1. Parliamentary Sovereignty

General Rule:
Parliament has the LEGAL power to “make or unmake any law, whatsoever,” regardless of how unjust, unwise, or unpopular that law is.

Sub-rules:
* Parliament cannot bind its successors (sovereignty of a later Parliament cannot be limited by the legislation of an earlier Parliament, e.g. where the earlier Parliament declares a particular rule to be “unamendable,” or to require a special majority – ¾ in the House of Commons, for example – for amendment).
* No other body can set aside or invalidate an Act of Parliament. This includes the judiciary, which was TRADITIONALLY incapable of invalidating Acts of Parliament, and remains GENERALLY incapable of invalidating Acts of Parliament, although EU law provides a strong exception to this rule, and Section 3 of the Human Rights Act provides a weaker one (discussed below).

This makes the UK very different from Germany. In Germany, the judiciary can set aside legislation that is inconsistent with the Grundgesetz, and amending the Grundgesetz requires compliance with a special procedure (and indeed, some provisions of the Grundgesetz cannot be amended, e.g. Article 1, on Human Dignity, which is placed beyond amendment by Article 79-3).

Exceptions to the General Rule:

A. Political Pressure: Parliamentary sovereignty is a LEGAL rule, meaning that the law permits Parliament to do whatever it likes. However, in reality, there are many laws that Parliament cannot make because of political pressure. For example, it is highly unlikely that Parliament could repeal the Scotland Act of 1998, which devolved legislative power to a new Scottish Parliament, because this would place the very existence of the UK – and more specifically, the existence of the Union between England and Scotland – in jeopardy.

B. Thoburn v. Sunderland City Council, and the Doctrine of Implied Repeal:
Traditionally, as a consequence of parliamentary sovereignty (and the rule that Parliament cannot bind its successors), inconsistencies between Acts of Parliament are resolved by the doctrine of IMPLIED REPEAL. According to this doctrine, an inconsistency will be resolved by assuming that a newer law will automatically repeal an older one with which it conflicts. However, in the Thoburn case, John Laws of the High Court (Queen’s Bench Division) suggested that some laws are more important than others. More specifically, he claimed that it is possible to distinguish between ORDINARY Acts of Parliament, and CONSTITUTIONAL ones, like the Bill of Rights (1689), the Act of Union (1707), the Scotland Act (1998), and the Human Rights Act (1998). To repeal these laws – i.e. CONSTITUTIONAL LAWS – Parliament would have to use EXPLICIT language. It cannot simply make a new law that conflicts with them, and then hope that courts will apply the doctrine of implied repeal.
C. EU Law: According to the European Court of Justice, EU law is SUPREME over national law (see Costa v. ENEL), which is to say that it has a higher legal status than national law – even national CONSTITUTIONAL law. Moreover, many provisions of EU law are regarded as having DIRECT EFFECT (see Van Gend en Loos), which is to say that they require no action on the part of legislatures in individual Member States before they can (and indeed, must) be enforced by the courts of those Member States. In the Factortame litigation, which involved the UK, the European Court of Justice ruled that the UK courts were required to disapply provisions of national legislation that conflicted with EU law, despite the fact that UK constitutional law prohibits courts – under the rule of parliamentary sovereignty – from setting aside Acts of Parliament. After this judgment, the House of Lords accepted the European Court’s ruling, which is to say that UK courts are now capable of (and indeed, required to) strike down Acts of Parliament that conflict with EU law.

D. Section 3 of the Human Rights Act: This will be discussed below, in the section on the separation of powers. Suffice it to say, for now, that Section 3 enables UK courts to effectively REWRITE Acts of Parliament if they are incompatible with human rights as protected by the Human Rights Act. The main limit on this power is that courts are only supposed to use it where rewriting the Act does not substantially change its character, or frustrate its purpose.

Note: Some scholars argue that Section 4 of the Human Rights Act also provides an exception to the principle of parliamentary sovereignty. Section 4 allows courts to make a DECLARATION OF INCOMPATIBILITY when they find that a particular Act of Parliament violates human rights. This “Declaration” will not change the validity of the violating law – it will remain valid and operational – but it is supposed to put political pressure on parliament to change the law in accordance with the court’s recommendations. The reason that some scholars see this as a limit on parliamentary sovereignty is that in practice, parliament tends to change the law in response to such declarations. Indeed, parliamentary responses are so consistent that it is sometimes suggested that the Human Rights Act has led the UK from a system of parliamentary supremacy to one of judicial supremacy – a system that is not dissimilar from the United States, where the US Supreme Court often has final say on the interpretation of constitutional (human) rights.
Case Study: Terrorism, Human Rights and the Rule of Law

A v. Secretary of State for the Home Department (also known as the BELMARSH case)

In 2001, just after the 9/11 attacks in America, the UK Parliament passed a law authorizing the effective INTERNMENT (indefinite detention, without trial) of foreign terror suspects. Since internment constitutes a clear violation of at least Articles 5 and 6 of the European Convention on Human Rights – the rights to liberty and a fair trial, respectively – the UK simultaneously issued a DEROGATION ORDER, which means that it exercised its legal right under Article 15 of the ECHR to violate particular human rights where 1) there is a WAR or other PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION, and 2) the measures taken in response to that emergency are STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION.

