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INTERPRETING PARLIAMENTARY INACTION

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ABSTRACT. *This article considers the interpretive significance of legislative inaction. Section I considers the nature of arguments based on legislative inaction. Section II explores the practical, conceptual and constitutional problems with trying to rely on legislative inaction as an interpretive aid. Section III concludes that attempts to draw inferences from legislative inaction alone are deeply flawed, but that inferences might legitimately be drawn from inaction if it forms part of the context against which the legislation is enacted. Even then, however, there are practical difficulties in determining what inferences to draw.*

KEYWORDS: *Parliament, legislation, statutory interpretation, rule of law.*

This article examines what, if any, legal significance can or should be attributed to parliamentary inaction in statutory interpretation. While this topic has received considerable attention in the US, there has been surprisingly little discussion in this jurisdiction.[1] The first part of this article considers the nature of arguments based on legislative inaction. The second addresses the practical, conceptual and constitutional issues surrounding the use of legislative inaction. The final part concludes (1) that interpretations which attach legal significance to legislative inaction alone are unsound, but (2) that legislative inaction during the passage of a Bill through Parliament may sometimes be relevant when construing the Act resulting from that Bill so long as there are other admissible parliamentary materials which shed light on the meaning of that inaction.

I. NATURE OF ARGUMENTS BASED ON LEGISLATIVE INACTION

Arguments based on Parliament's legislative inaction tend to fall into one of two categories.

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[1] For examples of the US literature, see L. Tribe, "Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence" (1982) 57 Indiana L.J. 515; W.N. Eskridge, "Interpreting Legislative Inaction" (1988) 87 Mich.L.Rev. 67.

A. Parliamentary Acquiescence or "Tacit Legislation"

The first category is where Parliament has refrained from revising a long-standing judicial interpretation and it is argued that Parliament has by its acquiescence approved and adopted that interpretation.

Arguments of this nature are rooted in the notion that Parliament is presumed to know the law and to legislate in light of that knowledge.[2] That presumption extends to earlier judicial decisions, including decisions about the meaning of legislation that uses the same or similar wording. It gives rise to a further, more specific, presumption that where Parliament uses wording that has already been interpreted by the courts in the same or a similar context, the legislative intention is that those words should bear the same meaning (this often referred to as "the *Barras* principle").[3]

It is no great leap to apply this reasoning to cases where Parliament has an opportunity to reverse a judicial decision on a point of statutory construction but refrains from doing so. Parliament can choose to reverse or modify the effect of a decision if it wishes to do so. If Parliament refrains from reversing a judicial decision this indicates that Parliament is satisfied with the decision, or so the argument goes.

Despite the superficial attraction of this reasoning there are many difficulties with relying on parliamentary inaction as an indication of what earlier legislation means, as demonstrated below. Moreover the notion of "tacit legislation" was strongly criticised by the Supreme Court in *R. (ZH and CN) v London Borough of Newham and London Borough of Lewisham*,[4] largely on the basis that the legislative will of Parliament is expressed through its enactments alone. Nevertheless, subsequent decisions indicate that arguments of this nature may not have been laid entirely to rest.

The recent decision in *R. (Mustafa) v Kent County Council*[5] is a case in point. The question before the court concerned the interpretation of the definition of "asylum-seeker" in Schedule 3 to the Nationality, Immigration and Asylum Act 2002, which was materially the same as the definition in section 94 of the Immigration and Asylum Act 1999. The meaning of the definition in section 94 had been clearly established by a High Court decision in 2004. Referring to that decision the judge said: "Moreover Parliament has amended section 94 of IAA and

[2] See e.g. *Campbell v Gordon* [2016] UKSC 38, [2016] A.C. 1513, at [44], per Lady Hale; *Majrowski v Guy's and St. Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 A.C. 224, at [72], per Lady Hale.

[3] *Barras v Aberdeen Sea Trawling and Fishing Co. Ltd.* [1933] A.C. 402; *R. (ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62, [2015] A.C. 1259, at [53], per Lord Hodge.

[4] *R. (ZH and CN)* [2014] UKSC 62, [2015] A.C. 1259.

