PARLIAMENTARY SUPREMACY: THE EU DILEMMA

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"[T]he flowing tide of community law is coming in fast. It has not stopped at the high water mark. It has broken the dykes and the banks. It has submerged the surrounding land so much so that we have to learn to be amphibious if we wish to keep our heads above the water," per Lord Denning in *Shield v. E Coomes (Holdings) Ltd [1978] IRLR 263*

Indeed, the words of Lord Denning ring true when one considers the situation faced by English judges in the face of a conflict between Parliamentary Sovereignty and Community law. Considering both bodies are to be perceived as sovereign, which then is to be triumphant in a conflict between the two? On the face of it, it would be simple to conclude the prevalence of the latter seeing as the United Kingdom (UK) is a member state of the European Union (EU). However, it is a bit more complicated than that.

The purpose of this article is to evaluate the supposed sovereignty of the UK Parliament particularly in light of its EU membership. In the process, it will seek to analyse the reason behind the adoption of the sovereignty and

to subsequently evaluate its position after the UK's entry into the EU. The article will also discuss the role of judges in shaping the doctrine into what it is today and to hypothesise on its possible future.

The Doctrine of Parliamentary Sovereignty

To some extent, Parliamentary Sovereignty can be understood using two claims; a structural claim and an empirical one. The structural claim[1] theory suggests that a sovereign body is an integral part of any constitution, whilst the empirical claim[2] theory bases itself on the 'rule of recognition'.

In regard to the structural claim theory, T. Hobbs suggests that the need for a sovereign body lies as a matter of normative political philosophy, that every state requires 'a Leviathan to lift mankind out of its war-like state of nature'.[3] In legal terms, John Austin[4] proposes that where there is law, there must be a sovereign body from which all legal norms emanate, whom of which to obey but which does not obey any other. Essentially, a leader is integral for any society to function properly; it is merely a matter of which institution is to be recognised as the leader.

This is where the empirical claim theory comes into play. The 'rule of recognition', according to Herbert Hart,[5] explains that the identity and scope of power of the sovereign lies in the complex and interweaving

[1] Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 OJLS 709, 712.
[2] ibid 714.
[3] ibid 712, n 16.
[4] ibid 712, n 17.
[5] ibid 715, n 39.

practices of the courts, officials and private persons who identify the law by reference to certain criteria. These criteria in turn depend on the general standard of official behaviour accepted to be the norm at any given point in time by the numerous bodies and persons who practise it and who are subservient to it.

The structural claim theory explains the need for a leader, but it is the empirical claim theory which explains why Parliament is recognised as the conventional and sovereign 'leader' of the UK. In brief, its rise historically resulted from the reduction of the King's prerogative powers, and following the introduction of the *Bill of Rights 1689*, its supremacy over the monarch was firmly established. Subsequently, much of the prerogative powers of the Crown were either abolished or curtailed. The unwritten nature of English constitution, a result of constitutional evolution rather than revolution, plays a significant role in the doctrine of Parliamentary Sovereignty. In a manner of speaking, it serves to fill up the 'vacuum' left behind by the lack of a written constitution. Under this doctrine, political sovereignty vests with the people whilst Parliament commands legal sovereignty and is responsible to the electorate for the continued grant of law making and executive authority. This process is renewed through democratic election and is based upon the concept of a responsive responsible government. It is this recognition of the established norm that contributes to the doctrine of Parliamentary Supremacy. Of course, perhaps the most obvious indicator of Parliament's sovereignty is the recognition given by the courts towards the doctrine.

Yet, what does being sovereign actually entail? According to A.V Dicey, to be truly sovereign means that Parliament can make or unmake any law, cannot be bound by a predecessor or bind a successor, and most

importantly, no person or body (including a court of law) may question the validity of its enactments.[6] In enacting laws, Parliament can alter its term of office,[7] alter the succession to the throne,[8] alter its own powers,[9] grant independence to dependant states,[10] limit its own powers in relation to dependant territories,[11] and legislate retrospectively[12] as well as extra-territorial effect.[13] A particularly important point to note is that treaties which are entered into by the UK do not take effect until authorised by Parliament by way of statute.

