal order because their validity can be traced back – directly or indirectly – to the first constitution.”³⁴

If a new legal system is established, a new basic norm has to be presupposed. According to *Kelsen*, the clearest example of how a new legal system is established and a change of the basic norm takes place is the “phenomenon of revolution”.³⁵

Regarding the foundation of separate legal systems in former colonies and dominions of the United Kingdom, it has to be mentioned first that legislative competences have lawfully been transferred to their legislators by Acts of the UK Parliament.³⁶ According to the revolutionary approach, this link between the delegating and the delegated institutions was severed by a “technical breach in continuity”.³⁷ The revolution was brought about by state organs of the former colonies and dominions and then completely sovereign states, for instance, by court decisions which expressed the attitude of independence by disregarding the Imperial Act of delegation. The foundation of a legal system by means of a “quiet revolution” is the prevailing approach in New Zealand today.³⁸ Similar changes in the jurisdictions of Pakistan, Uganda and Southern Rhodesia are also based on a revolutionary approach and references to passages cited above in *Kelsen's* “General Theory of Law and State”.³⁹

³⁴ *H. Kelsen*, General Theory of Law and State, translated by *A. Wedberg*, 1949, 115.

³⁵ *H. Kelsen* (note 34), 118.

³⁶ See, e.g., Statute of Westminster 1931.

³⁷ *P. A. Joseph*, Constitutional and Administrative Law in New Zealand, 1993, 121.

³⁸ See initially *F. M. Brookfield*, *Kelsen, the Constitution and the Treaty*, NZULR 1992, 193.

³⁹ *J. W. Harris*, When and Why does the Grundnorm Change?, C.L.J. 29 (1971), 103.

As far as the redelegation of the transferred legislative competences is concerned, it is obvious that, as a consequence of the revolutionary foundation of a legal system, Westminster Parliament lost such powers. Any such redelegating Act of the UK Parliament would be *ultra vires* because the territorial scope of an Act of the UK Parliament does no longer cover the area of a former colony or dominion in which such a revolutionary development has occurred.

b) Foundation of a Legal System in Continuity

Apart from the foundation of a legal system by revolution, it is highly debated whether a legal system can be established in legal continuity or not. In the colonial context, the question arises, if Westminster Parliament can finally transfer full sovereignty to a legislator of a colony or a dominion and if based on such a delegation a new legal system can be established. The consequence of such a definite transfer is that Westminster Parliament cannot redelegate these competences because of the finality of such a delegation. In the following paragraphs, these questions will be discussed in reference to the Canada Act 1982 as an example for a definite delegation.

The foundation of a national Canadian legal system has its origin in the British North America Act 1867⁴⁰ of the UK Parliament which was “significant in terms of constitutional independence”.⁴¹ However, since this Act did not include any procedural provisions concerning its amendment and, thus, these legislative competences have not been delegated to national Canadian authorities, these powers remained at Westminster. The constitution was ultimately domiciled in the United Kingdom. With the Statute of Westminster 1931, the Parliament of Canada was empowered to repeal, amend or alter all Imperial Statutes except those listed in Sec. 7 para. 1. It was clear: as long as this exception was in force, the legal sovereignty of Canada would be limited. Finally, after political initiatives to “bring home” the constitution, Canadian officials succeeded in convincing the UK Parliament to adopt the Canada Act 1982. Sec. 2 which is headed “Termination of power to legislate for Canada” states:

“No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law.”

⁴⁰ 1867 c. 3 (Regnal. 30 and 31 Vict).

⁴¹ P. Oliver (note 26), 112.

This development was widely interpreted to finally create an independent Canadian legal system. Two main arguments have been put forward against this view: first, critics argued – relying on *Kelsen* – that a new legal order can only be established, when an existing legal system is disrupted. *Kelsen's* legal theory has already been outlined above. It is crucial that the validity of a legal norm can only result from another legal norm. Thus, legal norms are not independent but interrelated. *Kelsen's* definition of legal systems is based on this insight:

“All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order.”⁴²

Kelsen's theoretical approach has been challenged by *Joseph Raz*. According to his interpretation,

“*Kelsen's* criterion for the identity of legal systems presupposes that no momentary system contains an original law which does not belong also to the first momentary system of the same legal system”.⁴³