[5] *R. (Mustafa) v Kent County Council* [2018] EWHC 2025 (Admin). For a further (albeit less clear) example, see *WB v W DC* [2018] EWCA Civ 928, [2019] Q.B. 625, at [35], where the reference to "the subsequent confirmation given by Parliament to the interpretation in *ex p Ferdous Begum*" would appear to be a reference to the supposed confirmation by Parliament, subsequent to the Human Rights Act 1998, by its failure to reverse or modify that decision.

Schedule 3 of NIAA on a number of occasions since the decision in *Nigatu* but . . . it has not amended the definition of 'asylum-seeker' for the purposes of those provisions. It can be inferred that Parliament intended the phrase to bear the meaning as decided in *Nigatu*."[6]

B. Rejected or Withdrawn Amendments

The second category of argument based on legislative inaction arises where an amendment proposed to a Bill during its passage through Parliament is rejected or withdrawn. The fact that an amendment has been proposed but not made is said to militate against a court reaching a decision that Parliament intended the result that it declined to enact.

The use that may be made of amendments moved but rejected or withdrawn was considered in some detail by the House of Lords in *R. v JTB*.[7] The question in that case was whether section 34 of the Crime and Disorder Act 1998[8] was intended to abolish the defence of *doli incapax* altogether for children 10–14 years old or merely to reverse the presumption that a child had that defence (leaving the defence available for any child who could prove that they did not know that their action was seriously wrong). During the passage of the Bill through Parliament Lord Goodhart QC had twice moved an amendment designed to reverse the presumption of *doli incapax* rather than abolish it. The amendment was firmly opposed by the Government. On the first occasion the amendment was withdrawn without being pressed to a vote; on the second occasion it was rejected on a division.

Lord Phillips (with whom the other members of the panel agreed) held that although the statutory wording was ambiguous, having regard to the mischief of the legislation the clear legislative intention was to abolish the defence of *doli incapax*. In reaching this conclusion Lord Phillips cited and placed considerable reliance on Parliament's rejection of Lord Goodhart QC's proposed amendments and the statements by the Government Minister in opposing them.[9] Lord Carswell doubted whether it was necessary to consider the parliamentary materials but found them to be admissible and to "settle the matter conclusively".[10] He described the rejection of the proposed amendments as "very cogent evidence of intention, stronger even than the statements of ministers, and it puts the conclusion beyond doubt".[11] Lord Brown agreed with those observations, characterising the rejection of the amendments as "most telling".[12]

[6] At para. [34].
[7] *R. v JTB* [2009] UKHL 20, [2009] 1 A.C. 1310.
[8] Section 34 of the Crime and Disorder Act 1998 provides: "The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished."
[9] Ibid., at paras. [31], [32], [35].
[10] Ibid., at para. [40].
[11] Ibid.
[12] Ibid., at para. [42].

II. Problems with Relying on Legislative Inaction

This Part of this article examines the practical, conceptual and constitutional problems with relying on legislative inaction as a basis from which to draw inferences as to meaning of the legislative text. Those problems arise, to varying degrees, in relation to both categories of argument from inaction.

Before examining those issues, however, it is necessary to say a brief word about the nature of statutory interpretation and the basis on which this article proceeds. The traditional focus of the courts in approaching questions of statutory interpretation has been to seek to discern and give effect to the intention of Parliament.[13] It is clear that the courts are not here concerned with the actual subjective intentions of individual members of Parliament as a matter of historical fact. The views of individual members are, in any event, likely to differ or conflict. The constitutional authority of Parliament to change the law as a collective body is exercised by using established procedures to produce a single authoritative legislative text from those many views.[14] When the courts refer to the "intention of Parliament" they are referring to the intention that it is reasonable to infer that Parliament intended the enacted text to have, read in context.[15] That is the sense in which legislative intention is used in this article.