The omnipotence of Parliament can, to a large extent, be traced to the willingness of the judiciary to follow and implement Parliamentary Sovereignty. This was supported by Lord Steyn in his 1996 lecture.[14] If true, this would tie in with Hart's theory of empirical claim that Parliament is only sovereign because the numerous parties, in particular the judiciary, accept it as such. In fact, the stance of the UK on treaties (as mentioned before) to some degree finds its existence due to judicial acceptance and support. Lord

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[6] Hilaire Barnett, *Constitutional and Administrative Law* (7th edn, Routledge-Cavendish 2009) 145.
[7] The Septennial Act 1715.
[8] Act of Settlement 1700, His Majesty's Declaration of Abdication Act 1936.
[9] Parliament Acts 1911 and 1949.
[10] Nigeria Independence Act 1960, Zimbabwe Independence Act 1979.
[11] Colonial Laws Validity act 1865, Statute of Westminster 1931.
[12] War Damage Act 1965.
[13] Continental Shelf Act 1964, Hijacking Act 1971, Aviation Security Act 1982.
[14] Lord Steyn, 'The Weakest and Least Dangerous Department of Government' (The 1996 Annual Lecture of the Administrative Law Bar Association, 27 November 1996). His Lordship observed that: "The relationship between the judiciary and legislature is simple and straightforward. Parliament asserts sovereign power. The courts acknowledge the sovereignty of Parliament. And in countless decisions the courts have declared the unqualified supremacy of Parliament. There are no exceptions."

Denning MR confirmed this view in *Blackburn v Attorney General*[15] where his Lordship stated that:

> Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that the Parliament tells us.[16]

Furthermore, there are numerous cases which cite judicial obedience to Parliamentary enacted legislations, such as *Ex Parte Canon Selwyn*,[17] *Madzimbamuto v Lardner-Burke*,[18] *Edinburgh and Dalkeith Rly Co v Wauchope*,[19] *British Railways Board v Pickin*[20] and most importantly *Jackson v Attorney General*.[21] The last case is of particular importance as on the facts, an Act passed under the Parliament Act 1911 would not have lived up to the test proposed by Lord Campbell due to the absence of consent by the House of Lords. His Lordship stated:

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[15] [1971]2 All ER 1380.
[16] ibid 1382
[17] [1872]3 JP 54. Cockburn CJ stated that: "There is no judicial body in the country by which the validity of an Act of Parliament could be questioned. An Act of the legislature is superior in authority to any court of law. We have only to administer the law as we find it, and no court could pronounce a judgment as to the validity of an Act of Parliament."
[18] [1969]1 AC 645. Lord Reid stated that: "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.
[19] [1842] 8 Cl & F 710.
[20] [1974] AC 765.
[21] [2005] UKHL 56. It concerned the validity of the Hunting Act 2004 and Parliament Acts of 1949.

> [A]ll the court of justice can look to is the parliamentary roll; they see that an Act has passed both Houses of Parliament, and that it has received the Royal Assent, and no court of justice can inquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament.[22]

Accordingly then, the court in this case could have inquired into the manner in which the provisions' were legislated without infringing on the separation of powers. Hence, not only are the courts submissive towards the Parliamentary legislation, they also deem it improper to doubt legislation even in light of incorrect legislative protocol.

A Different Perspective: Legal vs Political Sovereignty

The above discussion demonstrates that the sovereignty of the Parliament lies in its legislative power. In law, the capacity of the Parliament to enact legislation is seemingly untrammelled. This is largely due to the work of the courts as keepers of the law, and to this extent, they have performed admirably. However, before proceeding, it must be emphasised the difference between the *legal sovereignty* and *political sovereignty* of Parliament. What has been discussed so far involves only the former. As will be shown, the latter is far less supportive of Parliament's supposedly absolute sovereignty.

[22] *Edinburgh and Dalkeith Rly Co v Wauchope* [1842] 8 Cl & F 710

What then is political sovereignty? To put it simply, it refers to the extent of Parliament's political power to legislate without inducing political outcries. In contrast with its legal sovereignty, there are many limitations upon it politically. The clearest example of this is the passing of unreasonable and unenforceable laws. Excellent illustrations include Ivor Jenning's 'Parliament can legally make a man into a woman' (1959) and Leslie Stephens's 'Parliament could legislate to have blue eyed babies put to death' (1882). They demonstrate that while these examples are theoretically possible according to the doctrine of Parliamentary Sovereignty, it is politically unrealistic. Similarly, it is politically impossible to legislate for territories which the UK has renounced legislative competence, such as Canada.