First question: Why Internment? Why not use ordinary criminal law to prosecute foreign terror suspects? Why not deport them to their home countries?

On ordinary criminal law: There are several difficulties with the criminal prosecution of terror suspects. Firstly, many of the people on terror “watchlists” have not actually committed any CRIME. On the contrary, someone may be on a watchlist because of personal views that they’ve expressed to friends, or because of their google search history, or because of some other evidence that shows their support for terrorist ideology, but, crucially, not a clear intent to commit any terrorist act.

Secondly, even if there is evidence of intent to commit an act of terror, this will often come from the UK intelligence agencies, and revealing that evidence publicly – in open court – may compromise much larger investigations by letting terror groups know that they are being monitored, and by letting them know exactly HOW they are being monitored. This means, very simply, that it may be more costly OVERALL to reveal the evidence against someone than to just let them go. And yet, letting them go could mean putting members of the public at risk. So how do we deal with these people, these suspects, without compromising the investigations of our intelligence agencies?

On deportation: the first issue with deportation is that some terror suspects are not foreign, but are actually British nationals without another home state to which they can be deported. The trickier issue, though, is that the ECHR prohibits the deportation of many foreign terror suspects. This is because of Article 3 of the ECHR, which prohibits torture, as well as inhuman and degrading treatment. In the Chahal case, the European Court of Human Rights ruled that this Article prevents terror suspects from being deported to countries where they are likely to face torture, or likely to have evidence gained through torture used against them. And, unfortunately for the UK (and other ECHR signatories), terror suspects are often from such states, thereby rendering their deportation difficult if not legally impossible.
This brings us to INTERMENT, which was the UK’s response on account of the problems with ordinary criminal law and deportation. Inevitably, some of the suspects who were interned took legal action against the UK, and the case eventually ended up in the House of Lords. In its judgment, the House of Lords asked not whether the human rights of the applicants were violated – the UK government admitted that they were when it issued its derogation order – but merely whether the Article 15 conditions for derogation where satisfied. In other words, 1) was there a PUBLIC EMERGENCY, THREATENING THE LIFE OF THE NATION, and 2) was the detention without trial of foreign terror suspects STRICLY REQUIRED BY THE EXIGENCIES OF THAT SITUATION?

On the first question: The majority of judges on the court accepted the government’s claim that there WAS a public emergency threatening the life of the nation. In accepting this claim, they cited jurisprudence of the European Court of Human Rights, most notably its decision in Lawless v. Ireland. In Lawless (and Lawless was the first case that the European Court of Human Rights ever decided), the ECtHR accepted that there was a public emergency in Ireland under Article 15 when Irish terrorists were plotting attacks to be carried out in the UK, but not Ireland. Accordingly, Lawless suggested that European human rights law leaves a lot of leeway to states on the issue of Article 15 derogations, so that a national government need not work very hard to defend its claim on the existence of an Article 15 emergency.

The House of Lords also suggested that national security is an area where courts should generally – due to the separation of powers – practice a DEFERENTIAL approach, or JUDICIAL DEFERENCE. This is because courts do not have access to the same level of intelligence – classified information – that government ministers do, and they are accordingly not well-equipped to make educated, WELL INFORMED decisions on such matters. In other words, the difficult nature of national security decisions means that courts should generally DEFER to the supposedly better, more informed judgment of government ministers.

However, one judge disagreed with the majority’s conclusion – i.e. its conclusion that the government’s claim that there was a public emergency should be accepted. That judge, Lord Hoffman, wrote that the threat posed by Islamic extremism did not threaten “THE LIFE OF THE NATION,” but merely the lives of individual citizens. To threaten “the life of the nation,” Hoffman suggested, would be to raise the possibility that the UK’s system of government could collapse, be overthrown, or change fundamentally. And, in his view, Islamic extremism was not capable of bringing about any such changes.

This brings us to the second question before the court. To repeat, the majority answered the first question by accepting that there WAS a PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION. However, the court then had to determine if the UK’s decision to detain foreign nationals, without trial, was STRICLY REQUIRED BY THE EXIGENCIES OF THE SITUATION, and its answer to this question was a resounding NO.
The House of Lords gave two reasons for this conclusion. Firstly, it noted that the government had done little to prove that LESS RESTRICTIVE MEASURES – e.g. electronic tagging, surveillance, etc. – could not have been equally successful in tackling the threat posed by foreign terror suspects. Secondly, and perhaps more importantly, the court noted that the scheme of internment that applied to foreign nationals did not apply to British nationals. Of course, some terror suspects were British nationals: so if detention without trial was a necessary means of controlling the terror threat, why did the scheme not apply to British nationals as well? The court found that this inconsistency was illogical, and suggested that, since the government was already using less restrictive measures against British nationals, less restrictive measures WERE POSSIBLE.