There is of course a wider debate, particularly in the academic literature, about whether it is meaningful to use the concept of parliamentary intention in relation to a modern multi-member legislature acting collectively to enact legislation. Some have suggested that parliamentary intention should be rejected as an unhelpful fiction that serves only to mask the true reasoning and power of the courts,[16] while others have articulated more sophisticated jurisprudential arguments for rejecting legislative intention.[17] There are also proponents of interpretive intentionalism, including Richard Ekins who argues that legislative intention refers to the legislature's capacity as a group to act on a rational plan, in accordance with established procedures, to change the law for the public good.[18] While this article touches on questions of legislative intention, my purpose is not to engage in the wider debate about whether the concept is a helpful one. Rather it is to examine whether, if one accepts the concept of legislative intention as traditionally

[13] For a wide-ranging collection of authorities, see R. Ekins and J. Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 26 Sydney L.Rev. 39, at 39–41.

[14] P. Sales, "Legislative Intention, Interpretation, and the Principle of Legality" (2019) 40 Stat.L.R. 53, at 58.

[15] See e.g. *R. (Spath Holme Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349, 396G, per Lord Nicholls.

[16] See e.g. A. Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge 2018), 17–19, who proposes focusing on "purpose" rather than "intention".

[17] See e.g. R. Dworkin, *Law's Empire* (Cambridge, Mass., 1986), 313–54; J. Waldron, *Law and Disagreement* (Oxford 1999), 119–46.

[18] R. Ekins, *The Nature of Legislative Intent* (Oxford 2012), 13, 112–13. For another recent defence of legislative intention, see Sales, "Legislative Intention".

understood by the courts, there is any merit in arguments that seek to place reliance on parliamentary inaction in terms of Parliament's intent.

A. What Inferences to Draw?

The first concern about the use of legislative inaction is a practical one. Even if legislative inaction were relevant to questions of statutory interpretation, there is a difficulty in determining what inferences to draw.[19]

It is suggested that parliamentary inaction on its own tells us very little about the actual intention of members of Parliament (or, for that matter, others involved in the preparation of legislation). As mentioned above, the traditional focus of the courts on "the intention of Parliament" does not equate to trying to discover the intention of individual members as a matter of historical fact. The courts are concerned with the meaning that can reasonably be attributed to Parliament by a well-informed reader in respect of the statutory wording, read in context.[20] But in determining objectively what (if any) inferences a well-informed reader might reasonably draw in respect of legislative (in)action, it is surely necessary and appropriate to consider the range of reasons that might exist. It is therefore useful to begin by considering some of the possible explanations for parliamentary inaction, taking in turn the two categories identified in the first part of this article.[21]

Where Parliament has refrained from changing the effect of a judicial decision on a point of statutory interpretation the first possible cause for that inaction is simple ignorance. Questions of statutory interpretation are decided by the courts on a daily basis and it is unrealistic to suppose that members of Parliament are aware of each and every decision. Where members are aware of a judicial decision, they may approve or disapprove of the decision or be indifferent. Or they may be content to leave open the possibility of the decision being overturned by the courts in future. Even if members disapprove of a decision there may be legal or political reasons for not wanting to open up debate on related issues, not to mention pressures on parliamentary time. Moreover, in reality one might expect the views of different members of Parliament to differ: in the case of a statute, the enactment procedure provides a mechanism for collective decision-making, but there is no equivalent procedure for collective decision-making in the case

[19] A difficulty briefly acknowledged in *R. (ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62, [2015] A.C. 1259, at [85], per Lord Carnwath, at [167], per Lady Hale. See also Eskridge, "Interpreting Legislative Inaction", p. 98.

[20] See e.g. *R. (Spath Holme Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349, 396G, per Lord Nicholls.

[21] For discussion of causes of legislative silence more generally, see D. Howarth, "On Parliamentary Silence", U.K. Const. L. Blog, 13 December 2016, available at https://ukconstitutionallaw.org/.

of inaction; so it is impossible to attribute to Parliament as a whole any single view.[22]

Similarly, there are a broad range of possible causes for the rejection or withdrawal of an amendment that has been tabled during the passage of a Bill through Parliament. It may be that members do not support the proposal to which the amendment gives effect or that they support the proposal but consider the amendment to be unnecessary (on the basis that the Bill already produces the desired result). The process by which amendments are tabled and withdrawn, made or rejected also needs to be viewed as part of the wider legislative and political process. Amendments are tabled for various reasons and are not always proposed with a view to changing the legislative text.[23] For example, it is common for members to table amendments for the purpose of engineering a debate on a matter of personal interest, to bring pressure to bear on some unrelated matter or to seek clarification from the Government as to the intended effect of a provision. Probing amendments of this nature are rarely pressed to a division. It is also worth bearing in mind that the parliamentary voting system allows members to vote in favour or against a proposal but does not allow for nuances. In the House of Commons, the power of the Speaker or Chair to decide whether and which amendments may be debated and voted on is another factor to be taken into account.