The above examples serve only to illustrate the issue in its most fundamental form. There are many other more complex examples, such as concerning the devolution Acts involving Scotland (Scotland Act 1998), Northern Ireland (Northern Ireland Act 1998) and Wales (Government of Wales Act 1998). Although the UK has allegedly surrendered legislative sovereignty over Scotland and Northern Ireland, and acceded administrative sovereignty to Wales (the UK Parliament retains control for legislating over Wales), it remains possible for the UK Parliament to simply repeal the Acts. This course is entirely legal seeing as the Acts are enacted by the Parliament itself and not constitutionally provided. Yet, to do so would undoubtedly elicit outcries and possible political revolts by the three regions. Thus, politically, the Parliament is restrained from doing as it pleases.

The EU Dimension: The Downfall of Parliamentary Supremacy?

Perhaps the most controversial instance comes from the UK's membership of the European Union. Not only is it politically restraining, it has curtailed the legal sovereignty of Parliament as well. It is important to note that there is no international treaty which expressly states the supremacy of EU law.[23] Much like the devolution Acts, Parliament had enacted a legislation to restrict its legal power. As mentioned above, treaties made by the UK will only have effect should they be incorporated into domestic law. It was for the purpose of overcoming this that the European Communities Act 1972 (hereinafter referred to as "ECA 1972") was enacted by the Parliament; in particular, focus needs to be placed on Section 2(4)[24] which provides for the primacy of Community law. This effectively made EU law superior, and which unfortunately presented an express attack on the supremacy of Parliament. The question is this: Which is to be the proper sovereign body? Should the long established doctrine of Parliamentary Sovereignty give way to that of the express supremacy of the EU? Is there to be a change in leaders according to the empirical claim?

Even before the UK became a member, the supremacy of Community law had been asserted by the European Court of Justice (ECJ) by virtue of

[23] The only implied reference to the issue of supremacy is Article 10 of the Maastricht Treaty, which states: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

[24] Section 2(4) of the European Communities Act 1972 states: "...any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than the one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section."

several cases.[25] The rationale for this is obvious: its objective is to create a pan-European system of regulation and body of rights, something which would be unattainable were member states able to adopt contrary domestic provisions.[26] The view seems to be that through accession to the EU, the member states have 'surrendered' their sovereign power in relation to matters now regulated by the Union.

As mentioned, the supremacy of Community law was asserted by the ECJ; however, there have also been indications of increasing activism by the ECJ. Essentially, the EU confers legislative powers to member states by way of several manners of secondary legislation as stated under Article 249 of the EC Treaty; regulations, directives, recommendations and opinions. Of the four, only regulations are directly applicable, becoming domestic law without the need for domestic enactment. In *Van Gend en Loos v Nederlandse Tariefcommissie*,[27] it was established by the ECJ that to qualify a Community provision for direct effect, the article in question had to be clear and unconditional, and did not require further legislative intervention by the state. The test would entail that directives do not have direct effect upon domestic law. Yet, subsequent cases have proven that this is not always so. The case of *Van Duyn v Home Office*[28] in particular illustrated judicial activism on the part of the ECJ. The court held that the directive in question (Directive 64/221) was directly effective without the need for it to be domestically enacted, on the basis that it would be incompatible with the

[25] Example cases: *Costa v ENEL* (Case 6/64) [1964] ECR 1125, *Van Gend en Loos v Nederlandse Tariefcommissie* (Case 26/62) [1963] CMLR 105, *Simmenthal v Commission* (Case 92/77) [1979] ECR 777, *Internationale Handelsgesellschaft mbH v EVST* (Case 11/70) [1972] CMLR 255.
[26] Mark Elliot, 'United Kingdom: Parliamentary Sovereignty Under Pressure' (2004) 2.3 Icon 545, 549.
[27] (Case 26/62) [1963] CMLR 105.
[28] (Case 41/74) [1975] 1 CMLR 1.

binding nature of a directive to exclude the possibility that it may have direct effect. Similarly, in the cases of *Pubblico Ministero v Ratti*[29] and *Becker v Finanzami – Munster Innenstadt*[30] the ECJ advocated the direct effectiveness of directives because the 'practical effectiveness' of a directive would be weakened if individuals could not rely on it before a national court. Regardless of the reason used, it is apparent that the ECJ was expanding the legislated scope of Community law. For some member states, it represented the ECJ overstepping the legitimate boundaries of the judicial function; whether directives were to be directly applicable was a matter for primary legislation, not judicial determination.