The term “original law” refers to what *Kelsen* has called the “historically first constitution”. It is the layer of norms in a legal order which were created first from a chronological point of view. According to *Kelsen*, their validity results from the *Grundnorm*. In *Raz's* view, *Kelsen's* theoretical approach denies the possibility of a foundation of a legal system in continuity. *Raz* argues that according to *Kelsen* the validity of every legal norm derives from another legal norm which is part of the same legal system as the higher enabling norm. If this interpretation of *Kelsen* is applied to the Canadian example, a separate Canadian legal system has not developed yet, since the validity of its ultimate norms results from the Canada Act 1982 adopted by Westminster Parliament. Consequently, Acts of the Canadian Parliament are part of the UK legal system. This view is rejected by *Raz*:

“The continuity of a legal system is not necessarily disrupted by the creation of new original laws. Nor is the fact that the creation of a law is authorised by a law belonging to a certain legal system a sufficient proof that the authorised law belongs to that system. A country may be granted independence by a law of another country authorising all its laws; nevertheless, its laws form a separate legal system.”⁴⁴

⁴² *H. Kelsen* (note 34) 111.

⁴³ *J. Raz* (note 4), 188.

⁴⁴ *J. Raz* (note 4), 188. See also *J. Raz* (note 28), 98: according to *Kelsen*, “all laws belonging to one chain of validity are part of one and the same legal system. If this axiom were correct, certain ways of peacefully granting independence to new states would become impossible”.

In a similar way, *Peter Oliver* argues that “[i]n absence of a revolution, *Kelsen’s Grundnorm* would not change”;⁴⁵ similarly to *Raz*, he accepts the possibility of a continuing foundation of a legal system.⁴⁶

The conclusion that a separate legal system can be established in continuity is right. However, it would be a misunderstanding of *Kelsen’s* approach to argue that, according to his theory of a basic norm, a new legal system can only be found after a revolution. *Kelsen* distinguishes between the historically first constitution and the *Grundnorm*. The former is the “starting point of a norm-creating process and, thus, has an entirely dynamic character”.⁴⁷ What *Kelsen* calls “historically first constitution” and *Raz* calls “original law” is nothing but the chronologically first ultimate layer of norms in a legal system. All legal norms which are created in accordance with the ultimate layer of norms are part of the same legal system. The historically first constitution itself can lawfully and in legal continuity be replaced by a subsequent constitution, if the process of revision happens in accordance with the legal provision in force.⁴⁸ However, according to *Kelsen*, the validity of the first constitution cannot be proved scientifically so that a fictitious *Grundnorm* has to be introduced. It enables us to regard the historically first constitution as legally valid although the act of its creation is not enabled by a legal norm.

It is the phenomenon of a revolution which “clearly shows” how a change in the *Grundnorm* can take place.⁴⁹ This passage has often been misunderstood. The revolution is just one example – the one which is the clearest – of how a new legal system can be established with the consequence that a new *Grundnorm* has to be presupposed. However, it has not been argued by *Kelsen* that a revolution is the only way of how a new legal system can be formed; rather, it is in accordance with his theoretical approach to conclude that the Canadian legal system gained full independence in legal continuity – provided at this point that Westminster Parliament could limit its sovereignty. By Sec. 2 of the Canada Act 1982, the UK Parliament transferred full legislative sovereignty to the Canadian legislator. This provision

⁴⁵ *P. Oliver* (note 26), 292.

⁴⁶ *P. Oliver* (note 26), 312.

⁴⁷ *H. Kelsen* (note 34), 114.

⁴⁸ As many others, *J. W. Harris* misunderstands the concept of the *Grundnorm*, when he tries to find the “form” of the *Grundnorm* in identifying *Charles De Gaulle* as father of the Constitution of the Fifth Republic. This Constitution is adopted in accordance with the procedural rules as laid down in the Constitution of the Fourth Republic a.s.o. At the end of these delegating processes is the *historically first constitution* or *original law*. The validity of which cannot be traced back to a preceding legal norm. See *J. W. Harris* (note 39), 109 et seq.

⁴⁹ *H. Kelsen* (note 34), 118.

explicitly states that the delegation of competences terminates Westminster's "power to legislate for Canada". Because of the final transfer of full, i.e., unrestricted, law-making power, a new sovereign law-making institution is created at the moment of transfer. Since Acts of the new sovereign law-maker are the highest norms in Canada, they form the apex in the hierarchy of norms in the new legal system. The finality of the transfer precludes the possibility to trace back Acts of the new law-making institution to the UK legal system. The Parliament of Canada was established as equally sovereign law-maker to Westminster Parliament. The Constitution Act 1982, adopted by the Canadian Parliament which is attached in the annex of the Canada Act 1982 of the UK Parliament, is the historically first constitution of Canada. It is not the much older Constitution Act 1867 because it cannot be qualified as final delegation such as the Canada Act 1982. The law-making powers of the sovereign Canadian legislator result from the delegating Canada Act 1982 but do not depend on this statute; rather, according to *Kelsen*, a new *Grundnorm* has to be presupposed in order to regard the Canadian legal system as objectively valid.