From the above account it may be seen that for both categories of legislative inaction, there are a range of possible causes and no sound basis for distinguishing between them. The inaction of Parliament is ambiguous. There are any number of different inferences that could be drawn and, absent other factors, no reliable basis for preferring one over the other. In short, it is not possible for a well-informed reader to derive any support for a particular construction from legislative inaction alone.

But, while legislative inaction on its own tells us very little, it is arguable that in a case where an amendment is rejected or withdrawn during the passage of a Bill this can sometimes help to strengthen inferences based on ministerial statements under the rule in *Pepper v Hart*.[24] The rejection or withdrawal of an amendment following a clear ministerial statement as to the meaning of a statutory provision may indicate reliance on that statement, leading to a legitimate inference as to Parliament's intention (objectively assessed). In other words, the ministerial statement may go some way to suggesting a reason for Parliament's inaction, making the drawing of an

[22] A point made in A. Kavanagh, "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998" [2006] 26 O.J.L.S 180, at 182, in relation to the unenacted intentions of Parliament more generally.

[23] For a more detailed account, see M. Russell and D. Gover, *Legislation at Westminster* (Oxford 2017), 97–104, where it is suggested that there are at least five categories of opposition amendments: information seeking; signalling; political game-playing; procedural devices; and legislation change.

[24] *Pepper v Hart* [1993] A.C. 593.

inference from it more reliable. It is suggested that, on a proper analysis, this is the basis on which the House of Lords rightly relied on the rejection of amendments in *R. v JTB*,[25] discussed above.

The potential relevance of an amendment that has been withdrawn was acknowledged by Lord Browne-Wilkinson in *Pepper v Hart*[26] itself: "That Parliament relied on the ministerial statements is shown by the fact that the matter was never raised again after the discussions in Committee, that amendments were consequentially withdrawn and that no relevant amendment was made which could affect the correctness of the Minister's statement." While Lord Brown-Wilkinson's comment is directed at cases where a ministerial statement is subsequently uncontested because amendments are withdrawn,[27] the reasoning would seem to apply equally to situations as in *R. v JTB*[28] where a member has specifically challenged the minister's view and has unsuccessfully pressed the matter to a vote.

B. Accessibility

A related problem is that judicial reliance on parliamentary inaction undermines fundamental principles of accessibility and legal certainty inherent in the rule of law. As Lord Diplock said in *Fothergill v Monarch Airlines Ltd.*,[29] "[t]he rules by which a citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible". Accessibility requires not only that materials relevant to the proper interpretation of a statute should be publicly available but also that they should be readily identifiable as relevant to the discovery of its meaning. This dual requirement is recognised in Sales J.'s comments in *Bogdanic v Secretary of State for the Home Department*: "It is only material which is in the public domain and of clear potential relevance to the issue of interpretation of a legislative instrument which can be treated as having any bearing on the proper construction of that instrument."[30] Although parliamentary inaction is a matter of public record, reliance on parliamentary inaction is arguably problematic on both of these counts.