In light of these developments, there was bound to be conflict between the EU constitution and the supremacy of the Westminster Parliament, and it was the English judiciary which headed this frontier. Issues of Community law had arose in many different types of proceedings in diverse courts and tribunals including prosecutions in magistrates' courts and the Crown Court, proceedings for judicial review, in industrial tribunals and in civil actions for damages and other remedies against both public bodies and commercial organizations.[31] For the purposes of keeping in line with Community law, the mechanism of preliminary referencing to the ECJ was introduced. The rules for when the mechanism should be invoked were established by Lord Denning in *Bulmer v Bollinger*.[32] However, the courts in

[29] (Case 148/78) [1979] ECR 1629.
[30] (Case 8/81) [1982] ECR 53.
[31] Gavin Drewry, 'The Jurisprudence of British Euroscepticism: A Strange Banquet of Fish and Vegetables' (2007) 3(2) Utrecht LR (December).
[32] [1974] Ch 401. 1) The decision must be necessary to enable the court to give judgment – a court must feel that it cannot reach a decision unless a reference is made. 2) The decision of the question must be conclusive to the case – not just a peripheral issue. 3) Even if the court considers a reference to be necessary, regard

subsequent cases have eased the criteria, becoming more willing to make references, presumably to obtain an insight into the substantive doctrine which was being developed by the ECJ. This was illustrated in the infamous *Factortame* cases.[33] Here, the House of Lords made a referral and was in turn asked to issue an interlocutory injunction disapplying primary legislation (Merchant Shipping Act 1988) that appeared and was indeed found to be contrary to EU legislation. Surprisingly, the court made little mention of the implications for the doctrine of Parliamentary Sovereignty; only Lord Bridge addressed the issue in any meaningful way. His Lordship remarked that the supremacy of EU law was 'well established.... long before the United Kingdom joined the European Union. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary'.[34]

It is important to note that while the House of Lords accepted that it was empowered to go so far as to grant interim injunctions against ministers where an incompatibility between Community law and domestic law arose, it elucidated that this was a jurisdiction expressly conferred upon it by Parliament under Section 3(1) of the ECA 1972. In a manner of speaking, the court did nothing to indicate there had been an infringement to legal sovereignty of the Parliament. In fact, the way the Lords put it, their judgment actually seems to conform to the doctrine. They claimed they were upholding the doctrine by following the provision established earlier by the

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must still be paid to the delay involved, the expense, the difficulty of the point of law, and the burden on the ECJ.

[33] *Factortame Ltd v Secretary of State for Transport,* [1990] 2 AC 85 (HL) and *R v Secretary of State for Transport, ex parte Factortame Ltd (No.2)* [1991] 1 AC 603 (HL).

[34] *R v Secretary of State for Transport, ex parte Factortame Ltd (No.2)* [1991] 1 AC 603, 658-659 (HL).

Parliament which allowed them to rule against a later legislation. A similar issue was raised in *Thoburn v Sunderland City Council*.[35] The court here held that the ECA 1972 allowed the introduction of secondary legislation to amend the Weights and Measures Act 1985, impliedly overturning an Act of Parliament with regards to the earlier provision.

It would thus seem as though the English courts are masking restraints to the legal sovereignty of the Parliament behind the restraints to its political sovereignty. In the case of *Thoburn*, Laws LJ introduced the concept of 'constitutional statutes'[36] which are immune to implied repeals and can only be repealed by a subsequent provision if it was expressly stated as such. However, even if the condition for repeal was satisfied, such explicit contradiction was unfathomable since neither the European Commission nor other member states would tolerate a unilateral departure from the norms. Thus the sovereign ability of Parliament to derogate from Community law is largely notional.[37] Therefore, in this way, the courts are able to justify their departure, should the circumstances require it, from their obligation of upholding the legal sovereignty of Parliament. In other words, they acknowledge that Parliament's legal sovereignty has been weakened, but simply do not want to openly admit it.