The second objection against the foundation of a separate Canadian legal system in continuity is based on the traditional doctrine of Westminster's sovereignty. If there is indeed a valid "rule" in the UK legal system that the Parliament cannot limit its sovereignty, a final transfer of competences would be beyond the powers of Westminster Parliament. The content of parliamentary sovereignty in its traditional version was identified by several authors⁵⁰ and was later affirmed in three cases⁵¹. However, there are conclusive arguments that such a rule which limits parliamentary sovereignty has never existed or does not exist anymore. In the context of this paper, it is not necessary to elaborate these arguments in detail since they are thoroughly discussed in the literature referred to below.

- *Peter Oliver* has shown that the rule that no Parliament can bind a future Parliament is based on "exceptionally weak case law".⁵² The relevant cases have been decided more than 80 years ago and, although the courts did not have many opportunities to support their approach with detailed argu-

⁵⁰ See first and foremost *A. V. Dicey*, *An Introduction to the Study of the Law of the Constitution*, 10th ed. 1959, Part I. A current advocate of this view is *J. Goldsworthy* who argues that "according to a customary rule of recognition that underpins the constitution as a whole" Westminster Parliament cannot "destroy or diminish its continuing plenary power". See *J. Goldsworthy* (note 26), 192.

⁵¹ *Vauxhall Estates v. Liverpool Cooperation* (1932) 1 KB 733 (Div Ct); *Ellen Street v. Minister of Health* (1934) 1 KB 590 (CA); *British Coal Cooperation v. The King* (1935) AC 500.

⁵² *P. Oliver* (note 26), 306 et seq.

ments in the meantime, since Parliament rather rarely tried to bind future Parliaments, more recent decisions which confirm the traditional doctrine do not exist.

- If, besides the case law referred to above, the rule that no Parliament can bind its successors was created by custom and, thus, it is to be qualified as rule of customary law,⁵³ it has been amended by a changing *consuetudo*: the reality shows that the UK Parliament can bind its successors because it has already done so. The European Communities Act 1972 is undoubtedly in conflict with the traditional view of parliamentary sovereignty.⁵⁴

- The traditional interpretation of parliamentary sovereignty was developed and introduced by authors like *A. V. Dicey*. It is quite likely that scholarly opinions influenced the courts in introducing a rule which limits parliamentary sovereignty in the way discussed above. "In 1900 Dicey's account of the principle of parliamentary sovereignty would have gained general assent."⁵⁵ Clearly, scholarly opinion is not a source of law in the UK legal system and it is not sufficient to prove the validity of the traditional doctrine in referring to *Dicey's* works.

- A rule prohibiting self-restriction is not necessarily implied in the concept of legal sovereignty. On the contrary, this interpretation of being "sovereign in the continuing sense"⁵⁶ implies that there is a higher norm in the UK legal system than Acts of Parliaments which restricts parliamentary sovereignty to some extent. It does not even seem appropriate to talk about "sovereignty" in such a case of limited law-making power.

The traditional doctrine of parliamentary sovereignty either has never existed or it has been changed or repealed in the last decades. The strongest arguments are in support of the former view. However, more recent legislation and case law show that this traditional interpretation of the law in force in the UK legal system does not represent a view which is taken by authorities nowadays.

c) Preliminary Conclusions

In the 19th and 20th century, the UK Parliament transferred law-making powers to the legislators of former colonies and dominions. With time,

⁵³ For a further discussion on customary law in the UK legal system, see *V. C. Tiefenthaler*, *Gewohnheit und Verfassung*, 2012, 167 et seq.

⁵⁴ See below II. 3.

⁵⁵ *G. Marshall*, *The Constitution: Its Theory and Interpretation*, in: *V. Bogdanor* (ed.), *The British Constitution in the Twentieth Century*, 2003, 29 (42).