First, there are potential logistical difficulties connected to the skill, time and effort involved in any form of parliamentary research, especially in the case of older Acts. While parliamentary material is publicly available in hard copy and much is now available online, it is not easy to track down

[25] *R. v JTB* [2009] UKHL 20, [2009] 1 A.C. 1310.
[26] *Pepper v Hart* [1993] A.C. 593, 642.
[27] I am grateful to the anonymous reviewer who pointed out this distinction on an earlier draft of this article.
[28] *R. v JTB* [2009] UKHL 20, [2009] 1 A.C. 1310.
[29] *Fothergill v Monarch Airlines Ltd.* [1981] A.C. 251, 279F. See also *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), at [13], per Sales J. and the authorities cited there.
[30] *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), at [13].

everything relating to a provision's legislative history.[31] Even improvements in online access are unlikely to remove entirely the difficulties involved in piecing together the legislative history of a provision, which is made all the more difficult given that clause numbers are prone to change as a Bill is amended during its passage through Parliament. This objection to the use of legislative inaction mirrors the well-rehearsed objections to the use of parliamentary debates as an aid to construction.[32]

Secondly, and more importantly in terms of accessibility, the relevance of parliamentary inaction to questions of statutory interpretation is not readily apparent. There are any number of explanations for inaction and the lack of any reliable basis for distinguishing between them means that reliance on legislative inaction introduces an inherently unpredictable and speculative element into the decision-making process. The difficulty is compounded in cases where reliance is placed on parliamentary inaction following a judicial decision, since it is unclear at what point in time parliamentary inaction would crystallise into implied endorsement. It may also be noted that reliance on Parliament's failure to overturn an earlier judicial decision undermines the application of the normal rules of *stare decisis*, one of the objectives of which is often said to be to promote legal certainty.[33]

C. Legislative Intention

Arguments based on Parliament's failure to overturn a long-standing judicial interpretation are also problematic from the perspective of legislative intention as traditionally understood by the courts. They typically rely on an assertion that silence or inaction tell us something about the "true" intention of Parliament or members of Parliament.

The difficulty with these arguments is that they seem to equate parliamentary intention, as it is used in the context of statutory interpretation, with the intention of Parliament (or members of Parliament) for the time being. Even if it were possible to ascertain the actual intention of a collective body such as Parliament, its intention from time to time has no bearing on the interpretive exercise as it has traditionally been approached by the courts. When judges refer to the intention of Parliament they use this as a shorthand for the intention reasonably to be attributed to Parliament in respect of the words used, read in context. According to orthodox principles of statutory interpretation, the meaning attributed to the text must relate to

[31] E.g. the online version of *Hansard*, available at https://hansard.parliament.uk, has many months missing even from the past 20 years. For Bills in the 2007–08 Session or later Sessions, it is easier to find all of the parliamentary material since it is provided in the "Bills before Parliament" section on Parliament's website.

[32] The courts have decided that the difficulty of accessing parliamentary material and the cost and delay in researching it do not outweigh its potential value as an external aid to construction: *Pepper v Hart* [1993] A.C. 593, 637, per Lord Browne-Wilkinson.

[33] I am grateful to the anonymous reviewer who made this comment on an earlier draft of this article.

the intention that it is reasonable to infer that Parliament had *at the time of enacting* the legislation in question, so that post-enactment materials are not relevant. The timing point is apparent in Lord Nicholls' remarks in *In re Spectrum Plus Ltd. (in liquidation)*:

> the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book … Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in accordance with what it considers is the proper interpretation of the statute.[34]

Leaving aside later legislative intervention, it does not take much of an imagination to realise the difficulties that might arise if the interpretation of a statute could be affected by the subsequent – *unenacted* – intentions of members of Parliament, with the likely result that the meaning would vary over time according to changes in the composition of the legislature. For reasons that we will come on to, relying on later intentions would also undermine the effectiveness of the procedures by which Parliament's law-making authority is exercised through its enactments.

The focus on the intention to be attributed to Parliament when it enacted the legislation is, of course, subject to any later legislative intervention. The prime example is the interpretive obligation in section 3 of the Human Rights Act 1998 to construe legislation in a way that is compatible with the Convention rights so far as it is possible to do so.[35] In applying section 3 to earlier legislation, the court is giving effect to Parliament's intention as expressed in that section. Section 3 in effect modified earlier legislation. The analysis in relation to legislation that post-dates the Human Rights Act 1998 is rather different, since then section 3 forms part of the legal principles against which the later legislation is enacted and in light of which it must be read.