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[35] [2002] 4 All ER 156.

[36] ibid 185, "In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would not regard as fundamental constitutional rights.....The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA [European Communities Act 1972] clearly belongs in this family…"

[37] (n 26) 550.

This justification is perhaps necessary in light of the growing willingness of the courts when it comes to overriding domestic legislation without referring to the ECJ. The *Thoburn* case for instance, was held not at the ECJ in Luxembourg but the UK's own domestic courts. Aside from that, in *R v Secretary of State for Employment ex parte Equal Opportunities Commission*,[38] the House of Lords demonstrated confidence in disapplying provisions of a domestic statute without first referring the matter to the ECJ. Professor Nicol[39] observes that the UK's highest court was no longer compelled to refer to the ECJ whenever it believed them to be incompatible with Community law; it was prepared to overrule them itself. He further borrows an interesting quote from *Times* (5 March 1994) which claims that the *Equal Opportunities Commission* case provided Britain with its first taste of a constitutional court.

A New Doctrine of Parliamentary Supremacy?

What then is the significance of these developments? Laws LJ deems the conflict to be a positive course. He recasts the doctrine of Parliamentary Sovereignty as one of common law,[40] and hence subject to the same processes of evolution as all other common law principles. He further suggests that this development is beneficial in that it preserves the sovereignty of the legislature and the flexibility of the UK's uncodified constitution.[41] This dance that the judiciary does as it skirts around the

[38] [1995] AC 1.
[39] (n 31) 108.
[40] *Thoburn* (n 35) 183. "The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principles."
[41] ibid 185.

obvious fact that Parliament is no longer sovereign; what is the reason for this? It is this author's intention to submit that it is for a noble cause. Indeed, the reason for the judiciary's course of action seems to be that of developing the English law, and it appears that it has every right to do so seeing as the doctrine of Parliamentary Sovereignty is a consequence of judicial construction.

Even in *Jackson v Attorney General*, Lord Steyn,[42] Lord Hope[43] and Baroness Hale[44] remarked on the fragility of Parliament's sovereignty. Although judging in favour of the state, they explicitly recognised that there are certain things which lie beyond the competence of Parliament and which the courts would not permit, thus impliedly (expressly in Lord Steyn's and Lord Hope's cases)[45] stating that judges created the doctrine of Parliamentary Sovereignty and have the power to change it should they deem

[42] *Jackson* (n 21) 102, Lord Steyn stated: "Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of common law. The judges created this principle…..In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish…."

[43] ibid 120, Lord Hope stated: "It is sufficient to note at this stage that a conclusion that there are no legal limits to what can be done under section 2(1) does not mean that the power to legislate which contains is without any limits whatsoever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognize it as law."

[44] ibid 159, Baroness Hale stated: "The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of individuals from all judicial scrutiny."

[45] Baroness Hale perhaps implicitly agreed with these views given that she entertains the possibility of courts rejecting an attempt by parliament to deny access to a court.

it appropriate. This view does not seem to be limited to the judges themselves; there is much support from the academic community[46] as well.

There is indeed some indication of the courts 'bending but without breaking' the doctrine of Parliamentary Sovereignty to develop the law. Firstly, though the courts may be more willing to rule in favour of EU law, the issue seems to be limited mostly to minor conflicts. Secondly, the initial increase and subsequent decrease of preliminary references to the ECJ seems to indicate that the domestic courts are gradually understanding the scope of Community law supremacy and in doing so, are slowly developing and establishing a balance between Parliamentary Sovereignty and that of EU law. Although the doctrine of implied repeal is inapplicable to 'constitutional' statutes, the very fact that the option of an express appeal is available and that the courts would advocate it[47] should it come to be, supports this observation.

Therefore, much like the development of common law, the courts are aiming for a steady evolution of the law rather than a revolutionary overhaul, and the dip in the Parliament's sovereignty is merely a necessary evil of the process. A balance seems to have been struck between EU law and domestic law, with little 'apparent' sacrifice to the sovereign image of Parliament, yet

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[46] Sir William Wade, Trevor Allan and Sir John Laws (writing extra-judicially) have argued with great force and elegance that the sovereignty of Parliament depends on the willingness of the judiciary to recognize Parliamentary enactments as valid law. Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 OJLS, 709, 722. For primary sources of the authors, refer to n 83, n 84 and n 85 of the article.