⁵⁶ *P. Oliver* (note 26), 306, note 80.

these states aimed at gaining full legal sovereignty independently of the delegating authority in Westminster. One possible way to achieve this goal was a “silent revolution”. In these cases the relationship of delegation between Westminster Parliament and the legislator in the colony or dominion was unilaterally terminated by the latter. Other countries successfully found separate legal systems in continuity. Legal objections against such a development have been rejected in this section. However, a redelegation of law-making competences is not possible in either case: because the relationship between delegating and delegated institution was terminated in the one case and because the delegation was definite and, thus, irreversible in the other.

2. The Scotland Act 1998

The Scotland Act 1998 transferred legislative powers from the UK Parliament to the Scottish Parliament which “may make laws, to be known as Acts of the Scottish Parliament”.⁵⁷ These statutes have been described as “primary legislation”⁵⁸ in reference to their distinct similarities to Acts of the UK Parliament and their dissimilarities to delegated legislation.⁵⁹ Independently of such questions of designation, a transfer of competence has taken place between the two legislators. From a political point of view, it might be controversial whether Westminster Parliament should be able to withdraw these powers.⁶⁰ Legally, there are strong arguments for the existence of such a competence.

The empowerment of the Scottish Parliament to “make laws” is supplemented by the provision that the transfer of this competence “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”.⁶¹ The phrasing of this provision is clear in one respect, that both the UK and the Scottish Parliament have the parallel competence to adopt Acts of Parliament which are valid in Scotland. However, the continuing legislative competence of Westminster Parliament for Scotland has to be differed from the question whether the legislative powers of the Scottish Parliament can be withdrawn unilateral by the UK Parliament. This is not clearly defined in Sec. 28 of the Scotland Act 1998 or in any other of its

⁵⁷ Sec. 29 para. 1 Scotland Act 1998.

⁵⁸ *R. Hazell*, Shape of Things to Come, *Wld. Today* 55 (1999), 24; *R. Brazier*, The Constitution of the United Kingdom, *C.L.J.* 58 (1999), 96 (106).

⁵⁹ *A. McHarg* (note 1), 547 et seq.

⁶⁰ See also *R. Brazier* (note 58), 105.

⁶¹ Sec. 28 para. 7 Scotland Act 1998.

provisions; at the same time, the phrasing of Sec. 28 does not exclude such content. A systematic interpretation has to take into consideration that Schedule 5 of the Scotland Act 1998 defines so-called “reserved matters” which remain within the exclusive competence of Westminster Parliament. One general reservation is “the Constitution” and as a part of it “the Union of the Kingdoms of Scotland and England”.⁶² Unity in a legal system is commonly guaranteed by a supreme legal authority to which all subordinated law-making can be attributed. In reserving the competence to legislate on matters concerning the Union of England and Scotland, Westminster Parliament made clear that its supremacy is uncontested by the Scotland Act 1998. Devolution, respectively the competences of the Scottish Parliament, does concern “The Constitution” and the Union of both Kingdoms. Sec. 28 para. 7 and Schedule 5 Part I lit. b Scotland Act 1998 have to be read together since both provisions express the will of the delegating legislator to preserve the sovereignty of Westminster Parliament.

This view on Sec. 28 para. 7 is supported by historical arguments: in comparing Sec. 75 of the Government of Ireland Act 1920⁶³ and Sec. 28 of the Scotland Act 1998, *Rodney Brazier* argues that the clear wording of the former with regard to the competence of Westminster Parliament to re-transfer powers and the relative vagueness of the latter in this respect is a result of different political circumstances. It would not have been appropriate for the Labour Government of 1998 to grant powers to the Scottish Parliament in keeping a campaign promise and at the same time to “give too much prominence to the continuing and complete British legislative power”. That is why “a more restrained formulation was required”.⁶⁴ In addition, it can be taken into consideration that Sec. 28 para. 7 “has perhaps been included in the Act in response to the new constitutional climate engendered by *Factortame (No. 2)*”⁶⁵ which indicated for the first time that Westminster Parliament can bind its successors in accepting a higher source of law. It should be made clear that devolution does not lead to a limitation of parliamentary sovereignty in a similar way.

⁶² Schedule 5, Part I, lit. b Scotland Act 1998.

⁶³ Sec. 75 Government of Ireland Act 1920 (as amended by the Northern Ireland Constitution Act 1973; repealed 2.12.1999) was headed “Saving for supreme authority of the Parliament of the United Kingdom.” and stated: “Notwithstanding anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof.”

⁶⁴ *R. Brazier* (note 58) 104.