What is said here about the need to focus on the time of enactment does not in any way detract from the presumption that legislation is always speaking, which generally requires the courts to interpret and apply a statute as understood in light of current circumstances rather than simply by reference to the time of its enactment. Consistent with the orthodox approach to statutory construction, the presumption that legislation is always speaking applies because Parliament is ordinarily taken to intend its legislation to be read in a way that allows for changes that may occur over time. To "act as if the world had remained static since the legislation was enacted … would usually be perverse and would defeat the purpose of the

[34] *In re Spectrum Plus Ltd. (in liquidation)* [2005] UKHL 41, [2005] 2 A.C. 680, at [38].
[35] For a detailed examination of section 3 and legislative intention, see Kavanagh, "The Role of Parliamentary Intention".

legislation".[36] In other words, the intention reasonably attributed to Parliament in respect of the words used at the time of enactment is that they should bear an updating construction. This is in marked contrast to arguments based on subsequent legislative inaction where legal significance is attributed to Parliament's actual or supposed intention at some point between the enactment of the legislation and its interpretation or application.

It is perhaps worth acknowledging that there are theories of statutory interpretation according to which the judicial interpretation of statutes may legitimately change over time, even if that results in new interpretations that are inconsistent with the expectations of the enacting legislature.[37] The present analysis is not concerned with examining the merits or otherwise of those theories, any more than it is concerned with engaging in wider theoretical debates about whether the notion of "legislative intention" is helpful. My aim is more modest in that it is simply to demonstrate that arguments based on Parliament's failure to overturn a long-standing judicial interpretation do not derive legitimacy from appeals to the "true" intention of Parliament, which are in any event inconsistent with the prevailing understanding of legislative intention as used by the courts.

While arguments based on Parliament's failure to overturn a long-standing judicial interpretation are difficult to reconcile with traditional notions of legislative intention, the same objection does not apply in the case of arguments which seek to rely on the rejection or withdrawal of an amendment during the passage of a Bill through Parliament. The rejection or withdrawal of amendments is part of the contextual material from which it may be possible to construct arguments as to the reasonable intention to be imputed to Parliament – at the time – in respect of the words enacted. In statutory interpretation the meaning of the legislative text is determined by identifying objective indications as to its meaning, read in context, and evaluating which construction is the best fit. That construction is then attributed to Parliament. Failed attempts to amend the Bill during its passage through Parliament form part of that context. In this case there is no attempt to elide the notion of legislative intention with the subjective intentions of individual legislators.

D. Separation of Powers

The next difficulty with the use of legislative inaction as an interpretive aid, particularly when it comes to drawing inferences from Parliament's failure to overturn a long-standing judicial interpretation, is that it effectively gives Parliament the function of interpreting its own legislation otherwise than through the enactment of legislation. This confuses the proper

[36] *R. (ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [2015] 1 All E.R. 165, at [45], per Leggat J.
[37] See e.g. W.N. Eskridge, *Dynamic Interpretation* (Cambridge, Mass., 1994).

constitutional role of the courts and that of Parliament, leading to concerns in terms of the separation of powers and rule of law.

A basic distinction may be drawn between the role of the Parliament in enacting legislation and that of the courts in interpreting and applying it.[38] The doctrine of parliamentary sovereignty means that an Act of Parliament may override any inconsistent judicial decision, but it is for the courts and not Parliament to interpret the legal effect of an Act in the event of dispute.[39] The existence of an independent judiciary interpreting legislation is not only important for the rule of law, but is also an essential part of, or at least condition for the effectiveness of, parliamentary sovereignty.[40]

The difficulty with arguments that rely on Parliament's failure to overturn an earlier judicial decision is that they invite the court to defer not only to the sovereignty of Parliament in making laws but also in interpreting those laws, which is the proper constitutional function of the court. For a court to hold back from giving a statute the meaning that the court believes it to have in this way is nothing short of an abdication of judicial responsibility. While expressing a judicial decision in terms of the intention that Parliament has demonstrated through its inaction may appear to give a decision greater legitimacy, it in fact serves only to obscure the power that judges are really exercising.[41]

E. Absence of Law Is Not Law

In constitutional terms reasoning from parliamentary silence on its own is also objectionable on the basis that it attributes legal significance to the unenacted intentions of Parliament. This runs contrary to the "cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments".[42] "Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed".[43] "The beliefs or assumptions of those who frame Acts of Parliament cannot make the law."[44]

[38] See e.g. *X Ltd. v Morgan-Grampian (Publishers) Ltd.* [1991] 1 A.C. 1, 48, per Lord Bridge; *Duport Steel v Sirs* [1980] 1 W.L.R. 142, 157, per Lord Diplock.