[47] *Macarthys Ltd v Smith* [1979] 3 All ER 325, 329 per Lord Denning: "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."

it is inaccurate to say that the sovereignty of Parliament has not been visibly affected. It would appear that an entirely new doctrine has been created, one that is slightly less absolute than the conventional doctrine of Parliamentary Sovereignty, but which accurately provides for the approach of the courts towards legal and political conflicts. The question remains as to whether there was ever a need to be discrete about the whole issue.

On that question, the basic answer is that Parliamentary Sovereignty is a cornerstone of English law, and any indications of its weakening could very well jeopardise the whole system. At the same time, in light of rapid globalisation, one would have to be absolutely ignorant to retain the belief that localised superiority will not be mitigated where international alliances are formed. In liaising with other nations particularly in the context of international organisations, in addition to gaining benefits such as free trade, migration and tax reductions, as well as having a bevy of international allies, there are bound to be rules to follow to ensure uniformity and fairness between state members. In fact, the citizens of the UK themselves seem to recognise this; in the 1975 United Kingdom European Communities Membership Referendum, 67.2 % of the voters in UK opted that the UK should stay in the European Community. Is this then not a sign that the UK citizens are prepared to accept the EU as superior over the UK? This concept and development is thus supported by both structural and empirical claim theories. Furthermore, Parliament itself, through the enactment of the ECA 1972, has seemingly declared itself to be subservient to the EU. If so, why do the courts deem the need to be subtle?

The answer perhaps lies in the fact that the discreteness is practised not as a cover for the conflict with EU supremacy, but rather for a conflict of

a local nature. The tradition of judges making law is not a new one. Where Parliamentary provisions are silent or inadequate, it has always been the task of the courts to interpret them to suit the particular situation. The issue arises as to the extent of the powers of the court to interpret the law. The courts have been known to create new law where there is an absence of Parliamentary legislation, and in turn that has either been overruled or affirmed by Parliament. They have also been known to interpret legislation in an almost adverse manner using the purposive approach in order to justify the outcomes they want. By virtue of the ECA 1972, it would seem that the Parliament was intended in submitting to the supremacy of the EU. However, what if the courts thought otherwise?

It is of course trite to state that the doctrine of Parliamentary Sovereignty is a product of the judiciary; much of this was discussed above. It possesses the liberty to do as it wants to the doctrine, although its efforts so far are geared only towards the doctrine's support. To think that a simple legislation could undermine its efforts makes it understandable as to why the courts would want to skim over apparent attacks on the doctrine. When it comes down to it, it is primarily a matter of *national pride*; not only the fact that the courts would want to establish their hold over the doctrine they created, but also the fear that, by allowing for the repeated surrendering of the Parliament's power, the EU as well as other national bodies such as the United Nations, would make demands on the UK on the basis of international conformity and cooperation. This fear is arguably selfish, yet it is only natural considering the UK's long established history as that of a conqueror that the UK would be unwilling to freely accede to another power. At the same time, there are advantages to retaining a national identity; the main advantage of course being the unique currency that has become an

established characteristic of the UK and is recognised as one of the more recognised currencies in the world.

The Legitimacy of the Courts' actions

It thus becomes important that a balance is reached between cooperating with external bodies, and maintaining control over domestic matters. Regardless, are the courts allowed to do this? It has been mentioned above that the judiciary has the power to tweak the sovereignty doctrine, but it was not addressed as to whether they have the power to develop the law as they see fit. All that is left to do now is to reconcile this endeavour with that of another doctrine, the separation of powers. Is it really proper for the courts to do as they please without the support of the legislature?

Goldsworthy[48] theorises that the manner of development and establishment of common law at any particular time lies between Parliament's power of proposal and the recognition of this power by the courts. Basically a change in the rule of recognition requires an agreement between Parliament and the judiciary. Although judges do make adjustments to legislations through creating case law, they themselves cannot directly adopt a legislative role or a political one as it would infringe upon the separation of powers.