⁶⁵ *I. Loveland*, *Constitutional Law, Administrative Law, and Human Rights*, 5th ed. 2009, 440 et seq.; for a discussion of this decision, see below II. 3.

A comprehensive interpretation of Sec. 28 para. 7 Scotland Act 1998 leads to the conclusion that it enables Westminster Parliament to retransfer the legislative powers which were delegated to the Scottish Parliament.⁶⁶ Since the Act does not lay down conditions which have to be fulfilled in order to exercise this competence lawfully, it merely depends on the decision of the UK Parliament to retransfer legislative powers by *contrarius actus*, i.e., by an Act of Parliament.

3. The European Communities Act 1972 and the European Union Act 2011

The EU membership of the United Kingdom is legally based on two foundations: the Treaty of Accession signed by the Member States of the European Communities and the United Kingdom, and the European Communities Act 1972 adopted by Westminster Parliament. The need to transform an obligation of international law into a national legal provision results from the common law concept of dualism: “In a dualist country such as the UK there must be an Act of Parliament that adopts or transforms the EU Treaty into UK law.”⁶⁷ The Treaty of Accession creates an obligation under international law to transfer law-making powers from Westminster Parliament to the EU legislator; the transfer is made by the European Communities Act 1972.

In the context of this paper, it is relevant if and how these competences can be retransferred. The approach adopted will be a legal one; thus, political aspects of a withdrawing of competences from the EU will not be taken into consideration.⁶⁸

The European Communities Act 1972 had considerable impact on the UK legal system as a whole, even on its fundamental principles. According to the traditional doctrine of parliamentary sovereignty, Westminster Parliament could not bind its successors. Since that was exactly what the European Communities Act 1972 did, it was only consistent that representatives of the traditional view called this development *revolutionary*.⁶⁹ Against this

⁶⁶ See also *N. Burrows*, Unfinished Business: The Scotland Act 1998, M.L.R. 62 (1999), 241 (249).

⁶⁷ *P. Craig*, The European Union Act 2011: Locks, Limits and Legality, CML Rev. 48 (2011), 1915 (1937).

⁶⁸ In contrast, e.g., to *C. Turpin/A. Tomkins*, British Government and the Constitution, 7th ed. 2011, 355, this article will not take into consideration whether a withdrawal from the Union is likely or not. For a political view, see also *P. Craig* (note 67), 1940 et seq.

⁶⁹ *H. W. R. Wade*, Sovereignty – Revolution or Evolution?, L.Q.R. 112 (1996), 568.

position, it has been argued that Westminster Parliament possesses the power to repeal the European Communities Act 1972 and to leave the EU; consequently, the Parliament still has full sovereignty.⁷⁰ It has also been suggested, however, that such an interpretation of the principle of parliamentary sovereignty is “quite different from the pristine version”.⁷¹ As a consequence of the Communities Act 1972, the courts can review Acts of Parliament with regard to their compatibility with EU law and they can disregard them in cases of conflict.⁷² Although the courts cannot set aside statutes of Westminster Parliament, their competence to review contravenes the traditional doctrine of parliamentary sovereignty.

As a consequence of increased scepticism in the United Kingdom in regard to the powers of the EU,⁷³ the so-called “sovereignty clause” became part of the European Union Act 2011. Sec. 18 is entitled “Status of EU law dependent on continuing statutory basis” and states:

“Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

Could Westminster Parliament in passing that bill effectively maintain and strengthen its position as sovereign legislator so that a retransfer of the competences formerly delegated to the EU is possible at any time?

It has been argued that it “is not overtly confirmed [...] whether Parliament could repeal the ECA”.⁷⁴ Other commentators reply that “Parliament can of course repeal the European Union Act at any time”⁷⁵ and that – under the premise of continuing parliamentary sovereignty – “it seems clear that the ECA could be repealed”.⁷⁶ Again others take the view that the validity of European law is no longer depending on the delegation of law-making competences by the Member States because a new legal order has

⁷⁰ J. Laws, *Law and Democracy*, P.L. 1995, 72 (89).

⁷¹ V. Bogdanor, *Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty*, *Oxford J. Legal Stud.* 32 (2012), 179 (186).

⁷² See *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*, (1991) 1 AC 603.

⁷³ For the political history of the European Union Act 2012 see M. Gordon/M. Dougan, *The United Kingdom's European Union Act 2011: “who won the bloody war anyway?”*, *E.L.Rev.* 2012, 3 (4 et seq).