[39] An arguable, albeit limited, exception is that, where the courts have recognised Parliament's exclusive jurisdiction over matters relating to parliamentary proceedings and conduct, this jurisdiction covers certain questions of statutory interpretation: *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271, 280–81.

[40] *R. (Cart) v Upper Tribunal (Public Law Project intervening)* [2009] EWHC 3052 (Admin), at [38], per Laws L.J., endorsed by a majority of the Justices in *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 W.L.R. 1219

[41] See also *R. (ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62, [2015] A.C. 1259, at [82], per Lord Carnwath, at [147], per Lord Neuberger.

[42] *Wilson v First Country Trust* [2003] UKHL 40, [2004] 1 A.C. 816, at [67], per Lord Nicholls.

[43] *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] A.C. 591, 638, per Lord Diplock. See also T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993), 68: "legislative sovereignty inheres in the words enacted – interpreted correctly in accordance with the constitutional premises of the rule of law – not in the aspirations of government or even parliamentary majority".

[44] *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co. Ltd.* [1952] A.C. 401, 426, per Lord Radcliffe.

An Act derives its legal authority from its proper enactment by the Queen in Parliament, namely by having completed various stages by which the House of Commons, House of Lords and the monarch jointly make an Act of Parliament. It is the enactment process that confers legal authority on the text. It follows that Parliament cannot by silence or inaction itself make law.

Attributing legal significance to that kind of parliamentary inaction conflates the *unenacted* intentions of Parliament with its *enacted* intentions as expressed in legislation. While it may be convenient to refer to an Act, which has been considered and approved by both Houses of Parliament, as expressing the intention or will of Parliament, as noted above this is simply used as a shorthand for the intention reasonably imputed to Parliament in respect of the words used: it is the enactment procedure that gives an Act its quality as law. The will of Parliament as expressed in its enactments must be applied and given effect by the courts, but the hopes or intentions of members of Parliament individually or even collectively do not – as such – carry any legal status.[45]

The point was made by Lord Hobhouse in *Wilson v First Country Trust*[46] in relation to the use of parliamentary materials as an aid to construction:

> [T]he constitutional means by which laws are made is by the entry of a statute in the statute book. The source of the new law is the document itself not what anyone may have said about it or some earlier form of it … Likewise, it is another fundamental principle that the verbal expression of the law be certain, whatever difficulties in interpretation the words used may cause. Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law.

For these reasons, even if silence or inaction were reliable evidence of Parliament's will, or the will of individual legislators, there is no sound basis for attributing legal significance to Parliament's failure to overturn the judicial interpretation of a statute. Parliament's views as to what the law should be are not the same as what the law is.

But these objections do not apply with the same force, or arguably at all, in a case where Parliament has enacted legislation and reliance is placed on the rejection or withdrawal of an amendment during the legislative proceedings on that enactment.

The words that Parliament enacts in legislation can only properly be understood by considering the context in which they are used, since "language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified

[45] D. Feldman, "Statutory Interpretation and Constitutional Legislation" (2014) 130 L.Q.R. 473, at 481.
[46] *Wilson v First Country Trust* [2003] UKHL 40, [2004] 1 A.C. 816, at [139].

and considered before the process of construction or during it".[47] The word "context" is not confined to the internal context of a statute, but is understood in its widest sense to cover anything capable of shedding light on the meaning of the statutory language.[48]

Failed attempts to amend a Bill during its passage through Parliament form part of this wider statutory context. The wording that Parliament chose not to enact may arguably shed some light on the intended meaning of wording that it *did* enact.[49] This is consistent with the normal interpretive exercise and does not conflate legislative inaction with a source of law. This is not to say, of course, that such inaction will necessarily have any significant probative value, especially given the difficulty that has been discussed about knowing what inferences to draw. It will all depend on the availability of other relevant admissible material, such as ministerial statements, from which inferences may be drawn as to the reason for the withdrawal or rejection of the amendment.