However, there are two requirements for Goldsworthy's theory to be practicable. Firstly, it requires the courts to determine whether any legislation passed was the result of a unified consensus among legislators, as

[48] Jefffey Goldsworthy, 'Abdication and Limiting Parliament's Sovereignty' (2007) 17 KCLJ 255.

compared to one political party imposing its constitutional perspectives on the [disagreeing] rest. For instance, Goldsworthy notes that the courts took the view that there was a widespread consensus among legislators that domestic legislation which is inconsistent with European law should be disapplied under the ECA 1972.[49] In determining this, the courts were then able to construe the intention of the legislation and judge accordingly.

Secondly, the judges would have to be guided by their own assessment of constitutional principles in deciding if they should endorse any attempted proposals by Parliament. This point is also supported by Lakin[50] who suggests that the foundational principle of British constitutional theory is the principle of legality, which shapes the way a judge thinks about various other principles, all of which are inter-related. It is when these principles from different judges coincide with one another will there be true consensus, and thus leading to a change in the rule of recognition.

It is clear that the first requirement is much akin to fantasy. It is a near impossibility for the legislators to completely agree on a matter, and it is much less probable that the judges would make any effort to actually discover on the number of votes a particular legislation had garnered. At most a reference would be made to the Hansard. The second requirement is more plausible, although it is doubtful that a total agreement would be reached between all judges at any point in time; one only has to look at the volatile relationship between Lord Denning and the other Lords to realise this.

[49] ibid 279.
[50] (n 1) 730.

Considering the fact that both requirements are more ideal than practical, the only valid deduction one can make is that a considerable amount of discretion lies with the judiciary. This is a huge contradiction to the notion of the separation of powers, and yet it is no surprise considering the doctrine of separation of powers was a French invention and had never been part of the British Constitution or the Westminster model. The fact that the Prime Minister as the head of the executive leads the House of Commons in the legislative is a testament to this point. It can therefore only be stated that Goldsworthy was mistaken, and that the role of the courts in determining the restraints on the legal sovereignty of Parliament might be larger, and in fact should be larger than theoretically appropriate. This is indeed beneficial as it allows for the courts to take into account political factors (in particular the restraints on the political sovereignty of the Parliament), among others, when making judgments, as compared to upholding Parliament's legal sovereignty blindly.

Of course, this possession of discretion by the judiciary seems contradictory to the traditional structural claim theory, in that there should only be one leader from which legislative power flows. In fact, the whole Parliament Sovereignty versus European Union Sovereignty debate seems to also revolve around the structural claim theory. However, this is easily reconciled if one looks to the surrounding circumstances. In relation to the judiciary/Parliament issue, there is really only one body which has the express power to issue legislation, and that is Parliament, which is in turn supported by the judiciary. Undeniably, there have been numerous instances in which the judiciary had created law by itself. However, these instances only occur when and where there is no *express* legislature on the matter. It would thus seem to be an issue of convenience, where a case has been

brought before the court. There would be great injustice if the proceedings were to be halted or postponed simply because there is an absence of legislation on the matter. There is thus no issue as to which body has been recognised as sovereign.

In relation to the sovereignty debate between the UK Parliament and the European Union, it is once again a matter of convenience and perhaps, an issue of suitability as well. It is only proper that each member has the right of power over its own jurisdiction for numerous reasons, the primary one being the election of members of Parliament are those from within the member states rather than one on the scale of the entire union. Furthermore, as mentioned, it is the national parliaments who would have the best idea of the type of law needed by their respective jurisdictions, designing laws that fit into the particular circumstances and needs of their country. On this point, there is no doubt that sovereignty should remain with the nationl parliaments, and this would include the UK Parliament.

Conclusion

The apparent fact that Parliament is constrained by the EU has given rise to the notion that Parliament might not be all-powerful both politically and increasingly, legally. However, this realisation, far from rendering the UK helpless, is instead being utilised by the courts as a stepping stone towards the development of the law. It is inevitable that the doctrine of Parliamentary Supremacy will continue to be questioned in the coming days, perhaps not all originating from the EU argument but rather a consequence of the rapid rate of globalisation. There will undoubtedly be many clashes regarding the law, and in particular many debates will arise regarding the most appropriate

system of governance. At the same time, it is important to consider the multitude of political factors present in finding a balance; there are advantages to a universal compliance with external rules, yet there are also advantages to retaining control over one's own nation. It is therefore of some reprieve that one can find solace in the shadow of the noble judiciary, who can be depended upon to ensure that the law will always develop and operate in accordance with the pre-eminent notions of both justice and fairness.