⁷⁴ M. Gordon/M. Dougan (note 73), 8.

⁷⁵ V. Bogdanor (note 71), 189.

⁷⁶ M. Gordon/M. Dougan (note 73), 8.

developed in the meantime.⁷⁷ As the previous section of this paper on the foundation of a legal system has shown, this argumentation is not mere scaremongering. Parts of legal orders can detach from their initial foundation and become separate legal systems. It was the threat of such a development which caused the adoption of the sovereignty clause. According to the Explanatory Notes, the inclusion of Sec. 18 in the European Union Act 2011 would

“counter arguments that EU law constitutes a new higher autonomous order derived from EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute”.⁷⁸

Taking into account that the traditional view on parliamentary sovereignty has to be rejected and that Westminster Parliament can limit its powers, the European Communities Act 1972 was not a revolution but a mere exercise of powers and a transfer of law-making competences. In the European Communities Act 1972, Westminster expressed the will to self-limitation first and foremost in one respect, i.e., courts can review Acts of Parliament regarding their conformity with EU Law. Since neither the wording of the European Communities Act 1972, nor its *telos* suggest that a final transfer of competences was intended the power to initiate a withdrawal from the Union remains at Westminster. This interpretation of the European Communities Act 1972 is supported by the sovereignty clause in the European Union Act 2011 as well.

However, not only the national norm of delegation leads to the conclusion that a retransfer of competences is within the powers of the UK Parliament; this is also what the relevant European laws regulate: although the European Union is an organisation long-term in nature and membership is of indefinite duration, to leave the Union is not only factually⁷⁹ but also legally possible. While it is quite clear that a retransfer of powers is within the competence of the UK Parliament, a redelegation can lawfully not be done unilaterally; Westminster Parliament has limited its powers in so far as a retransfer of delegated competences can only be made in accordance with the formal procedures as laid down in the Treaties.

Besides the possibility to implement a change in the division of powers between the Union and the Member States⁸⁰, the so-called “exit clause” in

⁷⁷ J. D. B. Mitchell, What Happened to the Constitution on 1st January 1973?, *Cambrian L. Rev.* 11 (1980), 69.

⁷⁸ European Union Act 2011, Explanatory Notes, para. 120; see P. Craig (note 67), 1937. See also *Thoburn v. Sunderland City Council*, (2003) QB 151.

⁷⁹ R. Streinz, *Europarecht*, 9th ed. 2012, margin number 105.

⁸⁰ Art. 48 TEU (OJ 9.5.2008, C-115/13).

Art. 50 TEU explicitly states that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. According to this provision, the Union shall negotiate an agreement with the Member State in such a case; EU law ceases to apply to that Member State from the date of entry into force of the withdrawal agreement. Although it is a unilateral decision of a Member State to exit the Union,⁸¹ there is a procedural obligation under EU law to comply with the procedures laid down in the TEU (*pactum de negotiando*).⁸²

However, in the context of this article, it is crucial that an additional right for an individual state to withdraw from the Union based, for instance, on international law does not exist. All Member States have committed themselves to follow the procedure as laid down in Art. 50 TEU which derogates as *lex specialis* the general provisions of international contract law.⁸³

III. Concluding Remarks

Every competence is the result of a delegation. Thus, legal systems consist to a large extent of enabling and delegating norms. It is neither useful nor possible to develop a general theory of delegation and redelegation since the legitimacy of both phenomena depends on the legal provisions in force. Thus, any process of delegation has to be dealt with as individual case. The conditions according to which a (re)transfer of powers can take place regularly derive from the norm which enables the delegate to transfer its competences and from other superior legal norms. The three case studies of delegations by Westminster Parliament have shown that, in absence of an enabling norm, the question, whether delegated competences can be retransferred, has to be answered by interpretation of the delegating norm. Such a delegation can be revised unilaterally, via a formalized procedure, or it can be irreversible.

⁸¹ A right to veto of the EU does not exist.

⁸² O. Dörr, in: E. Grabitz/M. Hilf/M. Nettesheim (eds.), *Das Recht der Europäischen Union*, 49th ser. 2012, Art. 50 EUV, margin number 5.

⁸³ There is general agreement that a withdrawal from the EU was also possible before Art. 50 TEU came into force: the foundations of the European Union are international treaties which, in principle, can be cancelled in accordance with international law (see Art. 62 VCLT). See Ch. Calliess, in: Ch. Calliess/M. Ruffert (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 50, margin number 13.