F. Undermining the Legislative Process

Finally, reliance on parliamentary inaction as an interpretive aid risks undermining the legislative process in several important respects.

The first is related to the separation of powers argument made above. Reliance on parliamentary inaction diminishes the structural incentive that the separation of powers provides for Parliament to resolve important issues in the enacted text. The separation of powers ensures that any doubt that is left in the legislative text is decided by an institution outside Parliament's control.[50] If Parliament can effectively interpret its own laws, or significantly affect the interpretation of its own laws otherwise than through the legislative text, that incentive is substantially undermined. The point was made by Lord Wilberforce in *Black-Clawson*[51] in the context of the admissibility of parliamentary materials:

> Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be … it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.

To this Lord Wilberforce might well have added that it would likewise be a degradation of that process for the courts to reflect fancied meanings

[47] *R. (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 W.L.R. 2956, at [5], per Lord Steyn.
[48] See e.g. *A-G v HRH Prince Ernest Augustus of Hanover* [1957] A.C. 436, 461, per Viscount Simonds.
[49] For similar arguments, see Tribe, "Toward a Syntax of the Unsaid", p. 529.
[50] A. Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 L.Q.R 98, at 103–04; J. Manning, "Textualism as a Non-Delegation Doctrine" (1997) 97 Columbia L.R. 673, at 708.
[51] *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] A.C. 591, 629.

inferred from what Parliament has not said. *Pepper v Hart*[52] has, of course, made certain inroads into the exclusionary rule for parliamentary materials within well-defined limits, but the general point of constitutional importance made by Lord Wilberforce holds good.

Secondly, reliance on parliamentary inaction undermines the enactment process which is designed to ensure that those elected to Parliament have control over, and are accountable for, what is enacted into law.[53] As Philip Sales has said, Parliament's law-making authority can only be exercised effectively "if its enactments have reasonably determinate objective meaning which can be understood at the time it legislates and which continue to bear that meaning into the future to govern situations where the law falls to be applied".[54] The difficulty with reliance on parliamentary inaction is that it introduces an inherently unpredictable element into the interpretive process. Not only does this diminish the control that members of Parliament are able to exert over legislation, but it also means that they (as opposed to the courts) are less obviously accountable for the end result.

Thirdly, a related point is that the various stages through which a Bill must pass ensure that law-making is an open and deliberative process. Legislating is a serious business and not to be taken lightly. The legislative process is undermined if unenacted intentions attributed to Parliament in respect of legislative inaction are given legal force, even though they have not been subjected to the scrutiny and other safeguards inherent in the enactment process.

III. Conclusion

While arguments based on Parliament's legislative inaction are deceptively attractive, they are for the most part deeply problematic. Not only are there intrinsic practical difficulties in trying to attach significance to Parliament's failure to do something – silence is by its nature ambiguous – but there are also fundamental conceptual and constitutional problems with seeking to rely on legislative inaction alone as a basis on which to draw inferences as to legislative intent. In short, the absence of law is not law. For this reason, post-enactment legislative inaction is never relevant. That said, in some circumstances it may be possible to derive some support from legislative inaction where it forms part of the contextual background against which legislation is enacted. For example, the failure to pass an amendment during

[52] *Pepper v Hart* [1993] A.C. 593.
[53] The criticisms made here are the same as those that have been made in relation to the use parliamentary debates (see Kavanagh, "Pepper v Hart", pp. 99–100) but would appear to apply with all the more force in the case of parliamentary inaction.
[54] Sales, "Legislative Intention", p. 55.

the passage of a Bill through Parliament may be used to strengthen the inferences that may be drawn from other pre-enactment materials such as ministerial statements. Even then it is important to recognise the practical difficulties in trying to attribute meaning to what Parliament has not done and to understand the range of possible causes of inaction.